None of our business: The fragmentation of Australia's human rights obligations under refugee outsourcing agreements in Nauru and Manus Island

Suzanne Ballard

Faculty of Law – McGill University, Montreal

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws (LL.M).

Table of Contents

Abstract

Over the past decades, Australia's refugee policy has been increasingly carried out outside its territory, with many services to detained asylum seekers being outsourced to private contractors. The so-called Offshore Processing Centres of Nauru and Manus Island operate in uncertain areas of international human rights law, where the classic rules of attribution and remedies for human rights violations are challenged by the extraterritorial and outsourced nature of the policy. Recent investigations have shed light on systemic human rights abuses being committed in detention centres, without a clear scheme of accountability under international law.

This thesis seeks to reveal the critical limits of international human rights law that these policies highlight. The complex network of private and public actors involved in human rights violations remains unmatched by the international legal framework meant to address them. The state-centred rules of attribution fail to account for different degrees of responsibility from state and non-state actors, which further blurs the fragmented and underdeveloped scheme of remedies for such violations. As a result, individuals who are formally protected by human rights treaties remain in practice unable to hold perpetrators to account.

This analysis of the weaknesses in the legal framework seeks to highlight the existence of viable alternatives to address the accountability gap in Offshore Processing Centres: the flexible and evolving nature of international human rights law provides a sound basis on which to rethink the legal expression of rights claims. Providing better avenues to attribute human rights violations and access to remedies for victims appears necessary for human rights law to remain at the centre of refugee protection.

French Abstract

Sur les dix dernières années, les politiques australiennes en matière de droit d'asile ont été en large partie menées hors du territoire national, sur les iles de Nauru et Manus Island. En vertu d'accords diplomatiques, les demandeurs d'asile sont détenus dans des centres gérés par des acteurs privés. Ces politiques opèrent dans une zone d'ombre du droit international : leur aspect extraterritorial et le rôle central qu'y jouent des acteurs non-étatiques remettent en question l'application des règles d'attribution et d'accès aux réparations en matière de violations des droits de la personne. De nombreuses enquêtes ont récemment dévoilé les abus systématiques commis dans ces centres de détention, sans un clair processus de responsabilité en droit international des droits de la personne.

Ce mémoire vise à analyser les limites importantes du droit international que ces politiques révèlent. La place prépondérante de l'état en droit international excluant en principe les actes commis hors du territoire et par les acteurs privés, les droits de la personne peinent à refléter les différents degrés de responsabilité des acteurs publics comme privés sur Manus Island et Nauru. Ce schéma complexe et les difficultés qu'il crée viennent troubler un système de réparations pour les victimes déjà fragmenté et sous développé. Les victimes d'abus, bien que formellement protégées par les traités internationaux, se trouvent dès lors sans mode d'action pour défendre leurs droits et faire condamner les responsables.

Cette analyse des faiblesses du système juridique cherche à souligner les potentielles avenues que le droit international pourrait prendre pour contrecarrer le vide de responsabilité pour les abus commis dans les centres de Nauru et Manus Island. Le droit international des droits de la personne étant par nature malléable et évolutif, il constitue une base idéale pour reconceptualiser l'expression juridique des droits fondamentaux. L'optimisation des modes d'attribution et de réparation des violations des droits fondamentaux est indispensable pour que le droit international des droits de la personne continue à jouer un rôle clé dans la protection des réfugiés et demandeurs d'asile.

Acknowledgements

Every major project is the fruit of a collaboration, and mine has seen the light thanks to the wonderful community I am grateful to be a part of.

Je tiens à remercier mes parents Jean-Francois Ballard et Anne Ballard, pour m'avoir toujours soutenu dans mes projets, et pour m'avoir toujours donné les moyens de les accomplir. Ce travail marque la conclusion de 5 années d'études aux quatre coins du monde pendant lesquelles vous avez fait preuve d'un soutien a toute épreuve.

I am forever grateful for the unconditional support from David Wickstrom - for encouraging me to pursue my LL.M ac McGill in spite of it all, your presence through the highs and lows of this project, and your constructive comments on my work. You have helped me to find the confidence and resilience in me when I most needed it and to make the most of this journey.

I am really grateful for the support of my supervisor, Professor François Crépeau, for encouraging me to pursue this research project, for his interest in this particular topic and his insightful comments at the different stages of this thesis.

I am also infinitely thankful for the support I have received from other graduate students at the Faculty of Law: Jo Richardson, for your passion for this topic, your encouragement and your presence throughout this project; Amy Preston-Samson, for your insightful comments which eventually led to this thesis; Eliza Bateman, for your words of wisdom and your exceptional work for the graduate community at McGill.

I express my sincere gratitude to all the staff at the Faculty of Law at McGill University, for their support to students in their respective research projects and for creating a sense of community that most graduate students need to succeed. I am particularly thankful to Professor Angela Campbell for her continuous and unconditional support to all graduate students in times of uncertainty and for her outstanding work as the Associate Dean of the Faculty.

I wish to extend my thanks to all my friends and family, in France, Canada and Australia – I am grateful for your support and encouragements despite the distance separating us.

“One of the lessons of a long judicial life is that today’s heresies sometimes become tomorrow’s orthodoxy”

The Hon Michael Kirby AC CMG (1999)

Introduction

The right to seek asylum is one of the fundamental principles of international law proclaimed in post-Second World War treaties, and is at the root of the formal protection afforded to refugees – yet states have increasingly assumed an ambiguous approach to its application, often challenging the humanitarian ideals that underpin it. As a foundational human right, asylum has acutely illustrated the limits of universal human rights in a state-centred international system.

Hannah Arendt, in her influential book *The origins of totalitarianism* published in 1951, had already eminently depicted the tension between the Rights of Man and their legal expression:

> The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.[1]

Arendt's realist assessment of the Rights of Man in the mid-20th Century interestingly sheds light on the evolutions that asylum seekers' and refugees' rights have experienced ever since. While human rights were admittedly compromised in the post-Second World War era, the drafting of the 1951 Convention Relating to the Status of Refugees (herafter the Refugee Convention) and the ratification of numerous international human rights treaties in the following decades have challenged this view. Enforcement mechanisms, while still fragile and far from perfect, have proven to have an impact on the general discourse around rights and on states' willingness to ignore them. However, Arendt's statement seems oddly in line with recent attempts by many countries to subtract asylum seekers from the application of legal guarantees proclaimed in international human rights law and international refugee law. Australia's agreements with Nauru and Papua New Guinea aimed at externalising the processing of asylum claims has effectively challenged the applicability of core human rights to the most vulnerable. International human rights law has only provided a limited response: while many treaty bodies and agencies have voiced their concerns over the legality of this

[1] Hannah Arendt, *The origins of totalitarianism* (New York: Harcourt, Brace & World, 1966) at 370.

scheme of refugee protection, most of them lack the authority to legally enforce their recommendations against Australia.[2]

In virtue of its accession to the treaty in 1954, Australia has international obligations to fulfil towards asylum seekers reaching its shores, including the paramount obligation of non-refoulement.[3] The declaratory nature of refugee status means that a person is a refugee in light of his or her personal situation rather than following a formal recognition process: in that sense, asylum seekers may have rights under the Convention prior to the determination of their refugee status.[4] But the Refugee Convention must also be placed within the context of an extensive international human rights law regime, and states are increasingly called to account for general human rights violations of refugees under treaties such as the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) or the Convention for the Elimination of Discrimination Against Women (CEDAW). Over the years of their implementation, Australian decision-makers have successively interpreted these human rights treaties as a constraint on their sovereign powers to deal with immigration matters, thus maintaining an ambiguous relationship with international human rights law.[5] The most recent evolutions in domestic refugee law have reflected and further heightened this tense relation and called into question the consistency of Australia's scheme of refugee protection.

In 2001, the Tampa incident saw the Australian government refuse to accept asylum seekers who had been rescued by a Norwegian boat in Indonesian waters. The vessel was denied entry into Australian territorial waters in order to avoid triggering Australia's international protection obligations – shortly after, the government announced the implementation of the 'Pacific Solution', a new border protection and immigration control policy whose main

---

[2] See for example UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea - 23 to 25 October 2013* (2013); Office of the High Commissioner for Human Rights, "Migrants / Human rights: Official visit to Australia postponed due to protection concerns", (25 September 2015), online: <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>; Australian Human Rights Commission, *Human rights issues raised by the third country processing regime* (Australian Human Rights Commission, 2013).

[3] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Convention Relating to the Status of Refugees*] at art 33.

[4] James C Hathaway, *The rights of refugees under international law* (Cambridge [England]; New York: Cambridge University Press, 2005) at 278; S Kneebone, "The Pacific Plan: The Provision of 'Effective Protection'?" (2006) 18:3-4 International Journal of Refugee Law 696 at 703.

[5] Angus Francis, "Examining the Role of Legislators in the Protection of Refugee Rights: Toward a Better Understanding of Australia's Interaction With International Law" (2006) 13 Australian International Law Journal 147 at 162.

features remain in place today.[6] Through extensive modifications of the 1958 Migration Act (hereafter, the Migration Act), the Australian government successively 'excised' specific islands from its migration zone, termed 'offshore entry persons' (OEPs) asylum seekers who arrived at such excised zones and designated 'safe third countries' where they could be sent for the processing of their claims. Under the new provisions, OEPs were barred from applying for a protection visa unless the Minister decided otherwise, a provision that is still at the heart of the current policy.[7] These enactments purported to deter asylum seekers from resorting to people smugglers to make dangerous journeys to Australia, allegedly sending the message that life conditions would be more difficult than first imagined.[8]

Consecutive policies of externalisation have endorsed the 'out of sight, out of mind' strategy by trying to contain the most unpleasant aspects of migration away from the territory: detention and processing is now carried out by third countries in so-called Offshore Processing Centres (OPCs), where asylum seekers can be detained for years under sometimes appalling life conditions.[9] The latest policies have however pushed the logic of externalisation a step further by concluding arrangements with third countries (Papua New Guinea and Nauru) so as to ensure the resettlement of recognised refugees is carried out offshore as well, under the supervision and financial support of Australia. The Australian government has announced its intentions to secure agreements with other Asian countries for the resettlement of asylum seekers, namely Cambodia and the Philippines. At the time of writing, only 4 asylum seekers had reportedly accepted to be transferred to Cambodia, and the Philippines head of state has so far refused to enter a resettlement agreement with Australia.[10] Manus Island and Nauru thus remain the only islands hosting asylum seekers while their protection claims are assessed, but the outsourcing policy is slowly seeking support from other regional states through diplomacy.

---

[6] Tara Magner, "A Less than 'Pacific' Solution for Asylum Seekers in Australia" (2004) 16:1 International Journal of Refugee Law 53 at 56; Kneebone, *supra* note 4 at 697.
[7] Kneebone, *supra* note 4 at 697; *Migration Act 1958 (Cth)*, (Cth) [*Migration Act 1958 (Cth)*] at 91P and 91Q.
[8] M Foster & J Pobjoy, "A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory" (2011) 23:4 International Journal of Refugee Law 583 at 586.
[9] *Ibid* at 589.
[10] See Daniel Hurst & Ben Doherty, "Australia seeking refugee resettlement deal with Philippines, say reports", *The Guardian* (8 October 2015), online: <http://www.theguardian.com/australia-news/2015/oct/09/australia-seeking-refugee-resettlement-deal-with-philippines-say-reports>; Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet - Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia* (2015); Stephanie Anderson, "Philippines president rules out permanently resettling refugees", *ABC News* (27 October 2015), online: <http://www.abc.net.au/news/2015-10-27/phillipines-president-rules-out-refugee-deal/6890622>.

These so-called Memorandum of Understanding (MoU) or Regional Resettlement Arrangement (RRA) are political agreements as opposed to treaties and are vague as to the allocation of responsibilities: the modalities of their enforcement in domestic law thus remain uncertain.[11] These policies are underpinned by a strictly territorial view of human rights obligations, whereby responsibility for human rights violations can be avoided by invoking the exclusivity of states' sovereign powers over their territory. In its classic application, the territoriality principle thus confines a state jurisdiction to its territory: in competing exercises of state authority, territory is the primary rule, and extraterritoriality the exception.[12]

This division of responsibilities on the territorial level has been seconded by contracts between the Australian governments and private actors for the provision of services to asylum seekers in third countries. On the Regional Processing Centres (RPCs) of Manus Island and Nauru, detention, health and welfare services and security services are managed by private operators contracted out by the Australian government.[13] Tapping into the rigid public/private divide entrenched in international law, outsourcing successfully instrumentalises the state-centric nature of international law to avoid responsibility for potential human rights breaches. As international human rights obligations arise from the signature and ratifications of treaties by states, their application has been limited to the public domain, thus drawing a contentious line separating legally accountable actors and other actors, irrespective of their capacity to infringe on individual rights and liberties.[14]

Globalisation, and the increasing role that non-state actors have endorsed as a consequence thereof, has entailed changes in migration governance: states have had to face unprecedented migration flows, and have resorted to innovative tools to limit entrance pathways into their territory. The outsourcing and privatisation of migration management is thus more a

[11] *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, 3 August 2013; *Regional resettlement Arrangement between Australia and Papua New Guinea*, 19 July 2013.
[12] *Case of the Island of Palmas*, [1928] R.I.I.A Vol II. 4 Permanent Court of International Justice at 838.
[13] Australian Government, *Contract Notice - Welfare and Education services to transferees at Regional Processing Countries (Nauru & Manus)*, online: https://www.tenders.gov.au/?event=public.cn.view&CNUUID=D93CD6BF-F855-22B0-12060B2B863177FC (2014); Australian Government, *Operational, Maintenance and Welfare support services for the Manus and Nauru RPCs*, online: https://www.tenders.gov.au/?event=public.cn.view&CNUUID=1013CCBE-92A3-D1D4-722EC39FCBF61B39 (2014).
[14] Andrew Clapham & Academy of European Law, *Human rights obligations of non-state actors* (Oxford; New York: Oxford University Press, 2006) at 1–3.

pragmatic reorganisation of sovereign powers than a loss of state control.[15] The strong emphasis on sovereign powers and on a classic conception of international law has heightened the foundational dichotomies between the public and private spheres, on the one hand, and the international and domestic spheres on the other: any action that would fall outside the scope of either its territory or its traditional public powers would not be attributable to Australia, thus leaving a space where the link between sovereignty and responsibility is severed.[16]

The fulfilment of human rights used to be challenged by international law's inability to emancipate itself from state sovereignty and its failure to put forward a workable scheme parallel to citizenship rights. As Arendt points out, human rights were merely subject to the pre-existence of citizenship in a given jurisdiction.[17] This has partly been addressed by the web of international human rights treaties signed over the past decades, which substantially offer protection to individuals outside of the 'state-citizen' nexus. Based on states' ratification of these treaties, human rights obligations towards refugees are constantly being interpreted by domestic jurisdictions all over the world: the international scheme of refugee protection appears decentralised, working essentially on the precepts of international law whereby state sovereignty is a *sine qua non* condition for the fulfilment of international obligations. [18]

But the emphasis on states' interpretations of their human rights obligations shows some of its limits when it is not backed by a coherent monitoring regime. At the regional level, the absence of a regional human rights mechanism in the Asia-Pacific region stands out, where all other continents can now count on specific Courts or Commissions to oversee the human rights record of states parties. To add up to that troubling picture, the structure of the international refugee regime makes it very difficult for the UN Refugee Agency, the UNHCR, to have a say over the interpretation of the Convention globally. UNHCR was instituted separately from the Convention and its primary mission is to provide assistance to

[15] Thomas Gammeltoft-Hansen, *Access to Asylum - International Refugee Law and the Offshoring and Outsourcing of Migration Control* (PhD, Aarhus University, 2009) [unpublished] at 54–55.
[16] Thomas Gammeltoft-Hansen, *Access to asylum : international refugee law and the globalisation of migration control* (Cambridge; New York: Cambridge University Press, 2011) at 40–42.
[17] Arendt, *supra* note 1 at 291–293.
[18] See Nergis Canefe, "The fragmented nature of the international refugee regime and its consequences : a comparative analysis of the applications of the 1951 Convention" in *Critical issues in international refugee law: strategies toward interpretative harmony* (Cambridge University Press, 2010).

refugees and help to manage refugee crises worldwide. The agency's mandate thus differs from treaty bodies which have been later associated to human rights treaties for their implementation.[19] The international refugee regime is therefore 'fragmented': in the absence of an overarching supervisory body, states independently interpret their obligations, at the expense of the consistency and stability of the protection of refugee's rights.[20]

This fragmentation of the system has been widely commented upon by academics and is arguably one of its greatest strength at the same time as its main weakness.[21] While its concurrent application by national jurisdictions all around the world has enabled international refugee law to root itself in domestic law, the Australian example shows the possibility of restrictive, sometimes exclusive interpretations of treaty obligations.[22] This conundrum has been further reflected in the general reluctance to consider the Refugee Convention within the broader framework of International Human Rights Law (hereafter, IHRL) and to interpret its provisions in light of other rights-based instruments. Article 14 of the Universal Declaration on Human Rights of 1948 (hereafter, the UDHR) was the first expression of a "right to seek and to enjoy asylum" and was at the essence of the subsequent Refugee Convention of 1951.[23] While the latter does proclaim itself as a human rights treaty and enumerates rights of refugees, the political acuteness of migration issues and the high cost attached to guaranteeing human rights have led states to interpret their legal obligations narrowly, focusing on their duties within the confines of their jurisdictions rather than on the bundle of rights owed to asylum seekers before their claim is processed.[24]

While European jurisprudence has been increasingly progressive in its interpretive approach to asylum seekers' rights, the principles it has affirmed have had little impact on Australian judicial interpretation, which still maintains territory as a core limitation of human rights

[19] The agency has a similar mandate to that of the International Committee of the Red Cross regarding International Humanitarian Law in promoting compliance with treaty law. See A global Humanitarian Organization of Humble Origins, UNHCR at: http://www.unhcr.org/pages/49c3646cbc.html; see also Katie O'Byrne, "Roundtable on the Future of Refugee Convention Supervision - Is there a Need for Better Supervision of the Refugee Convention?" (2013) 26:3 Journal of Refugee Studies 327 at 332–334.
[20] Canefe, *supra* note 18.
[21] O'Byrne, *supra* note 19 at 331.
[22] *Migration and Maritime Powers Legislation Amendment (Resolving the Aylum Legacy Caseload) Bill 2014 - Explanatory Memorandum*, Austl, Commonwealth, House of Representatives, 25 September 2014 at 10.
[23] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 Preamble; *Universal Declaration of Human Rights*, 10 December 1948, 217 III at art 14.
[24] Hathaway, *supra* note 4 at 279; Alice Edwards, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum" (2005) 17:2 International Journal of Refugee Law 293 at 301.

responsibilities.[25] Australian Courts have remained at the margins of the development of international jurisprudence: the absence of constitutional and regional guarantees has been instrumental in Australia's isolation from IHRL.[26] Absent a supervisory mechanism for the Refugee Convention that would offer binding interpretive guidelines, the plethora of interpretations generated by domestic courts falls short of forming a coherent interpretive community. Instead, the guarantees of the Convention are applied unequally, with the determination of refugee status being depicted as a dangerous "lottery".[27]

International refugee law seeks to offer protection to individuals falling outside of the scheme of state protection: by highlighting the exceptional character of refugee status, it seems to reinforce the rule which sees the state as the main protector of rights, and thus the only potential perpetrator.[28] Although international case law has increasingly recognised that private actors could also infringe human rights, it has done so by holding the state to account, through its inability or unwillingness to protect individuals form private interference. Instead of overcoming the apparent conflict between the universal ideals of human rights, on the one hand, and the foundational idea of sovereignty as independence, on the other, the law governing refugee status situates itself at the point of friction between these competing forces. The protection of asylum seekers' rights, in revealing one of the starkest illustrations of the inherent tensions at the heart of the international human rights system, provides therefore an ideal forum to address the flaws that result from this conflict.

The rigidity of the state-centric model that underpins international law, and thus in great measure refugee protection, appears as the main constraint to a more coherent and comprehensive regime. While state sovereignty is an undeniable foundation of international law, its diametric opposition with human rights as proclaimed in international treaties undermines the possibility to entrench rights outside of the domestic sphere.[29] Facing the challenge of globalisation, the classic tenets of international human rights law fail to adapt to

[25] See for example *CPCF v Minister for Immigration and Border Protection*, [2015] HCA 1 ; *Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor*, [2014] HCA 22 ; *Al-Kateb v Godwin*, [2004] HCA 37 .
[26] Hon Sir Anthony Mason AC KBE, "Rights, Values and Legal Institutions: Reshaping Australian Institutions" (1997) 13 Australian International Law Journal 1 at 13.
[27] Canefe, *supra* note 18 at 198.
[28] *Ibid* at 180; see also George J Andreopoulos, Zehra F Kabasakal Arat & Peter H Juviler, *Non-state actors in the human rights universe* (Bloomfield, CT: Kumarian Press, 2006) at 4; See also Arendt, *supra* note 1 at 300; Matthew J Gibney, *The ethics and politics of asylum : liberal democracy and the response to refugees* (Cambridge, UK; New York: Cambridge University Press, 2004) at 54.
[29] Gibney, *supra* note 28; Canefe, *supra* note 18.

evolving state practices and thus to account for new forms of human rights breaches. Through the externalisation and outsourcing of international obligations, offshore processing agreements play within the territorial and conceptual limits of jurisdiction to effectively avoid being held by national standards - and hamper the application of international ones. By building on these clear-cut lines, IHRL creates more incentives for states to escape responsibility than it provides pathways to enforce individual rights.[30]

But while the limits of international law ought to be analysed, it is triggered by the necessity to see it as part of the problem as much as the solution. Without a view to reinforce the structure of refugee protection, this thesis would limit itself to an idealist statement and fall short of bringing constructive criticism to the debate. The limits of liberal theory, which conceptualises human rights as a weapon of citizens against their state, are most apparent in Australia's offshore processing scheme: asylum seekers to Australia are increasingly subject to human rights violations from third states and non-state actors, in addition to the persecution they are fleeing at home.[31] However, human rights has increasingly challenged the state-citizen nexus: individuals falling under the territory or jurisdiction of the state are nowadays protected by most human rights treaties, whether or not they are the citizens of that state.[32] In that sense, IHRL has already shown its ability to adapt to changing circumstances.

Highlighting the importance of international law in the offshore processing case should not be construed as a rejection of the relevance of domestic law to address human rights violations. Domestic law and procedures are essential to respond to abuses and guarantee access to judicial procedures of redress and accountability. However, domestic legislation regulating the extraterritorial action of private actors remains the exception, and being subject to domestic specificities, it cannot be expected to provide uniform answers from one jurisdiction to another. The role of IHRL should be understood as one of harmonising and coordinating the legal responses to human rights violations committed in outsourced and externalised scenarios.[33] The systemic nature of human rights violations committed in OPCs

[30] Gammeltoft-Hansen, *supra* note 16 at 146.
[31] Gibney, *supra* note 28.
[32] Article 2 of the ICCPR stipulates that a state party has obligations towards "all individuals within its territory and subject to its jurisdiction". The formulation has inspired many human rights treaties, including the Convention on the Rights of the Child and The Inter-American Convention on Human Rights. See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, article 2.
[33] For a thorough analysis of domestic initiatives to provide remedies for human rights violations committed by private actors, see Dinah Shelton, *Remedies in international human rights law* (Oxford; New York: Oxford University Press, 1999) at 160–174.

calls for a broader approach, which needs to be backed with efficient procedures to deal with the reparation of abuses once they are identified. IHRL thus needs to overcome its inherent discrepancies to avoid creating an incentive for states to circumvent their international obligations.

While the literature has extensively covered the legal consequences and the so-called 'loopholes' arising from the scheme, little has been written about the combination of outsourcing and externalisation of processing obligations in Nauru and Manus Island and its effect on the access to effective RSD procedures.[34] This thesis will seek to highlight how international law partly creates an undesirable paradox, where clear infringements of individual rights are not matched by a strong legal sanction from IHRL. In doing so, it will attempt to provide an honest account of how offshore processing policies are or aren't addressed in IHRL, based on the conviction that idealistic perceptions of law do not best serve its purpose. In a sincere attempt to grapple with the limits of IHRL, this paper seeks to avoid the unfortunate and counterproductive confusion often made between what is desirable as a matter of policy and what law actually sanctions. While human rights abuses and the culture of impunity that they convey may disrupt our inherent sense of justice, they do not always violate positive law, and to say otherwise does very little to inform the evolution of the latter.

Using Australia as a case-study and focusing on the effect of externalisation and outsourcing will necessarily limit the scope of the analysis. The aim is to shed light on a practice of states that has dangerously used the limits of international human rights law to ends that contradict its core objectives – however, this essay does not exclude that other state practices, such as the total privatisation of migration control, may have a similar effect.[35]

This thesis does not intend to provide an exhaustive study of the means to determine Australia's responsibility for breaches of human rights in OPCs, as such an analysis has been made elsewhere.[36] With a focus on international human rights law, its aim is to look at the

[34] Gammeltoft-Hansen has provided an extensive and insightful account of the combined effects of the outsourcing and externalization of migration management. This argument seeks to apply these findings to the Australian case. See Gammeltoft-Hansen, *supra* note 16.
[35] For an thorough analysis of this issue, see *ibid*, chap 5.
[36] See for example Francis, *supra* note 5; Guy Goodwin-Gill, "Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations, The" (2007) 9 UTS L Rev 26; Thomas Gammeltoft-Hansen & James C Hathaway, "Non-Refoulement in a World of Cooperative

issues raised by the hybrid nature of the offshore processing scheme, in particular the involvement of private actors providing services to asylum seekers or managing detention centres. The law on state responsibility will prove useful insofar as it enlightens the analysis of the interactions between private and public actors and their impact on concurrent responsibility. However, its particular focus on attributing a wrongful act to a state would considerably limit the scope of the argument made here, which aims to provoke a rethinking of the relations of states and non-state actors in migration management. Nonetheless, conclusions reached on the inclusion of private actors in framework of human rights law and issues of extraterritoriality may have far-reaching significance for other bodies of law. The increasing power assumed by private actors and the extraterritorial actions of states are challenges faced by human rights globally, which effects extend far beyond migration management. The criticisms raised are aimed at shedding light on some of the developments that IHRL has taken, or may take, to address the flaws in the attribution of obligations and remedies: as such, they may inform other legal analyses.

The emancipation of human rights from the classic precepts of international law is "far from complete":[37] whether it may ever be is a question that goes beyond the scope of this paper. However, it will be argued that the territorial delimitation of human rights obligations, coupled with the emphasis on the state as their sole duty-bearer, has newly questioned the ability of IHRL to adapt to the evolving nature of migration management. Taking Australia's offshore processing regime in Nauru and Papua New Guinea as its case study, this thesis will seek to reveal some of the fault lines in the international protection of asylum seekers' rights.

The first Chapter will analyse the means of attribution of human rights obligations under IHRL and attempt to apply them to the offshore processing scenario to highlight some of their main deficiencies. Attributing an obligation to a duty-bearer is a necessary step in proving a breach of human rights: absent a link between the victim and the perpetrator state, individuals have no claim under IHRL. As it stands, international law largely determines the rules of attribution applicable to human rights obligations of states. The strict, territorial and

---

Deterrence" (2014) 53 Colum J Transnat'l L 235; Michelle Foster, "Reflections on a Decade of International Law: International Legal Theory: Snapshots From a Decade Of International Legal Life: The Implications Of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing At International Law" (2012) 13 Melbourne J of Int'l Law 395; Sam Blay, Jennifer Burn & Patrick Keyzer, "Interception and offshore processing of asylum seekers: The international law dimensions" (2007) 9 UTS L Rev 7.

[37] Hathaway, *supra* note 4 at 6.

physical criterion of control imposed to attribute an obligation seems poorly equipped to reflect the involvement of different actors, at different levels, in human rights abuses, thus calling for the use of methods to effectively address this complexity. While positive obligations may partly fill the 'gap' left by the non-accountability of private actors, it is only by overcoming the limits that a restrictive interpretation of the 'effective control' criterion has imposed.

Accountability, and the provision of remedies to victims of abuse, becomes an issue in itself if the rules of attribution only enable states to answer for human rights violations. Chapter 2 will examine the current obstacles to full accountability in extraterritorial and outsourced scenarios, as the offshore processing case highlights. Absent binding legal obligations bestowed upon private actors, states remain the principal agents through which victims may obtain redress. The different, isolated and incomplete pathways to redress available to victims indicate the need for international law to reinforce the cohesion of these mechanisms if human rights are to be more than abstract ideals.

Chapter 1 - Active support or passive complicity? The attribution of human rights violations in outsourced and externalised exercises of power

International law has progressively evolved to account for the actions of states beyond their territorial boundaries. International Human Rights Law (IHRL), in particular, has often been the trigger in this evolution as human rights courts and treaty bodies have attempted to avoid leaving wrongful actions of states unpunished.[38] States' jurisdiction is crucial in determining their subsequent responsibility for human rights violations, as it establishes the formal link between a duty-bearer (the State) and the individuals who suffered from the breach. Nowadays, most human rights treaties explicitly refer to jurisdiction as the necessary condition to establish the liability of a state with regards to its human rights obligations.[39]

The United Nations Human Rights Committee, in its analysis of states obligations under the International Covenant on Civil and Political Rights (ICCPR), nuanced the territorial basis of jurisdiction:

> The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[40]

By phrasing it as an alternative to territory, the Human Rights Committee confirms that the latter is no longer a condition *sine qua non* for an individual to be under the jurisdiction of a particular state, thus opening the door to the extraterritorial accountability of states. Underlying the Committee's reasoning is the "special character" of human rights treaties and the need to adapt the rules of international law in order to ensure maximum protection of individuals under their provisions.[41] This reasoning is in line with broader rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties (hereafter "the

[38] Gammeltoft-Hansen & Hathaway, *supra* note 36 at 259.
[39] Nicola Wenzel, "Human Rights, Treaties, Extraterritorial Application and Effects" in *Max Planck Encyclopedia of Public International Law* (New York, N.Y.: Oxford University Press, 2008), para 3.
[40] UN Human Rights Committee, "General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant" (2004) CCPR/C/21/Rev1/Add13, para 10.
[41] *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts 74 and 75)*, [1982] Advisory Opinion OC-2/82 Inter-Am Ct HR (SerA) , paras 29–30; *Loizidou v Turkey*, [1995] No 15318/89 ECHR , 21 EHRR 188, para 70.

Vienna Convention"). Article 31 of the Vienna Convention stipulates that treaties ought to be "interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[42]

The very nature of human rights treaties thus gives another meaning to the term jurisdiction in international human rights law: rather than narrowly circumscribing the sovereign powers of the state in international settings, it opens opportunities for individuals to raise claims against states acting beyond their borders.[43] Indeed, the notion of jurisdiction under IHRL has departed from its usual meaning under general international law: the latter is concerned with the legality of a state's action beyond its borders while the former is concerned with establishing whether a state has human rights obligations towards individuals outside of its territory.[44] This view is widely accepted in the literature: as Meron eloquently puts it, "narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights".[45] In the present case, it would be indeed counterproductive to isolate the Refugee Convention from its human rights pedigree; refusing the extraterritorial application of some of the provisions of the Convention, in particular the obligation of non-refoulement, would amount to an antinomy. Asylum seekers are by nature travelling between jurisdictions, and the core guarantee they have not to be returned to a place where they face persecution would remain an empty promise but for its extraterritorial application.[46]

Establishing the extraterritorial application of human rights law is only a first step: a breach of an obligation must then be attributed to the duty bearer. In the present scenario, human rights violations could be attributed to Australia either as a result of its own actions or indirectly through the actions of private parties. As Gammeltoft-Hansen compellingly argues, "As a matter of positive law, the effectiveness of international human rights law as it stands at present is thus dependent either on directly attributing violations to a state party or on establishing an indirect obligation of the state in regard to the violation in question."[47] The

[42] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969), art 31.
[43] Wenzel, *supra* note 39, para 12; Theodor Meron, "Extraterritoriality of Human Rights Treaties" (1995) 89:1 The American Journal of International Law 78 at 80.
[44] Daniel Augenstein & David Kinley, "When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 281.
[45] Meron, *supra* note 43 at 82.
[46] Hathaway, *supra* note 4 at 163–164.
[47] Gammeltoft-Hansen, *supra* note 16 at 177.

attribution of human rights violations to a state in Nauru and Manus Island processing centres thus faces two major obstacles. First, the extraterritorial nature of Australia's actions makes the application of human rights obligations appear exceptional, if one reads the jurisprudence of regional and international human rights bodies. Second, the outsourcing of welfare, security and legal services to private service providers challenges the classic public/private divide that underlies and eventually determines the application of human rights obligations.

In this new framework, IHRL seems poorly equipped to give a clear answer to the systemic human rights violations that the offshore processing scheme has engendered. The current emphasis on direct control of the state over a territory or an individual as the main criterion of attribution of human rights obligations enables to break the "chain of command" at the heart of the offshore processing scheme - by not fulfilling the test of jurisdiction, the link between the duty-bearer and its obligations is severed.[48]

This analysis will not aim to provide detailed means of determining state jurisdiction on the one hand and corporations' control on another, but rather to see how their intertwined and concurrent actions can pose a consistent challenge to the application of the contemporary criteria of jurisdiction as understood by regional and international human rights bodies. For the purposes of this essay, effective control is considered in its broad sense, encompassing the many different phrasings that jurisprudence has given to the criterion (authority and control, de facto control, physical power and control, amongst others), or what Tzevelekos calls generically "effectiveness".[49]

The aim of this Chapter will not be to delve on the particularities of each of these terms, which have been coined in different jurisdictional and factual circumstances. Rather, the developments will show that the effective control test as a general rule, being essentially physical, state-centric and exceptional, does not allow to fully account for the actions of Australia in the immigration centres of Nauru and Manus Island, thus calling for attribution to be determined through other means under IHRL.

[48] *Ibid* at 218.
[49] Vassilis P Tzevelekos, "Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility" (2015) 36:1 Michigan Journal of International Law at 131.

In line with these considerations, this chapter will attempt to discuss the difficulties of direct attribution of human rights violations to Australia through the effective control test (A) and the subsequent obstacles to establish indirect responsibility through due diligence (B). It will conclude by analysing the positive evolutions that IHRL may take to improve the fulfilment of human rights obligations in externalised and outsourced contexts (C).

Part A – Effective control: an ineffective test for Australia's management of regional processing centres

While the extra-territorial application of human rights obligations is a useful tool to hold states accountable, determining that a state has jurisdiction remains exceptional. In *Bankovic v. Belgium*, the ECHR took a narrow territorial approach to states' obligations by highlighting the exceptional character of extra-territorial jurisdiction and the essentially regional nature of the Convention, limited to its "espace juridique".[50] The Court went on to identify two exceptional circumstances in which jurisdiction could be established extra-territorially: when the state exercises "effective control of the relevant territory" or "through the consent, invitation or acquiescence of the government of that country".[51]

The Court's approach has been widely criticised as restricting the avenues for the accountability of states' human rights violations committed abroad: some authors have seen the judges' reasoning as unjustifiably based on public international rules of jurisdiction, while some others have called it an "artificial judicial construction" serving the ends of the ECHR alone.[52] The effective control test was indeed, in *Bankovic*, essentially physical, and based on the time lapse within which control was held.[53] The Court has since evolved towards a more functional test to establish the jurisdiction of states: in *Al-Skeini v. United Kingdom*, the ECHR approached jurisdiction in a broader manner, yet, in its analysis of state agent authority and control, still focused on "physical power and control over the person".[54] In

[50] *Bankovic v Belgium [GC]*, [2001] No. 52207/99 ECHR , paras 55–80; Wenzel, *supra* note 39, paras 11–12; Gammeltoft-Hansen & Hathaway, *supra* note 36 at 260.
[51] *Bankovic v. Belgium [GC]*, *supra* note 50, para 71.
[52] Tzevelekos, *supra* note 49 at 131; Wenzel, *supra* note 39, para 12; See also Gammeltoft-Hansen & Hathaway, *supra* note 36 at 260; T De Boer, "Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection" (2015) 28:1 Journal of Refugee Studies Journal of Refugee Studies 118 at 125.
[53] De Boer, *supra* note 52 at 125; *Bankovic v. Belgium [GC]*, *supra* note 50, paras 75–82.
[54] *Al-Skeini and others v The United Kingdom [GC]*, [2011] No. 55721/07 ECHR , paras 133–137; De Boer, *supra* note 52 at 127; Gammeltoft-Hansen & Hathaway, *supra* note 36 at 263.

J.H.A v Spain, the UN Committee Against Torture (UNCAT) defined jurisdiction as "any territory in which [a state] exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law". [55] Building on this understanding, the Committee found that Spain exercised jurisdiction over individuals confined on a boat during an interception operation. This new interpretation of effective control expands its original definition by emphasising the possibility of indirect and partial control over individuals, thus considerably emancipating the definition from its territorial foundation.[56]

Although the latest evolutions ought to be praised for the flexibility they offer to characterise a breach of human rights committed abroad, both criteria appear in general deficient to qualify the degree of control held by Australia over its offshore detention centres. Australia's scheme of offshore processing for asylum seekers has been widely criticised by academics and international agencies alike for its failure to offer effective protection to the most vulnerable, and its subsequent failure to comply with the objectives of the Convention as part of the broader body of international human rights law treaties.[57]

The resort to 'Regional Processing Centres' (RPCs) started in 2001 under the Howard government: by what has been referred to as a "legal fiction",[58] Australia purported to exclude some remote islands, including Christmas Island, from its Migration Zone. As a result, asylum seekers arriving by boat to these excised territories were barred from applying for protection visas and from challenging their detention before Courts.[59] The process towards externalisation to third countries was closely accompanied by the progressive outsourcing of Australian detention centres to private service providers.[60]

---

[55] *JHA v Spain*, [2008] 41st Sess CAT/C/41/D/323/2007 UNCATOR , para 8.2.
[56] Gammeltoft-Hansen & Hathaway, *supra* note 36 at 265.
[57] See for example C Fleay & S Hoffman, "Despair as a Governing Strategy: Australia and the Offshore Processing of Asylum-Seekers on Nauru" (2014) 33:2 Refugee Survey Quarterly 1; Foster & Pobjoy, *supra* note 8; A Francis, "Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing" (2008) 20:2 International Journal of Refugee Law 273; Jennifer Hyndman & Alison Mountz, "Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe" (2008) 43:2 Government and Opposition 249; Kneebone, *supra* note 4; S Lowes, "The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the 'Malaysian Solution' Case" (2012) 12:1 Human Rights Law Review 168.
[58] Rebecca La Forgia, "Attorney General, Chief Law Officer of the Crown: But where is the law?" (2003) 28:4 Alternative Law Journal 163 at 164.
[59] Kneebone, *supra* note 4 at 697.
[60] Georg Menz, "Neo-liberalism, Privatization and the Outsourcing of Migration Management: A Five-Country Comparison" (2011) 15:2 Competition & Change 116 at 126; Kneebone, *supra* note 4 at 709–710; Fleay & Hoffman, *supra* note 57 at 18.

It will be argued that the outsourced and externalised management model of RPCs dangerously escapes the traditional scheme of jurisdiction under IHRL, while the model is increasingly being criticised for its poor human rights record. For this purpose, the first sub-part will discuss the division of power and management functions in RPCs and the problematic opacity that surrounds it (a), to then examine the limits that such a scheme imposes on the attribution of human rights obligations under IHRL (b).

a) Human rights in the mist of responsibilities: the "eminently foreseeable" tragedy of regional processing centres

RPCs have been operating since the implementation of the Pacific Solution in 2001. While the centres were briefly closed when the Labour party came into power in 2008, they were reopened following an increase in boat arrivals in 2012.[61] The policy was later reinforced under the Gillard government with the signing of two Memoranda of Understanding (MoU) with Papua New Guinea and Nauru, designating them as 'Regional Processing Countries'.[62] In 2013, the Australian Government concluded a Regional Resettlement Arrangement with Papua New Guinea and a new Memorandum of Understanding was signed with Nauru. The agreements stipulated that Nauru and Manus Island were to progressively carry out Refugee Status Determination (RSD) and undertake to resettle refugees whose claims were successful, thus reinforcing the pre-existing policies of externalisation.[63]

The scheme has progressively evolved from having Australian Immigration Officials and UNHCR staff to determine refugee claims (in Papua New Guinea and Nauru respectively) to delegating these functions to local authorities and service providers. At the time of writing, RSD in Nauru is conducted by Nauruan authorities, with the assistance of Claims Assistance Providers (CAPs), being agents from private migration law firms established in Australia, and contracted out by the Australian government.[64]

---

[61] Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 4–5; Foster & Pobjoy, *supra* note 8 at 591.
[62] Australian Human Rights Commission, *supra* note 2 at 5; Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 5–6.
[63] *Regional resettlement Arrangement between Australia and Papua New Guinea*, 19 July 2013; *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, 3 August 2013; Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 7–9.
[64] Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet - Offshore processing: refugee status determination for asylum seekers on Nauru* (2015) at 3–4; Republic of Nauru - Department of Justice and

All other functions catering for the needs of asylum seekers are entirely managed by private contractors. Currently, Transfield Services is running detention centres, International Health and Medical Services (IHMS) is in charge of healthcare while Save the Children holds the contract for welfare and education services, all of them operating on both Manus Island and Nauru.[65] At the time of writing, the government is currently renewing the tender for health and welfare services.[66]

Over the recent years, the Centres have been the subjects of widespread criticism over the allegations, progressively verified, of systemic human rights abuses taking place at the detention centres. Numerous so-called "incidents" have been reported at the Manus Island and Nauru detention centres, the most acute being the disturbances of 16-18 February 2013 on Manus Island.[67] These events, rather than isolated acts of gratuitous violence, are expressions of the systemic human rights violations taking place in OPCs and the opaque style of management that prevails among contractors.

The presence of private service providers, contracted out by Australia for the purpose of fulfilling its international obligations, considerably hampers the transparency that is necessary to assess the acts of public agents against human rights standards. The current outsourcing scheme is to be distinguished from privatisation in that the government maintains a margin of control over the process while hiding behind a veil of private actors. Privatisation, on the other hand, constitutes a total renunciation of services to the private sector, where accountability mechanisms are presumably found in market dynamics.[68] Unlike

---

Border Control, *Refugee Status Determination Handbook*, online: http://www.naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf (2013).

[65] Paul Farrell, "IHMS, the healthcare giant at the heart of Australia's asylum system - explainer", *The Guardian* (21 July 2015), online: <http://www.theguardian.com/australia-news/2015/jul/21/ihms-the-healthcare-giant-at-the-heart-of-australias-asylum-system-explainer>; Nick Evershed, "Mandatory immigration detention is a billion-dollar business - analysis", *The Guardian* (25 August 2014), online: <http://www.theguardian.com/news/datablog/2014/aug/25/-sp-mandatory-immigration-detention-is-a-billion-dollar-business-analysis>; Australian Government, *supra* note 13; Australian Government, *supra* note 13.

[66] Liam Cochrane, "Australia considers five-year offshore immigration contracts amid sexual assault allegations and 'fight club' claims", *ABC News* (7 August 2015), online: <http://www.abc.net.au/news/2015-08-07/australia-considers-five-year-offshore-immigration-contracts/6681208>; Australian Government, *Request for Tender for the Provision of Services in Regional Processing Countries*, https://www.tenders.gov.au/?event=public.atm.showClosed&ATMUUID=3A87D0FB-FD44-1499-3DF065077176C756 (2015).

[67] See Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61.

[68] Matthew Groves, "Outsourcing and non-delegable duties" (2005) 16 Public Law Review 265 at 265.

the surrender of control that privatisation implies, outsourcing and externalisation reflect a restructuration of state power around new tools of migration management.[69]

This policy is prominently based on contracts between the Australian government and service providers which in turn subcontract some activities to other private companies, thus creating several layers of agreements through which neither the Australian public nor asylum seekers can see clear.[70] Transfield's refusal to provide information concerning the activities it had contracted out and the identities of the subcontractors for the purposes of the Senate report of the Legal and Constitutional Affairs Committee starkly illustrates the opacity that outsourcing can create.[71] More recently, the company's inability to answer questions relating to their day-to-day management of the centre in view of the parliamentary inquiry into allegations of sexual assaults committed at the Nauru RPC highlights that the transparency issue is not limited to the wide range of private contracts entered into – the lack or concealment of information is an inherent part of the way the centres are managed.[72]

This lack of transparency has been instrumental both in triggering the unrest at detention centres as well as avoiding accountability for the subsequent human rights violations. Reports and testimonials from the RPCs have witnessed of the power, actual and perceived, of Commonwealth agents on the island. Several submissions provided by former staff at the RPC in Manus Island provide disturbing accounts of influence from the Department of Immigration, including control over information provided to asylum seekers and direct instructions from agents of the Department being given to service providers.[73] The testimonies are in line with the content of contracts released on Freedom of Information

[69] Menz, *supra* note 60 at 117; Groves, *supra* note 68 at 265; Gammeltoft-Hansen, *supra* note 16 at 35–40; Tally Kritzman-Amir, "Privatization and Delegation of State Authority in Asylum Systems" (2011) 5:1 Law & Ethics of Human Rights 194 at 201.

[70] See the recommendations in Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015).

[71] Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 25.

[72] Paul Farrell, "Nauru inquiry: Transfield unable to answer basic questions about operations", *The Guardian* (19 May 2015), online: <http://www.theguardian.com/world/2015/may/19/nauru-inquiry-transfield-unable-to-answer-basic-questions-about-operations>.

[73] Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 27; Elizabeth Thompson, *Submission 19 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 15–18; Christopher Iacono, *Submission 20 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 3; Nicole Judge, *Submission 12 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 11.

(FOI) requests, which contain very detailed management guidelines and obligations.[74] However, these actual spheres of influence stand in sharp contrast with the official respective MOUs and official statements from the Australian Government, which emphasise third countries' responsibilities for RPCs.[75]

The Senate Report into the incident of 16-18 February 2014 has qualified as "eminently foreseeable" the outbreak that occurred on Manus Island, which saw violent riots and protests in the compound as well as attempts to escape by a group of asylum seekers.[76] The subsequent report identified that the lack of clear information about RSD and resettlement processes were a major triggering factor in the uprisings.[77] In light of the allegations revealed by previous and subsequent Parliamentary reports and inquiries, the ambiguity around the official and actual role that state actors play in RPCs is at the forefront of the blame-shifting strategy that seeks to avoid accountability while retaining a large degree of control, albeit indirectly, on the management of RPCs and RSD procedures.[78]

In this blurred picture where private, public and foreign actors carry out related duties, without a clearly defined hierarchical structure, the lack of access to information adds a last layer of difficulty to attribute human rights obligations. The application of traditional rules of jurisdiction in international law appears to face considerable obstacles in this new externalised and outsourced model of migration management.

b) A momentary lapse of control: the limits of extraterritorial jurisdiction in international jurisprudence

While the management of detention centres has fuelled many criticisms in light of its contribution to appalling detention conditions for asylum seekers, the nature and degree of

[74] See for example G4S, *Contract in relation to the provision of services on Manus Island (PNG)* (2013); Transfield Services Australia, *Contract in relation to the provision of services on Nauru* (2013).
[75] *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, 3 August 2013; *Regional resettlement Arrangement between Australia and Papua New Guinea*, 19 July 2013; Fran Kelly, "Morrison: protecting asylum seekers a worthy goal (Interview with Immigration Minister Scott Morrison)", *ABC Radio National Breakfast* (7 March 2014), online: <http://mpegmedia.abc.net.au/rn/podcast/2014/03/bst_20140307_0742.mp3>.
[76] For a detailed examination of the events that occurred on Manus Island, see Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 77 and following.
[77] *Ibid* at 145.
[78] Daniel Webb, "Out-sourcing our dirty work: Australia's approach to asylum seekers | Human Rights Law Centre", online: <http://hrlc.org.au/out-sourcing-our-dirty-work-australias-approach-to-asylum-seekers/>.

control that Australia has over RPCs makes a case for its jurisdiction difficult at best, and circumstantial by nature. Many commentators have argued that Australia's "effective control" over the centres activates its human rights obligations, thus triggering liability for the abuses committed in detention centres.[79] However, most analyses focus on the past role of Australian officials in RSD procedures, without taking into account the progressive delegation of these functions to local officials.[80]

More importantly, the involvement of private companies is not always mentioned, let alone analysed in light of the jurisprudence, in terms of the complications it entails for the attribution of control. In their recent article, Gammeltoft-Hansen and Hathaway compellingly argue that rules of jurisdiction have evolved so as to counter the extraterritorial actions of states in the realm of migration regulation; however, their analysis focuses on interstate relations and does not mention the effect that contracts and subcontracts with private entities would have on the application of the relevant criteria for jurisdiction they put forward, namely authority over individuals and exercise of public powers.[81] Rather than giving a green light for states to commit human rights abuses outside their territory, this analysis seeks to highlight the current limits in the definition of jurisdiction in international human rights law in order to tackle such violations as they ought to be, through international law mechanisms.

It is arguable whether the delegation of authority to private contractors through contracts would suffice to characterise Australia's control over private actors. The jurisprudence, however, has not yet gone as far as finding effective control through contracts with private entities. Indeed, the rules of attribution in international human rights law differ from the Articles on State Responsibility – IHRL has developed special rules of attribution in line with the special character of human rights treaties, and the notion of jurisdiction holds different meanings in the two bodies of law.[82]

---

[79] See for example Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet - Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea* (2015) at 8; Webb, *supra* note 77; Max Chalmers, "Australia Obligated to Protect Refugees in Nauru, Say Legal Groups", *New Matilda* (26 November 2014), online: <https://newmatilda.com/2014/11/26/australia-obligated-protect-refugees-nauru-say-legal-groups>.

[80] *Regional resettlement Arrangement between Australia and Papua New Guinea*, *supra* note 11; *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, *supra* note 11; UNHCR, *supra* note 2 at 5.

[81] Gammeltoft-Hansen & Hathaway, *supra* note 36 at 257–266.

[82] Gammeltoft-Hansen, *supra* note 16 at 107; Wenzel, *supra* note 39, paras 4–12.

In *Al-Skeini*, the ECHR partly superseded the analysis of extraterritorial jurisdiction it had adopted in *Bankovic*. In assessing whether the United Kingdom was exercising jurisdiction over individuals killed by British troops in Iraq during occupation, the Court indeed found that personal jurisdiction was characterised in the "exercise of some of the public powers normally to be exercised by a sovereign government".[83] More precisely, the Court held that the UK had "authority and control" over individuals because of the exercise of these public powers. Thus, the Court refused to characterise "authority and control" in the mere power to kill an individual – which, as Milanovic highlights, can be reasonably construed as an exercise of "physical power" over a person.[84] Importantly, *Al-Skeini* maintains the exceptional character of extraterritorial jurisdiction developed in earlier decisions, by insisting on the exercise of "public powers" as determinant to qualify extraterritorial jurisdiction, without clearly defining what the expression may encompass. And although the Court seems to introduce the possibility for control to be indirect, it seems to be only applicable to control over an area rather than over individuals – thus offering little prospects of application to the case at stake.[85]

The ECHR's position is highly debatable in light of the expansion of extraterritorial migration control over the past decades.[86] Maintaining extraterritorial jurisdiction as an exception seems almost obsolete in an era where migration control beyond borders is on the point of becoming the rule rather than the exception.[87] The numerous tests used by the ECHR would thus be of little avail to characterise Australia's control over OPCs: while some degree of control can easily be characterised as "physical power and control", the presumption that Australia did not have jurisdiction would have to be overturned in each specific individual circumstance, the states of Nauru and Papua New Guinea being presumed to have territorial jurisdiction over the centres. The very circumstantial nature of physical control stands in contrast with the systemic yet indirect control that Australia maintains over RPCs through financial arrangements and unofficial directives to service providers.

[83] *Al-Skeini and others v. The United Kingdom [GC]*, *supra* note 54, para 149.
[84] *Ibid*, para 137; M Milanovic, "Al-Skeini and Al-Jedda in Strasbourg" (2012) 23:1 European Journal of International Law 121 at 129.
[85] *Al-Skeini and others v. The United Kingdom [GC]*, *supra* note 54, para 138.
[86] T Gammeltoft-Hansen, "International Refugee Law and Refugee Policy: The Case of Deterrence Policies" (2014) 27:4 Journal of Refugee Studies Journal of Refugee Studies 574 at 575.
[87] Gammeltoft-Hansen, *supra* note 16 at 1–19.

Furthermore, with the absence of definition of "public powers", the ECHR's finding carries more uncertainties than practical solutions to extraterritorial human rights violations. What is to be defined as a public power is a vexed political question that goes beyond the purpose of this analysis, and arguably beyond the jurisdiction of the ECHR too.[88] Even if, as Gammeltoft-Hansen and Hathaway argue, the exercise of public powers is to constitute a new base on which to characterise the extraterritorial jurisdiction of a state, it is rather unlikely to apply to the current offshore processing scheme. While migration control is arguably traditionally understood as a sovereign power of the state, the presence of private actors, again, blurs the edges of the otherwise clear analysis that the authors put forward.[89]

This is where what Gammeltoft-Hansen calls "sovereignty overstretching" is most evident and destructive for effective procedures: where the instrumentalisation of third countries' spheres of sovereignty, on the one hand, and the public/private divide, on the other, enables Australia to distance itself enough from its tools of migration control so as to discard any claim to its responsibility.[90] The current insistence on these artificially sharp boundaries therefore creates a scheme whereby Australia's control escapes a clear characterisation under international human rights law by defining itself by what it is not: not effective, not direct, not through state agent, not territorial.

The difficulty to ascertain jurisdiction has an impact on the ability to hold Australia responsible for guaranteeing human rights in general, and access to fair RSD procedures to asylum seekers in particular. As Tzevelekos argues, it may indirectly give a green light for states to commit human rights abuses whenever they can stay below the threshold of 'effective' control.[91]

Thus, the current criterion of effective control appears adapted to counter 'classic' extraterritorial abuses of human rights by states, but the jurisprudence is yet to evolve to cover more complex situations involving a variety of actors and several levels of decision-making. The failure to directly attribute human rights violations to a state leads to consider means of indirect attribution that may be relevant in the situation at stake. While Australia's

[88] See for example Clapham & Academy of European Law, *supra* note 14 at 11; Milanovic, *supra* note 83 at 131; Gammeltoft-Hansen, *supra* note 16 at 176–183.
[89] Gammeltoft-Hansen & Hathaway, *supra* note 36 at 266–272.
[90] Gammeltoft-Hansen, *supra* note 16 at 40.
[91] Tzevelekos, *supra* note 49 at 163–164.

obligation of due diligence could apply to fill the gap left by the absence of direct attribution, the criterion of effective control seems to limit its application.

Part B – Due diligence: an effective alternative to direct attribution?

Due diligence in IHRL refers to the positive obligation a state may have to "prevent, investigate and punish" human rights violations, as defined by the Inter-American Court of Human Rights in the case *Velásquez-Rodríguez v. Honduras*.[92] This distinction between negative obligations of the state (obligations not to interfere with individuals rights) and positive obligations (obligations to take active measures to protect them) was later endorsed by the Human Rights Committee in its General Comment No. 31: the obligation of a state "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" was thus interpreted broadly as including a positive obligation for the state to protect individual rights.[93] Importantly, the obligation extends temporally to cover the entire 'life-span' of a human rights violation: before (prevent) and after (punish, investigate and redress).

The obligation to prevent is particularly relevant to the case at stake, as it has been revealed that the Australian government was aware of the 'incidents' that were taking place in RPCs.[94] Interestingly, due diligence also covers secondary obligations to grant remedies to victims ("redress"), which, in light of the plethora of violations that have been established in Manus Island and Nauru, could potentially play a crucial role in compensating for the harms caused to asylum seekers. While the so-called 'secondary' obligations triggered after violations are also to be explored, they will make the subject of a thorough analysis in the second chapter of this essay.

As such, due diligence is an obligation of means for the state, as opposed to an obligation of result: a State must take active measures in its power to prevent human rights violations from

[92] *Velásquez-Rodríguez v Honduras*, [1988] Inter-Am Ct HR (SerC) No4 , para 172.
[93] UN Human Rights Committee, *supra* note 40, para 7.
[94] Paul Farrell, "Nauru inquiry: immigration minister personally told of serious incidents", *The Guardian* (19 May 2015), online: <http://www.theguardian.com/weather/2015/may/19/nauru-inquiry-immigration-minister-personally-told-of-serious-incidents>; See also Philip Moss, *Review into recent allegations relating to conditions and circumstances at the regional processing centre in Nauru : final report* (Department of Immigration and Border Protection, 2015).

being committed in its jurisdiction. This last term is crucial in understanding the main weakness the concept could present to be efficiently applied to the human rights violations occurring in Manus Island and Papua New Guinea.

The state-centric nature of the concept and its focus on jurisdiction suggest that due diligence may be subject to the criterion of effective control and fail to provide a solution to the conundrum analysed earlier. However, despite some inherent limits, the duty of due diligence may well develop to encompass situations involving both outsourcing and externalisation. The positive nature of the obligation, *prima facie*, distinguishes it from the otherwise negative obligation of non-refoulement that states like Australia pretend to abide by. By phrasing a duty as an obligation to take action, due diligence may well be in a position to defeat the "out of sight, out of mind" logic that underlies the offshore processing scheme.[95]

This analysis of due diligence will bear in mind the specificities of the offshore processing regime to highlight the relevant limits the concept may face in its practical application. While it may counter some of the difficulties in accounting for human rights violations in OPCs, it must not be taken as a panacea for the responsibility gap between states and service providers.

It will be argued that the positive obligations can only hope to be effective if freed from the rigid effective control test put forward in *Bankovic* (a). However, the application of due diligence to the right to seek asylum faces further practical limitations that may hamper its effectiveness in the situation at stake (b).

a) The case for a flexible effectiveness criterion for positive obligations

Due diligence has been mainly recognised and developed in the jurisprudence of regional courts and human rights monitoring bodies. Although the Articles on State Responsibility do not contain any specific provision on the subjective obligations of a State, the international

[95] Hannah Stewart-Weeks, "Out of Sight but Not out of Mind: Plaintiff M61/2010E v Commonwealth" (2011) 33 Sydney Law Review 831; Gammeltoft-Hansen, *supra* note 16 at 209–230.

jurisprudence has developed the notion of positive obligations and taken human rights a step further in the realm of private relations.[96]

In the *Bosnian Genocide* case, the ICJ listed criteria to be taken into account to assess the fulfilment of the obligation of due diligence. Starting form the point that the obligation "calls for an assessment in concreto", the Court identified that the capacity of the state to fulfil the obligation included notably "the geographical distance of the State concerned from the scene of the events, and […] the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events".[97]

Behind this analysis lies an implicit criterion of "effectiveness" as Tzevelekos calls it: as an obligation of conduct, the scope of due diligence will depend on the means available to the state to prevent the violation from occurring, which in turn will partly depend on the degree of control the latter has over a certain situation.[98] In that sense, positive obligations are still under the umbrella of the criterion of control.

However, as a subjective obligation, the scope and content of due diligence will depend upon the circumstances of the case: it is by nature flexible, adaptable to the duty-bearer's means of action. The jurisprudence has applied the concept in many different scenarios, accounting for the real diversity in which human rights violations take place. In *Velásquez-Rodríguez*, the IACHR ruled that a state was responsible for failing to prevent the arbitrary detention and subsequent disappearance of an individual, even if it could not be proved that state agents were directly involved.[99]

In *Ilascu*, the ECHR held that Moldova and Russia concurrently held jurisdiction – Moldova, having jurisdiction over its territory, had a positive obligation to guarantee the rights of the Convention, while Russia, by the provision of political and military support, was held responsible for the acts of the separatist group (the "MRT").[100] In this case, the ECHR thus

[96] Ineta Ziemele, "Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies" (2009) AEL 2009/8 EUI Working Papers 1 at 1–3.
[97] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] International Court of Justice (ICJ) , para 430.
[98] Tzevelekos, *supra* note 49 at 162.
[99] *Velásquez-Rodríguez v. Honduras*, *supra* note 91, paras 186–188.
[100] *Ilascu and others v Moldova and Russia [GC]*, [2004] No. 48787/99 ECHR ; See also Tzevelekos, *supra* note 49 at 161–162; Gammeltoft-Hansen & Hathaway, *supra* note 36 at 274.

denies that jurisdiction is an "all-or-nothing" proposition as was implied in *Bankovic*: although control is still relevant to positive obligations, it is rather in terms of degree than threshold. Should it be otherwise, due diligence would fail to put forward a constructive alternative to direct attribution, as they would then both rely on the same criterion of control.

More importantly, the reliance on effective control as a criterion to determine the scope and content of due diligence may fail to encompass some of the most destructive omissions of states, as the offshore processing case illustrates: the avoidance of direct control over private entities knowingly involved in numerous human rights abuses, while certainly causal in their occurrence, would not necessarily fall under a state's positive obligations had they been based on a strict effective control test.[101] As the obligation of due diligence requires states to take action against actual or potential perpetrators, the very absence of exercise of control, if intentional, could be characterised as a violation of the obligation.

Ilascu thus shows the flexibility of the due diligence obligation: even in the absence of effective control over its territory, Moldova's positive obligations are not extinguished, although 'tailored' to the means available to it. Thus, the case entrenches the real possibility to see indirect and direct attribution as complementary, with due diligence potentially playing a role with a differentiated, more flexible criterion of effectiveness based on the means available to the state to fulfil its obligations.[102]

However, even if the jurisprudence successfully frees positive obligations from an exclusive and rigid 'effectiveness' test of jurisdiction, the concept faces significant obstacles in its application, in a field in which international law is yet to develop, and in a context where the intertwining of state and non-state actors challenges the one-sided nature of due diligence.

b) Due diligence and third countries processing agreements: inherent limits

Due diligence imposes a specific duty for the state to take active measures to prevent and punish violations. As such, it does not apply to all human rights: it must be made explicit in the obligation considered. General Comment 31 has made clear that due diligence applies to

[101] *Ilascu and others v Moldova and Russia [GC], Partly dissenting opinion of Judge Loucaides*, [2004] No. 48787/99 ECHR ; Moss, *supra* note 93.
[102] Tzevelekos, *supra* note 49 at 168–169.

all obligations under the Covenant – for the situation at stake, this entails that, subject to the means at its disposal, Australia has to endeavour to guarantee asylum seekers' right to life (article 6), right not to be subject to torture or to cruel, inhumane and degrading treatment (article 7), the right to liberty (article 9) and the right to an effective remedy (article 2§3.a), amongst others.[103]

A state thus has an obligation to prevent an asylum seeker from being sent to a place where she may face torture, regardless of the agent responsible for this act.[104] Furthermore, the language employed in article 33 of the 1951 Convention defines the obligation of non-refoulement in broad enough terms ("in any manner whatsoever") to support such an interpretation.[105] However, in order for this reasoning to be applicable to the right to seek asylum, a corresponding due diligence obligation of the state should be identified. Because the right to seek asylum entails access to effective and fair procedures, it distinguishes itself from the negative obligation not to *refoule*.

Although the Conclusions of the Executive Committee on the International Protection of Refugees (hereafter 'the ExCom Conclusions') have insisted on the need to guarantee effective procedures in accordance with the purpose of article 14 of the UDHR, neither sources are formally legally binding.[106] Without a parallel duty enforceable under international law, the right to a full and fair asylum procedure may therefore remain an empty promise.[107]

Furthermore, due diligence only partially bridges the gap left by the involvement of private actors in human rights violations in RPCs. With its focus on jurisdiction, the obligation risks tapping into the artificially clear-cut lines between actors' spheres of influence, and the

[103] UN Human Rights Committee, "General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant" (2004) CCPR/C/21/Rev1/Add13, paras 6–8; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 [*entered into force 23 March 1976*], art 3–9.
[104] See for example *Soering v United Kingdom*, [1989] No. 14038/88 ECHR .
[105] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Convention Relating to the Status of Refugees*] at art 33; Thomas Gammeltoft-Hansen, *Access to Asylum - International Refugee Law and the Offshoring and Outsourcing of Migration Control* (PhD, Aarhus University, 2009) at 229.
[106] The customary nature of the right to seek asylum is highly debated. See for example Edwards, *supra* note 24; G S Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23:3 International Journal of Refugee Law 443; Hathaway, *supra* note 4.
[107] J R C Field, "Bridging the Gap Between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context" (2010) 22:4 International Journal of Refugee Law 512 at 526.

predominant position of states as duty bearers.[108] As the *Ilascu* case shows, human rights violations take place in increasingly complex scenarios where spheres of control, and thus jurisdictions, are no longer mutually exclusive. The offshore processing scenario pushes these boundaries even further by escaping the scheme of state responsibility for human rights breaches through a blame-shifting strategy that benefits from private actors' traditional exemption from human rights obligations under international law.

In an environment where several states and service providers carry out different but related duties, due diligence risks oversimplifying the scheme underlying most human rights violations committed in Manus Island and Nauru by emphasising states' duties above all else. In doing so, the risk would be to leave an even bigger gap of responsibility, where states' obligations of due diligence would be almost inexistent if their capacity to act is limited, only to leave service providers' actions unaccounted for.[109] Furthermore, as Gammeltoft-Hansen points out, territorial considerations will still affect the application of due diligence, as they will be taken into account in the concrete assessment of the state's control over private actors.[110] The presence of Papua New Guinean and Nauruan officials will be a key factor in assessing the degree of influence that Australia has over the process, all the more so as they are presumed to hold *de jure* jurisdiction over the centres.[111]

Finally, the lack of transparency around the management of RPCs has imposed a critical limit on the enforcement of due diligence obligations. In the offshore processing case, the corporate veil between public scrutiny and private actors has played a key role in maintaining a degree of secrecy around allegations of human rights violations.[112] While it is arguable whether this opacity is inevitable in outsourcing scenarios, the current scheme demonstrates that positive obligations are considerably difficult to determine if private actors evolve in a

[108] Yuval Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law" (2013) 7:1 The Law & Ethics of Human Rights at 62; Gammeltoft-Hansen, *supra* note 16 at 42; John Gerard Ruggie, "Business and human rights: the evolving international agenda" (2007) American Journal of International Law 819 at 826.
[109] Tzevelekos, *supra* note 49 at 163–164.
[110] Gammeltoft-Hansen, *supra* note 15 at 235.
[111] *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, *supra* note 11; *Regional resettlement Arrangement between Australia and Papua New Guinea*, *supra* note 11.
[112] In the words of Gammeltoft-Hansen, "Beyond reasons of efficiency, the appeal of privatizing migration control may equally lie in the distancing of control functions from the state in order to avoid accountability" Gammeltoft-Hansen, *supra* note 16 at 36. See also Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 25; Farrell, *supra* note 72.

legal framework that enables them to conceal their contribution to human rights abuses.[113] The need for transparency appears all the more fundamental in the case of indirect attribution if the latter is to be determined on a degree-based test of control. While in the case of direct attribution, the threshold of effective control was unlikely to be passed, in the case of positive obligations, while the test is more flexible it requires an assessment of all the means of control available to the state – most of which are "shrouded in secrecy" in RPCs.[114]

The combination of these technical issues, coupled with the scattered jurisprudence on the application of due diligence to private migration control, may further blur the analysis of indirect attribution.

Due diligence standards may thus face numerous obstacles when applied to the circumstances of offshore processing. Some of these are inherent to the management methods used in RPCs, and their debate would make the subject of another analysis. However, the flexibility that jurisprudence has afforded to the concept of due diligence suggests the possibility to adapt it to the reality of human rights abuses and reinforce the complementary relationship between indirect and direct attribution of human rights violations.[115] Only by avoiding to reproduce the deficiencies created by an overreliance upon the criterion of effective control can the obligation of due diligence reveal its full potential.

Part C – Complexity in complementarity: rethinking the attribution of human rights obligations

In light of the sporadic and sometimes contradictory jurisprudence on the extraterritorial application of states' obligations from human rights bodies and regional courts, an extensive body of literature has attempted to put forward models challenging this unsatisfactory *status quo*. This part will not aim at providing an extensive review of the solutions that have been put forward by the literature; it will narrow its focus to the criticisms raised throughout this

[113] *Australian Border Force Act 2015* (Cth), sec 41–51; Greg Barns & George Newhouse, "Border Force Act: detention secrecy just got worse", *ABC News* (28 May 2015), online: <http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086>.
[114] Azadeh Dastyari, "Asylum seekers punished more every year", (2014), online: *Castan Centre for Human Rights Law* <http://www.monash.edu/law/centres/castancentre/policywork/hr-reports/2014/asylum>.
[115] See Tzevelekos, *supra* note 49.

chapter to analyse the practical solutions that international law can offer to counter the current gap in responsibility in Nauru and Manus Island.

If the definition of effective control is, as De Boer argues, "a piecemeal approach" trying to encompass different situations without a clearly established principle, there is space for the further development of the notion of jurisdiction which would reinforce both direct and indirect attribution of a human rights violation. [116] Challenging the dichotomies at the heart of the state-centric criterion of effective control (a) is the first step towards a more comprehensive scheme of responsibilities that acknowledges and acts upon the presence of private actors in the realm of human rights (b).

a) A functional effective control test reinforcing direct and indirect attribution

A first step to challenge the 'none of our business' culture that prevails in the management of RPCs lies in re-centring jurisdiction around the actual capacity and legitimacy of the state to fulfil rights in a particular situation. This entails challenging both the territorial paradigm of jurisdiction and the exclusive, threshold-based criterion of effective control.

A functional approach to jurisdiction would effectively shift the emphasis away from borders onto the role of the duty-bearer in guaranteeing rights – as Judge Bonello puts it in his concurring opinion in *Al-Skeini*:

> when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.[117]

The words 'authority' and 'control' ought here to be interpreted in light of earlier remarks – that is, neither exclusive nor absolute. Some authors have interpreted 'authority' as implying a relationship between the individual and the state. Shany puts forward a compelling model whereby the state's jurisdiction would be limited by the existence of a "special relationship"

[116] De Boer, *supra* note 52 at 125.
[117] *Al-Skeini and others v The United Kingdom [GC], Concurring Opinion of Judge Bonello*, [2011] No. 55721/07 ECHR , para 12.

between the state and the individual, on the one hand, and any legal relationship on the other. In the author's words, jurisdiction would be characterised when the state, through its act or omission, causes "direct, significant and foreseeable" harm to individuals.[118]

Under this model of jurisdiction, Australia would retain some degree of responsibility for the detention of asylum seekers in Nauru and Manus Island: Australia's legal obligations under the Refugee Convention, the financial support it provides to the centres as well as the contracts passed with service providers already suggest strong factual and legal links between the state and transferred asylum seekers. The considerable investment of public funds and personnel that has gone towards the RPCs clearly indicates the country's ability to fulfil its obligations, whether or not it is actually exercising 'effective control' over these delimited areas.[119] The relational criterion would thus constitute a reasonable and necessary limit to states' extraterritorial obligations – in the absence thereof, states would be in too remote a position to effectively guarantee rights to individuals and extraterritorial jurisdiction would therefore constitute an excessively heavy burden.[120]

The introduction of a relational standard in jurisdiction necessarily entails adapting the obligations to the scope and nature of the relation between the individual(s) and the duty-bearer(s). The offshore processing case here again perfectly illustrates the complexity that can arise in certain contexts, whereby an individual may hold several claims of different nature against different duty-bearers. In his analysis of the extraterritorial application of the European Convention, Lawson suggests a proportionality rule whereby the scope of human rights obligations would have to be adapted to the capacity of the state to fulfil them.[121] Applied to the offshore processing regime, a similar approach would perhaps constitute a fair way to negotiate the respective responsibilities of state and non-state actors. While Australia's duties would be diminished due to the non-exclusive control it has over RPCs, it would nonetheless avoid the current gap of responsibility that results from the "all-or-nothing" conception of jurisdiction.

---

[118] Shany, *supra* note 107 at 69.
[119] Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 7.
[120] Shany, *supra* note 107 at 69.
[121] Rick Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights" in Fons Coomans & Menno T Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004) 83 at 106.

This position has been criticised for enabling treaties to be "divided and tailored", allegedly making fundamental rights relative guarantees that governments can pick and choose from.[122] However, a large part of the literature has rightly discarded these views for failing to acknowledge that the shift in jurisprudence has reflected a similar shift away from the state-centric paradigm.[123] Jurisdiction can no longer be conceived of as the exclusive exercise of power of one state over individuals; the realities of human rights obligations tell a much more nuanced story of degrees of control over areas or individuals, direct or indirect, by public or private bodies.

Adapting correlating responsibilities to the capacity of each duty-bearer is not only possible in light of the evolving nature of international law, but it is a necessity if IHRL, and the Refugee Convention in particular, is to serve the goals intended by its drafters. Just as women victims of domestic violence have been historically excluded from the protection afforded by human rights, asylum seekers victims of corporate abuses risk falling outside the scope of human rights treaties. This idea is compellingly defended by Christine Chinkin:

> There is apprehension that to transform the vision of human rights to include acts by private individuals would disturb and undermine the entire edifice of human rights. Women in turn argue that the system has excluded harms most frequently inflicted upon them and that the vision has never held out the same promise of fulfilment of human dignity to them as to men. If human rights law is so fragile that it cannot withstand such reconceptualization, then it is barely worth preserving.[124]

Underlying this criticism of the dichotomies that pervade international law is the conviction that the picture of human rights violations is often more complex than their legal reflection. Accepting this intertwining of responsibilities is the next step to reinforce the accountability of human rights obligations by state and non-state actors alike.

b) Embracing the complexity of outsourced and externalised heads of power

---

[122] *Bankovic v. Belgium [GC]*, *supra* note 50, para 75.
[123] See Michal Gondek, "Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?" (2005) 52:03 Netherlands International Law Review 349; Clapham & Academy of European Law, *supra* note 14 at 25–58; Shany, *supra* note 107; Gammeltoft-Hansen, *supra* note 16.
[124] Christine Chinkin, "International law and human rights" in Tony Evans, ed, *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 105 at 115.

Reinforcing the complementarity of indirect and direct attribution opens the possibility to account for more complex forms of human right violations. The new relational, degree-based criterion of control to determine extraterritorial jurisdiction can become a useful tool through which states can address human rights abuses by non-state actors committed outside their territory. As Kinley and Augenstein argue, the regulation of corporations through domestic law, or its absence, creates a jurisdictional link between the state and the individual victim of corporate misconduct, thus constitutive of extraterritorial human rights obligations.[125] While the 'classic' effective control test would have discarded corporate actions on Nauru and Manus Island as operating outside of the traditional sphere of Australia's jurisdiction, the consideration of the relationship between the individual and the state and its capacity to fulfil its human rights obligations enables to bring into the picture the new 'tools' of migration management that outsourcing entails.

The necessity to move away from the *Bankovic* test of control ought to be highlighted – however, it should not overshadow the due diligence of corporations themselves. While an extensive analysis of corporations obligations under domestic and international commercial law would be superfluous here, the increasing work done at the inter-governmental level on business and human rights deserves to be mentioned to inform the legal context of this discussion.

To date, no binding framework has been put in place to regulate the actions of corporate bodies worldwide, despite recent efforts at the UN level.[126] Most relevant to the topic of this analysis, the United Nations Global Compact (UNGC) is a set of ten voluntary principles focusing on the prevention of direct and indirect human rights abuses by corporations.[127] The OECD Guidelines for Multinational Enterprises are recommendations of "responsible business conduct" for all multinational corporations operating in the thirty-eight signatory states.[128] While not legally enforceable either, the Guidelines benefit from a complaints

[125] Augenstein & Kinley, *supra* note 44 at 285.
[126] For a comprehensive overview of the mechanisms aimed at bringing private actors into compliance with international human rights law, see Clapham & Academy of European Law, *supra* note 14 at 196–252; Surya Deva & David Bilchitz, *Human rights obligations of business : beyond the corporate responsibility to respect?* (2013).
[127] UN Global Compact, "The Ten Principles of the UN Global Compact", online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.
[128] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises (2011 Edition)* (2011).

mechanism whereby legal entities can lodge a "specific instance" against a corporation believed to have breached the principles.

More recently, the UN Guiding Principles on Business and Human Rights (hereafter, the GPs) were developed under the aegis of the Secretary General Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Importantly, the GPs "pillars" or overarching principles emphasise states' responsibilities to prevent violations by private actors, the due diligence of corporations and the need to promote access to effective remedies.[129]

The UNGC, the GPs and the OECD Guidelines illustrate the leverage as well as the limits behind the idea of bringing business into compliance with human rights: given the difficulty to move from voluntary principles to legally binding commitments, the frameworks need to be seen in relation with state responsibility for human rights abuses. The flexibility of these compliance mechanisms reflects the perceived need to leave untouched market dynamics and the related comparative advantage that multinationals may see in operating in several countries.[130]

The limited or sometimes inexistent legal avenues to hold companies liable suggest the need to reinforce both the framework of state responsibility to cover the actions of companies, as well as the existing voluntary frameworks to avoid a gap in liability that prevails over abuses committed by corporations.[131] In other words, neither framework constitutes a perfect 'solution' to the flaws of the other; but rather than considering them as separate set of rules operating in different contexts, their similar objectives, to promote the respect of international human rights norms, should be highlighted in order to fully reflect the complexity of human rights abuses nowadays.[132]

This complexity, rather than shying us away from the issue of corporate violations of human rights, should drive us to disentangle the web of responsibilities and obligations that the many legal and regulatory schemes have created. Oversimplifying human rights violations is as

[129] Augenstein & Kinley, *supra* note 44 at 272.
[130] Clapham & Academy of European Law, *supra* note 14 at 204.
[131] Björn Fasterling & Geert Demuijnck, "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights" (2013) 116:4 Journal of Business Ethics 799 at 808–809.
[132] See for example Clapham & Academy of European Law, *supra* note 14 at 566.

undesirable as it is obsolete, for they increasingly take place in contexts where the Westphalian model of the state is challenged. In other words, analyses of the obscure status of private actors in human rights law should not fall short of enlightening the picture with creative solutions for lawmakers and practitioners alike.

Efforts aimed at exploiting the potential of corporate regulatory schemes should be welcomed and encouraged by the need to close the 'gaps' that exist in such complex frameworks – this should not, however, be entirely exclusive of states' partial responsibility, as illustrated by the recent human rights abuses in RPCs.[133]

The idea of a complementarity between non-state and state actors' respective responsibilities should be further explored, and its practical implications assessed; while the author argues for the need to embrace the complexity of human rights violations to better address them, democratic and legitimacy concerns should be properly addressed in this debate.[134] While companies do not have the public legitimacy to act as protectors of human rights in the same way states are, the outsourcing of responsibilities without any related accountability and scrutiny mechanism denies the transparency that the public sphere would require. Implementing a corporate regulatory scheme parallel to state responsibility would be instrumental in guaranteeing the protection of individual rights, and assuring access to effective remedies when they are breached.

[133] The Human Rights Law Centre has filed a specific instance with the Australian National Contact Point (NCP) in 2014 on the basis of a breach of the OECD Guidelines by the security company G4S for its role in managing the Manus Island RPC. In the author's view, the complaint fails to demonstrate G4S's liability without entering into governmental policy consideration. The rejection of the complaint in June 2015 also highlights the limited powers available to the NCP. More information available at: http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm

[134] See Clapham & Academy of European Law, *supra* note 14 at 533–534.

Chapter 2 – Furthering the logic of unaccountability: access to remedies and private actors in international human rights law

The efficiency of IHRL as it stands depends on its ability to realise the rights proclaimed in treaties through effective procedures. The conceptual attribution of a human rights breach to a perpetrator is only one side of the coin – it ought to be complemented by access to remedies for victims of abuse, in order to restore the harm caused.

Remedies, or reparations,[135] have long been considered a fundamental principle of law and justice: one of their primary aims is to correct injustices committed by attempting to provide relief to the victim. The notion of rights necessarily entails a correlative duty to enforce them – without effective complaints procedure, human rights would remain mere hypotheticals that states would be free to ignore. In other words, to borrow the classification adopted by the International Law Commission Articles on State Responsibility, primary obligations to protect human rights need to be supported by secondary obligations to provide remedies if the former are breached.[136] This Chapter, however, will focus on the difficulties for victims to access remedies as a result of violations committed by state and non-state actors overseas, as opposed to reparations following the breach of a rule of international law in an interstate dispute.

The right to an effective remedy is now well established in IHRL. Article 2.3 of the ICCPR guarantees the right of every individual to an effective remedy, and establishes States obligation to give effect to this right through "competent judicial, administrative or legislative authorities".[137] In *Velásquez-Rodríguez*, the Inter-American Court of Human Rights gave more content to the obligation of remedies for violations committed by private actors. The Court carefully distinguished the approaches to remedies in IHRL and criminal law: "The objective of international human rights law is not to punish those individuals who are guilty

[135] For the purpose of this essay, 'remedies' 'redress' and 'reparations' will be taken as synonyms. The author nonetheless acknowledges that the terms may have been coined in different legal contexts and given different meanings.
[136] See James Crawford, *State Responsibility - The General Part* (Cambridge: Cambridge University Press, 2013); Tzevelekos, *supra* note 49 at 142–143.
[137] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, article 2.3.

of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible".[138]

Nonetheless, the Court emphasised that states had an obligation to provide effective institutional avenues to investigate and prosecute perpetrators, and for victims to obtain compensation.[139] In doing so, the *Velásquez-Rodríguez* decision highlights the role of international law, and the due diligence obligation in this particular case, in indirectly giving force to victims' rights by imposing an obligation upon states to provide remedies, instead of filling this gap itself.

Remedies can take several forms depending on the aims intended and the nature of the violation.[140] The literature and the jurisprudence have identified different, non-mutually exclusive methods of reparation: restitution, compensation, rehabilitation, guarantees of non-reoccurrence, and satisfaction, including a right to the truth.[141] This analysis does not aim to provide an exhaustive account of the different methods of redress – it will limit itself to consider those that are directly relevant to the case at stake.

All methods of redress imply access to effective procedures: judicial proceedings may be a form of remedy by fulfilling compensatory and restitutive functions, which may redress the moral harm caused to the victim. In other circumstances, access to justice is the means through which redress is obtained. For the purposes of this essay, remedies will be understood both in their procedural and "substantive" meanings.[142]

Human rights violations, by nature, may affect individuals in extremely complex ways, and thus ought to give rise to comprehensive reparations. But as fundamental values, their violation arguably also damages the foundational principles of a society, and must therefore

---

[138] *Velásquez-Rodríguez v Honduras*, [1988] Inter-Am Ct HR (SerC) No4 , para 134. For a discussion of the impact of the decision on the evolution of the right to remedies in IHRL, see Cecily Rose, "An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors" (2010) 33 Hastings Int'l & Comp L Rev 307.
[139] *Velásquez-Rodríguez v. Honduras*, *supra* note 91, paras 174–176.
[140] Shelton, *supra* note 33 at 7–9.
[141] *Ibid* at 9; Pablo De Greiff, "Justice and Reparations" in Pablo De Greiff, ed, *The Handbook of Reparations* (Oxford; New York: Oxford University Press, 2006) at 452; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147 UNGAOR, 2005, UN Doc A/Res/60/147, para 18.
[142] See Shelton, *supra* note 33 at 8.

be met with strong condemnation in order to reaffirm the importance of these moral standards. In this sense, remedies are by nature symbolic: by attempting to restore the harm caused by human rights violations, they indirectly acknowledge the fundamental significance of rights. *A contrario*, their absence triggers a sense of injustice and impunity that may considerably undermine the legitimacy and authority of human rights claims. As argued by Shelton, "Remedies and sanctions thus affirm, reinforce, and reify the fundamental values of society".[143]

Reparations are naturally linked to the obligation breached, which are primarily attributed to states under IHRL, as discussed in the previous chapter. While the latter has developed a wide jurisprudence on the attribution of human rights violations committed by private actors, the question of remedies remains comparatively underdeveloped.[144] The right to remedies, although proclaimed in international human rights treaties and jurisprudence, crucially lacks enforcement mechanisms at the international level.

Remedies require access to effective institutions or complaints mechanisms, most of which are found at the national level.[145] However, the increasingly transnational nature of human rights breaches, as the offshore processing case demonstrates, challenges the traditional spheres of national jurisdiction, creating dangerous spaces where enforcement mechanisms are maintained beyond the reach of victims. Adding transnational corporations to the equation, the offshore processing scenario raises questions for which international law struggles to find answers: who bears responsibility to redress the harm caused by private actors operating overseas, and based on which criteria? Which remedial mechanisms should be prioritised, and to what aims? What should be the role of international law in solving these issues?

Rather than providing comprehensive and precise answers, this chapter will attempt to untangle the complexity that is as the origin of these questions. In other words, this analysis will seek to highlight the ways in which international law fails to effectively regulate the provision of remedies for human rights breaches, and the consequences this can have on victims' rights in scenarios like those of Manus Island and Nauru.

[143] *Ibid* at 12.
[144] *Ibid* at 1–2.
[145] Jernej Letnar Černič, *Human rights law and business : corporate responsibility for fundamental human rights* (Groningen [The Netherlands]: Europa Law Pub., 2010) at 127–129.

The accountability gap that prevails in Manus Island and Nauru confirms Deva's argument that "a combination of strong medicines" is the best remedy to these ills.[146] The offshore processing scheme remains under-regulated: despite the existence of several sets of guidelines for corporate responsibility, their non-binding nature remains a crucial factor in victims' inability to claim remedies for violations committed by private actors. In other words, corporate social responsibility mechanisms, whether internal to companies' management systems or in the form of international guidelines, fail to put forward effective checks and balances on corporate action, and may thus let human rights violations unaccounted for.

The complexity of human rights breaches calls for the evolution of international law to match the intertwining of responsibilities between public and private actors. This conclusion is reflected both in the attribution issue explored earlier and the provision of remedies that this chapter will analyse. The difficulties faced in attributing human rights breaches to service providers, as analysed in the first chapter, are instrumental in the denial of effective remedies. The absence of a clear, legally binding obligation to provide remedies to victims is a first and very important part of the accountability issue.[147] As remedies fulfil both symbolic and substantive purposes, restoring the harm caused to individuals needs to take into account all the actual contributors to a human rights violation.

The right to the truth and guarantees of non-reoccurrence most relevantly illustrate that remedies cannot be taken as a separate issue from the violation: a full account of the violation and appropriate denunciation of the act is a necessary (although not sufficient) element of an effective remedy.[148] Applied to the case at stake, this need for complexity requires the acknowledgement of the different levels of contribution from the Australian government, third countries' governments and service providers to human rights violations, and their reflection in the provision of remedies for victims. In light of the growing body of evidence around human rights violations taking place on the RPCs of Nauru and Manus Island, this

[146] Surya Deva, "Multinationals, human rights and international law : time to move beyond the 'state-centric' conception" in Jernej Letnar Cernic & Tara Van Ho, eds, *Human rights and business : direct corporate accountability for human rights* (Oisterwijk, The Netherlands: Wolf Legal Publishers (WLP), 2015) at 35.
[147] See for example Clapham & Academy of European Law, *supra* note 14 at 225; Fasterling & Demuijnck, *supra* note 130 at 807; Augenstein & Kinley, *supra* note 44 at 278.
[148] note 140, para 22.

analysis of rights to reparation appears fundamental to provide a full account of the gaps in protection the offshore processing scheme reveals.[149]

This argument will be centred on the availability of accountability mechanisms for breaches of human rights at the international level – as such, it will not aim to point out to limitations that are intrinsic to domestic legal systems. Private actors are increasingly operating at the transnational level and resort to what could be termed 'jurisdiction shopping': the fierce competition between legal systems often implies a dangerous "race to the bottom" whereby states imposing the least legal constraints upon corporations will be deemed the most attractive.[150] This indirect encouragement has thus been widely regarded as one of the main factors in turning towards international law to harmonise the legal framework. As the SRSG John Ruggie highlights in his 2008 Report, globalisation has engendered "governance gaps" which endanger the respect and fulfilment of human rights globally.[151]

The provision of effective remedies is thus intrinsically linked to the effective regulation of corporate conduct at the international level: in the absence of domestic incorporation of human rights treaties, the horizontal application of human rights to relations between service providers and individuals on Nauru and Manus Island remains utopic.[152] Without the breach of a clearly defined obligation, victims of human rights abuse may thus remain without a remedy. In that sense, international law can play a central role in ensuring that access to effective remedies is a matter of law, not policy.[153]

The need for regulation of corporate conduct at the international level should not be construed as endorsing a purely 'top-down' approach: rather, international law should provide a solid basis for, and foster a constructive dialogue between the different 'layers'

[149] See for example Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70; Australian Human Rights Commission, *supra* note 2; Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61; Moss, *supra* note 93; UNHCR, *supra* note 2.
[150] Carlos M Vazquez, "Direct vs. Indirect Obligations of Corporations Under International Law" (2004) 43 Colum J Transnat'l L 927 at 931.
[151] UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, A/HRC/8/5 (2008) at 3–4.
[152] See for example Michael Kirby, "Domestic Implementation of International Human Rights Norms" (1999) 5:2 Australian Journal of Human Rights 109; Vazquez, *supra* note 149 at 937–938.
[153] Richard Falk, "Reparations, international law, and global justice: a new frontier" in Pablo De Greiff, ed, *The Handbook of Reparations* (Oxford; New York: Oxford University Press, 2006) at 481.

where regulation is needed.[154] Based on this preliminary argument, this Chapter will seek to highlight how international law fails to provide the "combination of strong medicines" that effective remedies require.[155]

The three levels of normativity identified in this chapter, namely corporate, state and international, are complementary to each other, but none is sufficient to guarantee effective remedies in itself, as illustrated by the lack of access to remedies on Nauru and Manus Island.[156] The soft law and internal regulation approach to corporate abuses fails the 'strength' test (A). States' obligations remain the principal yet insufficient way to guarantee access to fair and effective remedies (B), which thus calls for international law to coordinate a variety of independent procedures and institutions of redress (C).

Part A – Corporate social responsibility mechanisms: a necessary but insufficient solution

The corporate responsibility to respect human rights as articulated in the GPs has been widely perceived as a "missed opportunity" for international law to finally bridge the gap left by the absence of legally binding obligations on private actors.[157] The Special Representative of the Secretary General on Business and Human Rights (hereafter, "the SRSG") was appointed to report on the human rights obligations of private actors, following the failure to develop a foundational framework for a future binding treaty on the topic, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights.[158] The Guiding Principles (GPs) tabled in 2011 were therefore a welcome progress from this "stalemate", and have arguably enabled to reinvigorate the debate around human rights and business, despite the criticisms they have attracted.[159]

[154] Černič, *supra* note 144 at 86; Surya Deva, *Regulating corporate human rights violations : humanizing business* (Milton Park, Abingdon, Oxon; New York: Routledge, 2012) at 202.
[155] Deva, *supra* note 145 at 35.
[156] For a thorough classification of the different layers and levels of enforcement of corporate responsibilities, see Černič, *supra* note 144 at 83–88.
[157] Nicola Jägers, "UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?" (2011) 29:2 Netherlands Quarterly of Human Rights 159 at 160.
[158] Augenstein & Kinley, *supra* note 44 at 272; Jägers, *supra* note 156 at 159–160.
[159] Jägers, *supra* note 156 at 160.

The GPs are founded on three independent but coordinated pillars: the state obligation to protect human rights from private actors' abuses, the corporate responsibility to respect human rights through the fulfilment of due diligence obligations and states' duty to ensure that victims have access to effective remedies.[160] At the heart of the GPs lies the belief that private actors' responsibility to act with due diligence can also fill the accountability gap by itself, independently of states' duties.[161] As some authors have argued, however, the Principles do not give themselves the means to achieve their objectives: absent any external monitoring and enforcement of these responsibilities, internal mechanisms will prove insufficient to both encourage corporate compliance on the one hand and provide effective remedies on the other.[162] The GPs thus epitomise the main flaws of corporate social responsibility approaches today: while they may appear necessary to create a culture of compliance within corporate structures, they cannot by themselves guarantee access to effective remedies for victims of human rights violations.

The recent Parliamentary inquiry into the circumstances in the Nauru RPC highlights the main functions and flaws of remedial mechanisms internal to corporate management structures. Based on the tripartite structure put forward earlier, the presence of internal complaints mechanisms is crucial to guarantee the reporting of relevant human rights abuses to other regulatory levels, and to address incidents before they escalate.[163] Ascertaining the truth about a certain event is also a central part of some remedies, and cannot be done without the information being effectively reported at the grassroots level.

This element appears particularly problematic in the Nauru RPC: while the recent Parliamentary enquiry has provided a forum for some crucial incidents to be revealed, their veracity is sometimes fiercely debated at the very heart of the report. In particular, former employees of Wilson Security have alleged that the company had shredded incident reports involving some of their personnel. While the company denies the allegations, the report also points out to the company being "unaware" of many incidents pointed out by staff at the

[160] UNOHCHR, *Guiding Principles of Business and Human Rights - Implementing the "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011).
[161] *Ibid*, para 11.
[162] Fasterling & Demuijnck, *supra* note 130 at 807.
[163] Sarah Knuckey & Eleanor Jenkin, "Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?" (2015) 19:6 The International Journal of Human Rights 801 at 803–804.

RPCs, thus highlighting at least certain flaws in the reporting process.[164] The need to ascertain reliable information at the bottom of the reporting chain is crucial to further investigations as well as to the "dialogue" taking place between the different institutional actors involved in the provision of remedies, such as police officers, psycho-social workers and governmental officials.[165] It is this lack of a legal framework to coordinate the actions of institutional officials which seems to be missing in the management of incident reporting on Nauru.[166]

These issues, in turn, point out to a deeper concern about the independence of company-based mechanisms. Internal mechanisms are intrinsically linked to corporate management, and as highlighted by the Senate report, may amount to a company assessing its own conduct based on criteria it has itself determined. In the absence of an external and independent monitoring body, internal grievance mechanisms threaten the provision of effective remedies both in principle and in practice.

As a matter of principle, grievance mechanisms need to guarantee levels of transparency and impartiality if they are to be deemed "effective" in the terms of the Guiding Principles.[167] In their analysis of the relatively new concept of company-created remedy mechanisms (which they label CHRM), Knuckey and Jenkin highlight some of the dangers they may pose to victims' right to an effective remedy. These privatised remedies may considerably undermine the role of the state in providing justice. In particular, some of these mechanisms may bar victims from claiming civil remedies, and their scope and content can disproportionately reflect corporate interests in settling legal matters swiftly and privately.

Internal grievance mechanisms identified in this development to be necessary are thus to be distinguished from the entirely privatised remedial mechanisms analysed by Knuckey and Jenkin: the former are intended to work in complement to, not entirely replacing, state-based

[164] Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 24–27.
[165] Deva, *supra* note 153 at 202–203.
[166] For example, it was revealed that out of the 834 complaints from asylum seekers received by Transfield and transferred to the Australian Department of Immigration and Border Protection, only 18 were transmitted to the Nauru Police Force for examination. The rest were not given further action by the Department, despite the potential conflict of interest that the report highlights in this regard. See Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 37.
[167] UNOHCHR, *supra* note 159, para 31; See also UN Human Rights Council, *supra* note 150, para 95.

remedial processes.[168] In barring claimants from further legal action regarding these human rights violations, CHRM risk shifting the question of remedies from law towards policy; the latter would therefore depend on a bargaining process between companies and communities, which, as the authors argue, are often flawed by "power asymmetry" at the detriment of victims.[169]

Conflicts of interests may also arise in relation to the company's financial objectives. There often appears to be a deep conflict between corporate interests and victims when a company is publicly listed and thus has an interest in restraining information about potential human rights breaches in order to maintain its position on the market.[170] Following the multiple allegations of misconduct directed against its personnel, Transfield issued a statement to its shareholders with a view to mitigate the consequences this may have on the company's activity. The document notably states that "investigations show no evidence to support the majority of these allegations" and discard any accusation on the basis of a breach of international human rights law by negating its application to the company's operations.[171] Although public awareness campaigns and divestment initiatives may create an incentive for greater human rights transparency, the maximisation of profit thus appears to be the major driver of publicly listed corporations if the latter are not bound by clear and solid legal standards – thus encouraging what the SRSG calls "tokenistic rather than effective processes" for victims' remedies.[172]

In practice, this perceived conflict of interest may discourage victims from coming forward to report abuse if they feel the information may then be used against them, a perception that is all the more prevalent in the cases of acute vulnerability that asylum seekers in Nauru and Manus Island RPC present. In the absence of clearly independent complaints processes, asylum seekers may fear reprisals or negative repercussions on their protection claims and

[168] UNOHCHR, *supra* note 159, para 29; Knuckey & Jenkin, *supra* note 162 at 811–812.
[169] Knuckey & Jenkin, *supra* note 162 at 803; Falk, *supra* note 152 at 481.
[170] See for example Nicholas McMurray, "Privatisation and the obligation to fulfill rights" in Jernej Letnar Cernic & Tara Van Ho, eds, *Human rights and business : direct corporate accountability for human rights* (Oisterwijk, The Netherlands: Wolf Legal Publishers (WLP), 2015) at 257.
[171] No Business in Abuse, "Response to Transfield Statement - Annexure A", (18 September 2015), online: <https://d68ej2dhhub09.cloudfront.net/1229-NBIA_Reponse_to_TSE_18.09.15.pdf>.
[172] Ruggie, *supra* note 107 at 26.

their future life in the Nauruan community.[173] Furthermore, although service providers can in theory undertake to respect human rights through complaints processes, their fair and effective functioning in practice remains hypothetical if they are not monitored. Although Wilson Security has rejected the relevance of shredding allegations, outlining that the incident reporting process is "tamper-proof", in the absence of independent reviewers, the proper functioning of the reporting process is difficult to verify.[174]

The need for company-level grievance mechanism to be independently monitored should not be construed as a criticism of their irrelevance. Internal and state-based mechanisms fulfil different purposes that, along with international regulation, complement themselves to provide effective remedies to victims. However, internal mechanisms cannot by themselves guarantee the right to an effective remedy without a risking a dangerous deviation from the current standards developed under international law and jurisprudence.

Access to effective procedures is thus dependent upon recognising the respective roles of state and non-state actors in the protection and fulfilment of human rights. This acknowledgement requires a rethinking of the relation between states obligations and corporate responsibilities that is at the heart of the GPs: relying exclusively on states' obligations to guarantee access to full and fair procedures of redress may exacerbate the accountability gap rather than filling it.

Part B – State obligations, corporate responsibilities: an unequal equation?

The GPs adopted by the Human Rights Council have been widely criticised by the literature for failing to put forward a viable alternative to the state-centric model which prevails in IHRL.[175] The 'Protect, Respect and Remedy Framework' is indeed based solely on the obligations of states, while corporations only have 'responsibilities' to respect human rights.

[173] Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 38; See also Knuckey & Jenkin, *supra* note 162 at 803.
[174] Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 24.
[175] See for example Augenstein & Kinley, *supra* note 44 at 272; Deva, *supra* note 145 at 33; Jernej Letnar Černič, "An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights" in Jernej Letnar Černič & Tara Van Ho, eds, *Human rights and business : direct corporate accountability for human rights* (Oisterwijk, The Netherlands: Wolf Legal Publishers (WLP), 2015) at 155.

The Framework thus roots itself on the already existing duties of states in international law to use all means within their power to prevent violations from private actors. However, it fails to clearly articulate the relationship between states' obligations and corporate responsibilities: by weakening rather than strengthening the obligations of states to protect against corporate human rights violations, the GPs seem to perpetuate the limitations of IHRL rather than remedying them.[176]

The SRSG's effort to build the GPs around due diligence obligations ought to be praised – as the earlier analysis has shown, due diligence presents considerable potential to contain the actions of corporations both within and outside a state's territory.[177] Absent a clear, binding obligation on corporations, the GPs were an opportunity to challenge the territorial paradigm of IHRL by recognising states' obligations to take active measures to prevent human rights abuses committed abroad by private actors operating under substantial control from the state.[178] Instead, the GPs side-step the contentious issue of extra-territorial obligations of states, thus failing to provide a solid basis for human rights obligations in any of its pillars: corporations' obligation to 'respect' remain unenforceable, and states' obligations to take extraterritorial measures remains exceptional.[179]

Furthermore, the difficulties in attribution explored earlier have a direct impact on the ability for victims to seek remedies. International law as it stands places the burden on the bearer of legally binding obligations, including positive obligations of due diligence. As argued earlier, due diligence still requires an assessment of the degree of control the duty-bearer has over a particular situation.[180] The limitations in attribution of human rights obligations thus impose a double constraint on the provision of remedies.

First, as private actors are not directly bound by IHRL, remedies for their human rights abuses will be dependent upon states' due diligence obligations: secondary rules of international law can only be breached by states, even if private actors are at the origin of the violation.[181] The due diligence obligation compels states to use all means in their power to

[176] Černič, *supra* note 174 at 155; Deva, *supra* note 145 at 37.
[177] See Chapter 1 – B).
[178] Jägers, *supra* note 156 at 161.
[179] Augenstein & Kinley, *supra* note 44 at 276.
[180] Tzevelekos, *supra* note 49 at 163.
[181] Vazquez, *supra* note 149 at 933; For a discussion on the distinction between primary and secondary rules of international law, see Crawford, *supra* note 135.

"prevent, investigate and punish" human rights violations, thus imposing an obligations of means as opposed to an obligation of result.[182] Victims of abuse may therefore remain without a remedy if the state, despite taking active measures, fails to provide effective avenues of redress. Second, the "effectiveness" element, if interpreted as a threshold-based criterion, risks making remedies hypothetical if no agent has exclusive and total control over the individual.[183] The result would be a dangerous over-emphasis of states duties to provide remedies, without effective means to enforce them under international law.

The Australian offshore processing case can therefore be identified as what Deva labels a "hard case": a situation whereby businesses' responsibilities are uncertain and states are unwilling or unable to protect human rights.[184] On the one hand, the indirect and opaque control exercised by Australia makes a case for state responsibility doubtful; on the other hand, the internal mechanisms meant to regulate service providers' actions in the RPCs appear largely insufficient to guarantee their accountability for human rights abuses. In this situation, Deva argues, the soft law approach to business and human rights will fail to guarantee effective remedies for victims.[185]

The "hard cases" of Nauru and Manus Island also highlight the GPs failure to re-equilibrate the unbalanced equation between victims' right to remedies on the one side and corporate interests on the other. By placing all bets on states to protect against violations, the GPs are oblivious to the possible convergence of interests between states and private actors in discarding responsibility for human rights abuses. In the wake of a growing body of evidence as well as international and domestic pressure to hold perpetrators accountable, the Australian government has repeatedly denied its direct involvement in human rights abuses.[186]

Furthermore, as the recent Parliamentary inquiry reveals, out of the 834 written complaints Transfield received from asylum seekers in the space of fourteen months, only eighteen were given further action, despite all of them being notified to the Australian Department of

[182] *Velásquez-Rodríguez v. Honduras*, *supra* note 91, para 172.
[183] Tzevelekos, *supra* note 49 at 163–164.
[184] Deva, *supra* note 145 at 33–34.
[185] *Ibid* at 34.
[186] See the Dissenting Report by Coalition Senators, Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 137–147.

Immigration.[187] Issues in incident reporting highlighted earlier thus take a new dimension: by concealing evidence about potential human rights abuses taking place within their management systems, service providers may shield not only their own responsibility but also the Australian government's. As both parties seem to weigh into the "out of sight, out of mind" logic, asylum seekers have no clear resort under international law to have their rights respected and fulfilled.[188]

The intertwining of the three pillars thus seems to assume the existence of a legal framework of enforcement of human rights obligations which is lacking in most cases. As Deva argues, a deep contradiction underlies the 'Protect, Respect and Remedy' framework: if states have an obligation to ensure individuals' rights are protected against corporate misconduct, this should imply that non-state actors have legal obligations themselves.[189] However, if international human rights treaties are not directly incorporated into domestic law, no legal framework supports this logic, and the discrepancy becomes apparent: as human rights law does not grant states the licence to compel non-state actors, the latter's actions become only subject to policy considerations as opposed to legal ones.[190]

While interests of corporations may at times converge with the protection of human rights, the potential for the opposite is a looming threat to the fundamental values that human rights embody.[191] Absent legally binding obligations under IHRL and independent monitoring institutions to enforce them, the GPs scheme risk failing to their objectives.

Part C – Present flaws, future strengths? Improving the coordination of remedial procedures under IHRL

The convergence of interests between states and corporate actors dangerously increases the possibility of complicity in abuses going unpunished. This accountability gap suggests the

[187] *Ibid* at 37; See also Farrell, *supra* note 93.
[188] For the concealing of evidence, see Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 24–26; see also No Business in Abuse, *supra* note 170.
[189] Deva, *supra* note 145 at 37.
[190] Augenstein & Kinley, *supra* note 44 at 278.
[191] For a discussion on the tension between the GPs due diligence and human rights as fundamental values, see Fasterling & Demuijnck, *supra* note 130 at 801–802.

need for a re-equilibration of the equation between corporate and public actors: corporate actors cannot be held to account for human rights violations without a 'strong' duty of due diligence for states, which in turn requires close monitoring from independent bodies.

While existing human rights institutions, judicial and non-judicial, have endeavoured to voice their concerns about living conditions on Nauru and Manus Island, domestic policies have considerably restricted their jurisdiction. As a result, with neither courts nor institutions with a clear mandate to oversee human rights abuses being willing or able to have a significant say, victims may remain without procedural or substantive remedies and allegations of human rights may remain contested on both sides.[192]

The question of remedies for human rights violations in RPCs, again, illustrates the need for international law to give the means to states to fulfil their international obligations. In the absence of regional human rights treaty in the Pacific region, judicial remedies for human rights abuses committed on Manus Island and Nauru are most likely to be found at the national level.[193] It will be argued that international law can play a central role in reinforcing the scheme put forward by the GPs by providing the tools for its enforcement.

In analysing the weaknesses of the current structure, care will be taken to refer to institutions and bodies directly relevant to the case at stake: it will not be intended to provide an exhaustive account of the global scheme of accountability of private actors operating overseas. Yet, this analysis will limit itself to the role of IHRL, as a body of law that does not prejudice of the way it is implemented. Australian domestic law will be referred to insofar as it influences the ability for international law to achieve its objectives, but it shall not be the

[192] The Australian government recently reiterated its view that the Regional Processing Arrangements remained beyond the jurisdiction of the Australian Human Rights Commission. See Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 89.

[193] See Černič, *supra* note 144 at 84. Despite the absence of regional remedies, the Human Rights Committee has heard complaints from individuals based on the first Optional Protocol to the ICCPR. However, the Committee's findings are not binding upon the State party: in the case of a violation of the Covenant, they merely require the State to provide written explanations and potential remedies. In is Communication No. 2136/2012, the Committee found that Australia's policies breached articles 7 and 9 of the ICCPR, yet its recommendations have had little effect on policy making ever since. See UN Human Rights Committee (HRC), *Communication No. 2136/2012: Views adopted by the Committee at its 108th session (8 – 26 July 2013),* 20 August 2013, CCPR/C/108/D/2136/2012, available at http://www.refworld.org/docid/52270d1d4.html [accessed 25 February 2016]; *Optional Protocol to the International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171, arts 1-5 (entered into force 23 March 1976, accession by Australia 25 September 1991).

primary topic of this analysis, despite its central role in providing remedies for human rights victims.

The following analysis will seek to analyse the different, relatively isolated institutional pathways of corporate accountability (a) to suggest that guaranteeing access to remedies may lie in the reinforcement of current mechanisms rather than in adding further layers to an already complex, yet overall inefficient network (b).

a) A patchwork of dysfunctional enforcement mechanisms

The different flaws of internal corporate social responsibility mechanisms, on the one hand, and states' due diligence obligations on the other suggests that while the foundations for an effective enforcement of corporate human rights responsibilities have been set, enforcement is lacking in most cases. The nature of human rights abuses by transnational private actors exacerbates the general difficulty for victims to access remedies.[194] In theory and in practice, the extraterritorial nature of the offshore processing scheme effectively keeps national monitoring mechanisms, judicial and non-judicial, at a distance.

The dangerous "marginalisation", witnessed by Augenstein and Kinley, of states' obligations to regulate the extraterritorial activities of corporations finds an equivalent in the shift from law to policy, and the ensuing marginalisation, that the offshore processing regime has meant for means of enforcement of human rights. The authors' analysis of the GPs highlights a contradiction between the 'weak' wording of states' extraterritorial obligations, on the one hand, and the strong emphasis on states' duty to provide remedies on the other.[195] However, if the regulation of the extraterritorial actions of corporations is a matter of policy, the offshore processing scheme risks abandoning some of the legal remedies attached to the rule of law.[196]

This shift has been illustrated in many attempts to curtail the jurisdiction of Australian Courts to hear matters related to asylum seekers in Nauru and Manus Island. Whether these attempts have been or will be entirely successful are beyond the scope of this analysis and have been

[194] *Ibid* at 87; Shelton, *supra* note 33 at 21.
[195] Augenstein & Kinley, *supra* note 44 at 276; see also Jägers, *supra* note 156.
[196] Hyndman & Mountz, *supra* note 57 at 251–252.

analysed at length elsewhere.[197] However, they have put considerable barriers for asylum seekers to access judicial remedies, thus underlining the need for international law to regulate the provision of remedies for human rights violations occurring in externalised and outsourced scenarios.[198]

The practical barriers to access judicial remedies also suggest that part of the improvement may lie in the enhanced coordination between several mechanisms, rather than on the exclusive focus on access to courts. As Shelton argues, remedies should primarily aim to restore the victim to the situation *ex ante*, by the best means available.[199] While access to procedures in this process is key, it should not exclude non-judicial mechanisms, nor should it prejudice access to more complex, tangible forms of reparations if the latter appear more appropriate.[200]

In the case of sexual abuse committed in the RPCs of Nauru and Manus Island, reparations could include psychosocial support, counselling services and guarantees of non-reoccurrence – most of which have been reportedly lacking in Nauru, as highlighted by the recent Parliamentary inquiry into the living conditions at the Nauru RPC.[201] Access to judicial mechanisms remains a central issue for individuals detained in RPCs - however, legal representation is generally costly, and access to lawyers has often been limited.[202] Thus,

---

[197] See for example J Boughey & G Weeks, "'Officers of the Commonwealth' in the Private Sector: Can the High Court Review Outsourced Exercises of Power?" (2013) 36:1 The University of New South Wales law journal 316; Mary Crock & Hannah Martin, "Refugee rights and the merits of appeals" (2013) 32 U Queensland LJ 137; Michelle Foster & Jason Pobjoy, "A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory" (2011) 23:4 International Journal of Refugee Law 583; Stewart-Weeks, *supra* note 94; Francis, *supra* note 57; Kneebone, *supra* note 4.

[198] The latest attempt to challenge the legality of the offshore processing scheme recently failed to succeed in the High Court of Australia. The Court held that the contractual arrangements between the Australian Government and service providers were valid under Australian law, and that the plaintiff's detention was therefore authorized under statute. The involvement of third countries and service providers in the plaintiff's detention were key to the Court's judgment. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.

[199] Shelton, *supra* note 33 at 21.

[200] Clapham & Academy of European Law, *supra* note 14 at 55; UN Human Rights Council, *supra* note 150 at 22.

[201] Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *supra* note 70 at 100; Shelton, *supra* note 33 at 21.

[202] On Nauru, asylum seekers are assisted by Claims Assistance Providers (CAPs) but may hire legal representation at their own cost. However, lawyers may not always be available in practice: see Andrew and Renata Kaldor Centre for International Refugee Law, *supra* note 64; Republic of Nauru - Department of Justice and Border Control, *supra* note 64 at 129; see also concerning allegations of an Australian lawyer's visa denial on Nauru Paul Farrell, "Australian law groups urge Coalition to pressure Nauru over growing legal crisis", *The Guardian* (2 June 2015), online: <http://www.theguardian.com/world/2015/jun/02/australian-law-groups-urge-coalition-to-pressure-nauru-over-growing-legal-crisis>; For access to legal representation on Manus Island, see UNHCR, *supra* note 2; Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *supra* note 61 at 58–68.

while the lack of access to courts is a fundamental part of the issue, it remains one over which international law may have very little control, and it should not overshadow the role that other non-judicial institutions may play, in particular in the blooming field of corporate human rights obligations.

The relative unavailability of judicial mechanisms to hold private actors accountable for human rights violations illustrates the importance of non-judicial mechanisms – however, the current framework of corporate responsibility can be best defined as a patchwork of uncoordinated mechanisms which fail to fulfil the requirements set by international law.[203] At the international level, independent institutions assessing the compliance of transnational corporations with human rights guidelines is crucially lacking: as Ruggie puts it, access to remedies for victims of corporate abuse is a "patchwork of mechanisms [that] remains incomplete and flawed".[204]

The United Nations Global Compact (UNGC) comprises of ten broad principles aimed at encouraging corporate engagement in the community in the areas of human rights, labour, environment and anti-corruption, but does not have any monitoring mechanisms available. Corporate members of the UNGC sign up on a voluntary basis, and while they are required to submit "Communications on Progress" annually, these reports are a self-assessment of measures taken by the company to increase its compliance with the principles, and they are not independently monitored.[205]

The GPs, despite their efforts to attract attention to the issue of remedies by making it a pillar by itself, do not go beyond setting standards for effective grievance mechanisms. Although they emphasise states' duty to guarantee access to effective judicial and non-judicial procedures of redress, the principles' enforcement relies on states' willingness to enact national legislation to implement them, which Australia is yet to do.[206]

---

[203] See note 140.
[204] UN Human Rights Council, *supra* note 150 at 22.
[205] Clapham & Academy of European Law, *supra* note 14 at 225; UN Global Compact, "The Communication on Progress (COP) in Brief", online: <https://www.unglobalcompact.org/participation/report/cop>.
[206] Although UN agencies have encouraged the adoption of National Action Plans to implement the GPs, Australia has not yet taken steps in that direction. See Office of the High Commissioner for Human Rights, "State National Action Plans", (2015), online: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>; "The Serious Business Of Human Rights: Corporate Australia Needs Rules Defined", online: *New Matilda* <https://newmatilda.com/2015/10/07/serious-business-human-rights-corporate-australia-needs-rules-defined/>.

Finally, the OECD Guidelines have been revised in 2000 to enable any person to file a complaint against a corporation (Specific Instance Procedure) to National Contact Points (NCPs), the national institutions designed to assess the compliance with the Guidelines.[207] Although the Guidelines are voluntary commitments for corporations, adhering governments like Australia are bound to implement them.[208] The NCPs vary in their composition from one state to another, but are usually constituted of governmental officials: currently, the Australian NCP is a member of the Australian Foreign Investment and Trade Policy Division.[209]

This lack of independence from the state can trigger doubts with regard to its central role in coordinating the complaints procedure: in light of potential conflicts of interests referred to earlier, the impartiality and transparency that is to be expected from the Specific Instance Procedure can be substantially altered if the NCP is completely dependent from the government.[210] States like Sweden or the Netherlands, for example, have set up multi-stakeholder NCPs comprised of governmental, corporate and labour representatives.[211] The diversity of the interests represented appears essential if the complaints procedure is to be a meaningful accountability mechanism to investigate corporate misconduct: despite its non-judicial nature, the procedure should be able to independently assess the veracity of the allegations put forward, have clearly defined stages, and release a public statement outlining the outcomes of the complaint and the reasons leading to its decision.[212]

The recent statement published by the Australian NCP following the filing of a complaint by the Human Rights Law Centre (HRLC) illustrates some of the flaws of the procedure. Although the final statement from the NCP clearly outlines the steps taken throughout the assessment of the complaint, the NCP appears to refuse to engage in any substantial analysis of G4S's breach of the OECD Guidelines in Manus Island on the basis of other procedures

[207] Černič, *supra* note 144 at 190.
[208] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises (2011 Edition)* (2011), Preface, para 1.
[209] Australian Government, "The Australian National Contact Point", online: <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>.
[210] Černič, *supra* note 144 at 197; UN Human Rights Council, *supra* note 150 at 24.
[211] UN Human Rights Council, *supra* note 150 at 26; Černič, *supra* note 144 at 190.
[212] Clapham & Academy of European Law, *supra* note 14 at 208–209; Černič, *supra* note 144 at 196–197.

and reviews being undertaken in other fora.[213] This argument, however, excludes potential productive cooperation between institutions, and could severely restrict any future opportunity to enforce and interpret the Guidelines, as other judicial or parliamentary procedures with similar but different objectives may be initiated in parallel.

While judicial mechanisms may be the most appropriate forum of remedies when available, the specific role of the NCP as a mediator and conciliator between multiple stakeholders makes the Specific Instance a key forum to address corporate misconduct in a different, less adversarial setting. As both judicial and non-judicial procedures fulfil different goals, they should not be seen as mutually exclusive.[214] Rather, an effective scheme of corporate accountability calls for increased cooperation between institutions in order to offer as many pathways to remedies as possible.

b) Enhancing enforcement mechanisms: cooperation, adjudication and complementarity

This somewhat bleak depiction of institutional mechanisms at the transnational level should not, nonetheless, overshadow some of the positive developments that the last decades have seen, which represent great potential for the reinforcement of access to remedies.

The NCPs, despite their flaws, are currently the main mechanisms through which corporate responsibilities can be given force. On the one hand, the Guidelines have a worldwide reach: they have been ratified by 45 states and apply to all entities incorporated in the ratifying country.[215] Their extraterritorial reach can thus potentially overcome the limitations of the 'effective control' test explored earlier: the Guidelines could establish another, different link between the state, through domestic legislation, and its corporations, whereby the latter would be directly responsible for their actions. Furthermore, the Guidelines apply to parent companies as well as local branches, thus extending their reach to all levels of multinational enterprises.[216]

---

[213] Australian Government, "Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd", (10 June 2015), online: <http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm>.
[214] Černič, *supra* note 144 at 192–193; UN Human Rights Council, *supra* note 150 at 23.
[215] OECD, "National Contact Points", online: *OECD Guidelines for Mutlinational Enterprises* <http://mneguidelines.oecd.org/ncps/>.
[216] Černič, *supra* note 144 at 184–186.

On the other hand, the Specific Instance Procedure could be improved by adopting a structure representing the different interests at stake, and guaranteeing a minimal degree of independence from the government.[217] The NCP's position as a national institution should not be understood solely as an impediment to the efficiency of its work: the privileged links it can entertain with both national human rights institutions, on the one hand, and transnational bodies like the OECD Investment Committee, on the other, makes it a potential intermediate player between international standards and their implementation at the local level.[218] Some authors have also suggested that NCPs could be merged or integrated within the structure of national human rights institutions in order to enhance their independence and maximise the use of resources.[219]

National human rights institutions like the Australian Human Rights Commission can also play a key role in clarifying the often complex intertwining of accountability mechanisms. As Ruggie points out, the lack of information about access to procedures is a first and substantial obstacle to remedies: by coordinating and clarifying access to the different mechanisms available to victims of corporate violations, national human rights institutions can act as "lynchpins" between global standards such as the OECD Guidelines and national judicial institutions.[220] Such a scheme would enhance the application of the overall broad, voluntary guidelines of corporate accountability to the cases at stake, and thus fully exploit their potential to close the current accountability gap. As judicial remedies are best guaranteed at the national level, the effective adjudication of international principles at the domestic level requires cooperation between the different levels of regulation, which can be the role of national human rights institutions.[221]

Furthermore, as Cantú Rivera argues in his analysis of the implementation of the GPs, adjudication of the principles in national courts and tribunals can be a very effective means to

[217] UN Human Rights Council, *supra* note 150 at 24.
[218] The OECD Investment Committee will receive reports from NCPs and may provide guidance on the interpretation of the Guidelines in a Specific Instance. See Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises (2011 Edition)* (2011), Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, paras 42–45.
[219] UN Human Rights Council, *supra* note 150 at 26; Černič also suggests that NCPs could be transformed into a national ombudsman on business and human rights. See Černič, *supra* note 144 at 204.
[220] UN Human Rights Council, *supra* note 150 at 25.
[221] Deva, *supra* note 153 at 200.

give binding force to soft law.[222] At the very least, in the case of Australia, the principles can be used as an interpretive tool to clarify an ambiguity in domestic law.[223] Although the OECD Guidelines are voluntary principles of business conduct that do not intend to conflict with domestic law, they impose a binding commitment upon governments to support their implementation, and to see them as "complementary" with national legislation.[224] As such, the Guidelines may be used to construe statutes that are unclear, or even constitutional provisions with a similar wording.[225]

Adjudication plays a central role in the cyclic reinforcement of international law norms that happens through the interpretive dialogue between international and national institutions: a specific interpretation giving "teeth" to soft law in a given jurisdiction may create a standard that other national institutions can adopt, thus reinforcing the application of the rule in the domestic realm at the same time as strengthening its status in international law.[226] Furthermore, the constructive interpretation of international norms is the first steps towards their adoption as customary rules; which, in light of the unanimous agreement in the Human Rights Council over the corporate responsibility to respect human rights contained in the GPs, "would not be far fetched to conceive".[227]

Independent institutions, whether judicial, non-judicial, national or transnational, are key for the enforcement of remedies and their monitoring to ensure the transparency and fairness of the process; but they are to be seen in complement to, not replacing, the other levels of regulation.[228] Creating a culture of compliance from the very bottom levels of management is key to the effective implementation of the wide array of soft law principles, but corporate responsibility initiatives need to be monitored by independent institutions which ensures that processes are not made "tokenistic", and human rights not diluted into corporate interests.[229] The continuous interaction between different levels of regulation creates the "upward-

[222] Humberto Fernando Cantú Rivera, "Business & human rights : from a 'responsibility to respect' to a legal obligations and enforcement" in Jernej Letnar Cernic & Tara Van Ho, eds, *Human rights and business : direct corporate accountability for human rights* (Oisterwijk, The Netherlands: Wolf Legal Publishers (WLP), 2015) at 310; UNOHCHR, *supra* note 159, para 1.
[223] Michael Kirby, "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges" (2008) 9 Melb J Int'l L 171.
[224] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises (2011 Edition)* (2011), Preface, para 1.
[225] Kirby, *supra* note 221.
[226] Jägers, *supra* note 156 at 163.
[227] Cantú Rivera, *supra* note 220 at 316.
[228] Deva, *supra* note 153 at 200.
[229] UN Human Rights Council, *supra* note 150 at 26.

downward cycle of dialogue" that Deva refers to: by constantly reinterpreting its concepts, regulatory institutions each bring a different expression that will help shape the development of the framework of corporate accountability.[230]

[230] Deva, *supra* note 153 at 202.

Conclusion

The implementation of IHRL thus depends on maintaining a balanced system where both states and non-state actors have different but related, complementary responsibilities. International law has a key role to play in coordinating, and ultimately enforcing, the complex intertwining of accountability that flows from the progressive integration of private actors in the equation of human rights claims. Extraterritorial human rights violations have justified addressing the issue at the transnational level: states are all too often unwilling or unable to give voice to right-claims directed against its national corporations.[231] Independent institutions operating at the national and transnational levels thus play a key role in monitoring the fulfilment of human rights obligations and ensuring pathways to remedies are available.

Institutional pathways are also crucial in the conceptual evolution of human rights claims: the development of the attribution of human rights obligations beyond rigid notions of territoriality and effective control requires interpretive creativity from institutions with a mandate to protect and promote human rights. While the availability of remedies is directly linked to the presence of effective institutions, it is also dependent upon attributing the breach to the variety of actors responsible, which IHRL has struggled to achieve. The enforcement of rights in judicial and non-judicial fora thus strengthens the values of fundamental rights at the same time as it has the potential to challenge their ideological underpinnings, and thus contribute to the development of new forms of attribution.

However, the offshore processing scheme, by applying the territorial, threshold-based criterion of effectiveness, denies the application of the national legal framework and keeps independent institutions at a distance. The presence of institutions may be key to providing effective remedies, but absent a shift in the understanding of attribution of obligations, these remedies may be incomplete or hypothetical. The questions of attribution and accountability are thus intrinsically related, and the former cannot be solved without the latter. The reinforcement of human rights accountability is also dependent upon overcoming the deficiencies in attributing obligations and improving the efficiency of, and cooperation between the different mechanisms of accountability.

[231] Deva, *supra* note 145 at 33–35.

Developing a relational criterion of control to identify a particular relationship between the state and the individual has the potential to reinforce both direct attribution and indirect attribution, and to encompass a wider range of relationships. As the offshore processing case has illustrated, human rights violations arise in increasingly complex contexts where multiple actors play different role, which they ought to be held accountable for. Just as the question of attribution demands a legal framework that addresses its complexity, remedies require the availability of multiple mechanisms in order to rectify the harm caused to individuals as completely as possible.

The involvement of private actors in the human rights equation thus challenges the traditional binary which saw the state as the only possible perpetrator of abuses against individual victims. The increasing power of private actors has initiated a conceptual change in the idea of human rights: from a mere "shield from state oppression", rights claims have increasingly become weapons of protection in the hands of individuals.[232] Human rights thus seem to have become a new claim for power without being followed by legal means of fulfilling these new ideals. As the above analysis has shown, international law has overall proved unable to provide means of enforcing the rights of private individuals against other private actors.

The human rights abuses committed on Manus Island and Nauru illustrate the risks associated with upholding a scheme that no longer reflects the reality of human rights. Despite the growing body of evidence being revealed about private and public exactions, IHRL has struggled to give a clear answer to claims for justice and accountability. Without a translation of the abstract value of rights claims into legal guarantees, IHRL risks failing where it is most needed: to protect those who, absent the protection of a state in the form of citizenship rights, are at the mercy of the international community. The "rightlessness" of the stateless that Arendt described in 1951 has taken a new form in the 21st century in offshore processing centres: asylum seekers are not only denied rights in virtue of their legal status, or its absence, but also because their rights claims falls outside the scope of the state-centred scheme of human rights.[233]

[232] Clapham & Academy of European Law, *supra* note 14 at 56.
[233] Arendt, *supra* note 1 at 296.

But this rightlessness, despite flowing form the structure of international law, is far from being a fatality. IHRL, in its dynamic nature, has shown its capacity to depart, albeit slowly, from the territorial and public/private divides. The analysis of the challenges that universal human rights eminently face should not limit itself to a criticism of their conceptual flaws, nor should it depict them as abstract ideals beyond the reach of fulfilment. By stretching IHRL to its limits, these issues force a reconsideration of the edges of the concepts of attribution and responsibility drawn in law. These concepts are the remnants of an international system centred on the rights and prerogatives of states in their mutual relations, and one that the ideals of human rights increasingly contest. Questioning the state-centred paradigm is an on-going and necessary process to reveal the complexity of human rights violations – and to justify the shift in perspective that makes the heresies of today a viable alternative for tomorrow.

Bibliography

Legislation: Australia

Australian Border Force Act 2015 (Cth).

Migration Act 1958 (Cth).

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 - Explanatory Memorandum, Austl, Commonwealth, House of Representatives, 25 September 2014.

Legislation: International

Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171.

Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171.

Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

Legislation: Other

Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, 3 August 2013.

Regional resettlement Arrangement between Australia and Papua New Guinea, 19 July 2013.

Jurisprudence: Australia

Al-Kateb v Godwin, [2004] HCA 37.

CPCF v Minister for Immigration and Border Protection, [2015] HCA 1.

Plaintiff M68/2016 v Minister for Immigration and Border Protection, [2016] HCA 1.

Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor, [2014] HCA 22.

Jurisprudence: International

Al-Skeini and others v The United Kingdom [GC], [2011] No. 55721/07 ECHR.

Al-Skeini and others v The United Kingdom [GC], Concurring Opinion of Judge Bonello, [2011] No. 55721/07 ECHR.

Bankovic v Belgium [GC], [2001] No. 52207/99 ECHR.

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), [2007] International Court of Justice (ICJ).

Case of the Island of Palmas, [1928] R.I.I.A Vol II. 4 Permanent Court of International Justice.

The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts 74 and 75), [1982] Advisory Opinion OC-2/82 Inter-Am Ct HR (SerA).

Ilascu and others v Moldova and Russia [GC], [2004] No. 48787/99 ECHR.

Ilascu and others v Moldova and Russia [GC], Partly dissenting opinion of Judge Loucaides, [2004] No. 48787/99 ECHR.

JHA v Spain, [2008] 41st Sess CAT/C/41/D/323/2007 UNCATOR.

Loizidou v Turkey, [1995] No 15318/89 ECHR, 21 EHRR 188.

Soering v United Kingdom, [1989] No. 14038/88 ECHR.

Velásquez-Rodríguez v Honduras, [1988] Inter-Am Ct HR (SerC) No4.

Secondary Material: Monographs

Andreopoulos, George J, Zehra F Kabasakal Arat & Peter H Juviler. Non-state actors in the human rights universe (Bloomfield, CT: Kumarian Press, 2006).

Arendt, Hannah. The origins of totalitarianism (New York: Harcourt, Brace & World, 1966).

Černič, Jernej Letnar. Human rights law and business : corporate responsibility for fundamental human rights (Groningen [The Netherlands]: Europa Law Pub., 2010).

Jernej Letnar Cernic & Tara Van Ho. Human rights and business : direct corporate accountability for human rights (Oisterwijk, The Netherlands: Wolf Legal Publishers (WLP), 2015).

Clapham, Andrew & Academy of European Law. Human rights obligations of non-state actors (Oxford; New York: Oxford University Press, 2006).

Crawford, James. State Responsibility - The General Part (Cambridge: Cambridge University Press, 2013).

Deva, Surya. Regulating corporate human rights violations : humanizing business (Milton Park, Abingdon, Oxon; New York: Routledge, 2012).

Deva, Surya & David Bilchitz. Human rights obligations of business : beyond the corporate responsibility to respect? (2013).

Gammeltoft-Hansen, Thomas. Access to Asylum - International Refugee Law and the Offshoring and Outsourcing of Migration Control (PhD, Aarhus University, 2009) [unpublished].

---. Access to asylum : international refugee law and the globalisation of migration control (Cambridge; New York: Cambridge University Press, 2011).

Gibney, Matthew J. The ethics and politics of asylum : liberal democracy and the response to refugees (Cambridge, UK; New York: Cambridge University Press, 2004).

Hathaway, James C. The rights of refugees under international law (Cambridge [England]; New York: Cambridge University Press, 2005).

Shelton, Dinah. Remedies in international human rights law (Oxford; New York: Oxford University Press, 1999).

Secondary Materials: Book Chapters

Canefe, Nergis. "The fragmented nature of the international refugee regime and its consequences : a comparative analysis of the applications of the 1951 Convention" in Critical issues in international refugee law: strategies toward interpretative harmony (Cambridge University Press, 2010).

Chinkin, Christine. "International law and human rights" in Tony Evans, ed, Human Rights Fifty Years On: A Reappraisal (Manchester: Manchester University Press, 1998) 105.

Falk, Richard. "Reparations, international law, and global justice: a new frontier" in Pablo De Greiff, ed, The Handbook of Reparations (Oxford; New York: Oxford University Press, 2006).

Greiff, Pablo De. "Justice and Reparations" in Pablo De Greiff, ed, The Handbook of Reparations (Oxford; New York: Oxford University Press, 2006).

Lawson, Rick. "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights" in Fons Coomans & Menno T Kamminga, eds, Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2004) 83.

Wenzel, Nicola. "Human Rights, Treaties, Extraterritorial Application and Effects" in Max Planck Encyclopedia of Public International Law (New York, N.Y.: Oxford University Press, 2008).

Secondary Material: Articles

Blay, Sam, Jennifer Burn & Patrick Keyzer. “Interception and offshore processing of asylum seekers: The international law dimensions” (2007) 9 UTS L Rev 7.

Boer, T De. “Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection” (2015) 28:1 Journal of Refugee Studies Journal of Refugee Studies 118.

Boughey, J & G Weeks. “‘Officers of the Commonwealth’ in the Private Sector: Can the High Court Review Outsourced Exercises of Power?” (2013) 36:1 The University of New South Wales law journal 316.

Crock, Mary & Hannah Martin. “Refugee rights and the merits of appeals” (2013) 32 U Queensland LJ 137.

Edwards, Alice. “Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum” (2005) 17:2 International Journal of Refugee Law 293.

Fasterling, Björn & Geert Demuijnck. “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights” (2013) 116:4 Journal of Business Ethics 799.

Field, J R C. “Bridging the Gap Between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context” (2010) 22:4 International Journal of Refugee Law 512.

Fleay, C & S Hoffman. “Despair as a Governing Strategy: Australia and the Offshore Processing of Asylum-Seekers on Nauru” (2014) 33:2 Refugee Survey Quarterly 1.

Forgia, Rebecca La. “Attorney General, Chief Law Officer of the Crown: But where is the law?” (2003) 28:4 Alternative Law Journal 163.

Foster, Michelle. “Reflections on a Decade of International Law: International Legal Theory: Snapshots From a Decade Of International Legal Life: The Implications Of the Failed ‘Malaysian Solution’: The Australian High Court and Refugee Responsibility Sharing At International Law” (2012) 13 Melbourne J of Int’l Law 395.

Foster, Michelle & Jason Pobjoy. “A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s ‘Excised’ Territory” (2011) 23:4 International Journal of Refugee Law 583.

Francis, Angus. “Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing” (2008) 20:2 International Journal of Refugee Law 273.

---. “Examining the Role of Legislators in the Protection of Refugee Rights: Toward a Better Understanding of Australia’s Interaction With International Law” (2006) 13 Australian International Law Journal 147.

Gammeltoft-Hansen, T. “International Refugee Law and Refugee Policy: The Case of Deterrence Policies” (2014) 27:4 Journal of Refugee Studies Journal of Refugee Studies 574.

Gammeltoft-Hansen, Thomas & James C Hathaway. “Non-Refoulement in a World of Cooperative Deterrence” (2014) 53 Colum J Transnat’l L 235.

Gondek, Michal. “Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?” (2005) 52:03 Netherlands International Law Review 349.

Goodwin-Gill, Guy. “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement” (2011) 23:3 International Journal of Refugee Law 443.

---. “Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations, The” (2007) 9 UTS L Rev 26.

Groves, Matthew. “Outsourcing and non-delegable duties” (2005) 16 Public Law Review 265.

Hyndman, Jennifer & Alison Mountz. “Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe” (2008) 43:2 Government and Opposition 249.

Jägers, Nicola. “UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?” (2011) 29:2 Netherlands Quarterly of Human Rights 159.

Kirby, Michael. “Domestic Implementation of International Human Rights Norms” (1999) 5:2 Australian Journal of Human Rights 109.

---. “Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges” (2008) 9 Melb J Int’l L 171.

Kneebone, Susan. “The Pacific Plan: The Provision of ‘Effective Protection’?” (2006) 18:3-4 International Journal of Refugee Law 696.

Knuckey, Sarah & Eleanor Jenkin. “Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?” (2015) 19:6 The International Journal of Human Rights 801.

Kritzman-Amir, Tally. “Privatization and Delegation of State Authority in Asylum Systems” (2011) 5:1 Law & Ethics of Human Rights 194.

Lowes, S. “The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the ‘Malaysian Solution’ Case” (2012) 12:1 Human Rights Law Review 168.

Magner, Tara. “A Less than ‘Pacific’ Solution for Asylum Seekers in Australia” (2004) 16:1 International Journal of Refugee Law 53.

Menz, Georg. “Neo-liberalism, Privatization and the Outsourcing of Migration Management: A Five-Country Comparison” (2011) 15:2 Competition & Change 116.

Meron, Theodor. “Extraterritoriality of Human Rights Treaties” (1995) 89:1 The American Journal of International Law 78.

Milanovic, Marko. “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23:1 European Journal of International Law 121.

O'Byrne, Katie. "Roundtable on the Future of Refugee Convention Supervision - Is there a Need for Better Supervision of the Refugee Convention?" (2013) 26:3 Journal of Refugee Studies 327.

Rose, Cecily. "An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors" (2010) 33 Hastings Int'l & Comp L Rev 307.

Ruggie, John Gerard. "Business and human rights: the evolving international agenda" (2007) American Journal of International Law 819.

Shany, Yuval. "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law" (2013) 7:1 The Law & Ethics of Human Rights.

Stewart-Weeks, Hannah. "Out of Sight but Not out of Mind: Plaintiff M61/2010E v Commonwealth" (2011) 33 Sydney Law Review 831.

Tzevelekos, Vassilis P. "Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility" (2015) 36:1 Michigan Journal of International Law.

Vazquez, Carlos M. "Direct vs. Indirect Obligations of Corporations Under International Law" (2004) 43 Colum J Transnat'l L 927.

Ziemele, Ineta. "Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies" (2009) AEL 2009/8 EUI Working Papers 1.

Secondary Material: Newspaper Articles

Barns, Greg & George Newhouse. "Border Force Act: detention secrecy just got worse", ABC News (28 May 2015), online: <http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086>.

Chalmers, Max. "Australia Obligated to Protect Refugees in Nauru, Say Legal Groups", New Matilda (26 November 2014), online: <https://newmatilda.com/2014/11/26/australia-obligated-protect-refugees-nauru-say-legal-groups>.

Cochrane, Liam. "Australia considers five-year offshore immigration contracts amid sexual assault allegations and 'fight club' claims", ABC News (7 August 2015), online: <http://www.abc.net.au/news/2015-08-07/australia-considers-five-year-offshore-immigration-contracts/6681208>.

Evershed, Nick. "Mandatory immigration detention is a billion-dollar business - analysis", The Guardian (25 August 2014), online: <http://www.theguardian.com/news/datablog/2014/aug/25/-sp-mandatory-immigration-detention-is-a-billion-dollar-business-analysis>.

Farrell, Paul. "Nauru inquiry: Transfield unable to answer basic questions about operations", The Guardian (19 May 2015), online: <http://www.theguardian.com/world/2015/may/19/nauru-inquiry-transfield-unable-to-answer-basic-questions-about-operations>.

---. “Nauru inquiry: immigration minister personally told of serious incidents”, The Guardian (19 May 2015), online: <http://www.theguardian.com/weather/2015/may/19/nauru-inquiry-immigration-minister-personally-told-of-serious-incidents>.

---. “Australian law groups urge Coalition to pressure Nauru over growing legal crisis”, The Guardian (2 June 2015), online: <http://www.theguardian.com/world/2015/jun/02/australian-law-groups-urge-coalition-to-pressure-nauru-over-growing-legal-crisis>.

---. “IHMS, the healthcare giant at the heart of Australia’s asylum system - explainer”, The Guardian (21 July 2015), online: <http://www.theguardian.com/australia-news/2015/jul/21/ihms-the-healthcare-giant-at-the-heart-of-australias-asylum-system-explainer>.

Hurst, Daniel & Ben Doherty. “Australia seeking refugee resettlement deal with Philippines, say reports”, The Guardian (8 October 2015), online: <http://www.theguardian.com/australia-news/2015/oct/09/australia-seeking-refugee-resettlement-deal-with-philippines-say-reports>.

Sinclair, Amy. “The Serious Business Of Human Rights: Corporate Australia Needs Rules Defined”, online: New Matilda <https://newmatilda.com/2015/10/07/serious-business-human-rights-corporate-australia-needs-rules-defined/>.

Secondary Material: Other

Andrew and Renata Kaldor Centre for International Refugee Law. Factsheet - Offshore processing: Australia’s responsibility for asylum seekers and refugees in Nauru and Papua New Guinea (2015).

Andrew and Renata Kaldor Centre for International Refugee Law. Factsheet - Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia (2015).

Andrew and Renata Kaldor Centre for International Refugee Law. Factsheet - Offshore processing: refugee status determination for asylum seekers on Nauru (2015).

Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee. Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (2014).

Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru. Taking responsibility: conditions and circumstances at Australia’s Regional Processing Centre in Nauru (2015).

Australian Government. Operational, Maintenance and Welfare support services for the Manus and Nauru RPCs, online: https://www.tenders.gov.au/?event=public.cn.view&CNUUID=1013CCBE-92A3-D1D4-722EC39FCBF61B39 (2014).

Australian Government. Contract Notice - Welfare and Education services to transferees at Regional Processing Countries (Nauru & Manus), online: https://www.tenders.gov.au/?event=public.cn.view&CNUUID=D93CD6BF-F855-22B0-12060B2B863177FC (2014).

Australian Government. Request for Tender for the Provision of Services in Regional Processing Countries, https://www.tenders.gov.au/?event=public.atm.showClosed&ATMUUID=3A87D0FB-FD44-1499-3DF065077176C756 (2015).

Australian Government. "Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd", (10 June 2015), online: <http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm>.

Australian Government. "The Australian National Contact Point", online: <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>.

Australian Human Rights Commission. Human rights issues raised by the third country processing regime (Australian Human Rights Commission, 2013).

Christopher Iacono. Submission 20 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (2014).

Dastyari, Azadeh. "Asylum seekers punished more every year", (2014), online: Castan Centre for Human Rights Law <http://www.monash.edu/law/centres/castancentre/policywork/hr-reports/2014/asylum>.

Elizabeth Thompson. Submission 19 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (2014).

G4S. Contract in relation to the provision of services on Manus Island (PNG) (2013).

Kelly, Fran. "Morrison: protecting asylum seekers a worthy goal (Interview with Immigration Minister Scott Morrison)", ABC Radio National Breakfast (7 March 2014), online: <http://mpegmedia.abc.net.au/rn/podcast/2014/03/bst_20140307_0742.mp3>.

Moss, Philip. Review into recent allegations relating to conditions and circumstances at the regional processing centre in Nauru : final report (Department of Immigration and Border Protection, 2015).

Nicole Judge. Submission 12 - Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (2014).

No Business in Abuse. "Response to Transfield Statement - Annexure A", (18 September 2015), online: <https://d68ej2dhhub09.cloudfront.net/1229-NBIA_Reponse_to_TSE_18.09.15.pdf>.

OECD. "National Contact Points", online: OECD Guidelines for Mutlinational Enterprises <http://mneguidelines.oecd.org/ncps/>.

Office of the High Commissioner for Human Rights. "State National Action Plans", (2015), online: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

Organisation for Economic Cooperation and Development (OECD). OECD Guidelines for Multinational Enterprises (2011 Edition) (2011).

Republic of Nauru - Department of Justice and Border Control. Refugee Status Determination Handbook, online: http://www.naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf (2013).

Transfield Services Australia. Contract in relation to the provision of services on Nauru (2013).

UN Global Compact. "The Communication on Progress (COP) in Brief", online: <https://www.unglobalcompact.org/participation/report/cop>.

UNHCR. UNHCR Monitoring visit to Manus Island, Papua New Guinea - 23 to 25 October 2013 (2013).

UN Human Rights Committee. "General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant" (2004) CCPR/C/21/Rev1/Add13.

UN Human Rights Committee. *Communication No. 2136/2012: Views adopted by the Committee at its 108th session (8 - 26 July 2013),* 20 August 2013, CCPR/C/108/D/2136/2012, August 2013, CCPR/C/108/D/2136/2012.

UN Human Rights Council. Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (2008).

UNOHCHR. Guiding Principles of Business and Human Rights - Implementing the "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011).

Webb, Daniel. "Out-sourcing our dirty work: Australia's approach to asylum seekers | Human Rights Law Centre", online: <http://hrlc.org.au/out-sourcing-our-dirty-work-australias-approach-to-asylum-seekers/>.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147 UNGAOR, 2005, UN Doc A/Res/60/147.