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

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1 Introduction
Human rights elephants in a globalising world

1.1 INTRODUCTION

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

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

1 Harland, 1994, p. 21.
2 Heimert, 1995, p. 1474.
3 Whenever this book speaks about 'tuskless elephants', it refers to elephants that were *deprived* of their tusks through poaching, not to elephants that were naturally born without tusks. See also Raubenheimer & Miniggio, 2016.
4 Stiles, 2004, pp. 309–310.

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

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

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

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

1.2 Focus of this research

1.2.1 Focusing on contexts of confinement

1.2.1.1 A choice for confinement

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

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

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

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

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

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

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

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

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

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

11 McKay, 2015, p. 633.

12 Cassese, 2005, p. 375.

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

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

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

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

1.2.1.2 Some remarks on confinement in migration control

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

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

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

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

16 Wilsher, 2011, p. 1.
17 Kraler & Hollomey, 2010, p. 41.
18 Bacon, 2005, p. 2; Silverman & Nethery, 2015, p. 1.
19 Lucassen, 2016, p. 79.
20 Wilsher, 2011, p. 1.
21 Conlon & Hiemstra, 2017, p. 1; Michael Flynn, 2014, p. 170.
22 Turnbull, 2017, p. 2. See also Silverman & Nethery, 2015.
23 Ackerman & Furman, 2013, p. 251; Conlon & Hiemstra, 2017, pp. 1–3; De Genova, 2016; Hiemstra, 2016, p. 434.

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

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

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

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

25 See also Spijkerboer, 2018.

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

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

28 Turnbull, 2017, p. 4.

29 Sampson & Mitchell, 2013, p. 100.

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

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

1.2.2 Focusing on the 'glocal' level

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

31 Other contexts, such as the use of detention in various contexts of South-South migration, remain largely underexplored. See also Ryburn, 2016, p. 48. See, more generally, also Woldemariam, Maguire, & Von Meding, 2019.
32 See for example O'Neill, 2016, p. 7; Scheper, 2015, p. 741.
33 Coomans, 2011, p. 2. In this sense, we are rapidly moving towards a world that is "increasingly interconnected": Furman, Epps, & Lamphear, 2016, p. 3.
34 Vandenhole & Benedek, 2013, p. 366.
35 Brysk, 2002, p. 1. Some have traced globalisation back to as far as the year 1000 CE: see Stearns, 2010, p. 5.
36 Steger, 2017, p. 12, see also Brysk, 2002, p. 1.
37 Langford, Vandenhole, et al., 2013, p. 4.
38 Franko, 2017, p. 362; Jakobi, 2013.

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

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

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

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

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

41 Franko, 2017, pp. 355–356.

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

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

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

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

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42 Ife, 2009, p. 147.

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

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

45 Ife, 2009, p. 147.

46 Franko, 2017, p. 356.

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

1.3 Research questions

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

> *To what extent can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by the globalisation trends of 'commodification' and 'crimmigration'?*

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

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

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

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

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

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

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

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

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

50 Subedi, 2003, p. 171.
51 A. Buchanan, 2013, p. 274.
52 Ife, 2009, p. 111.
53 Blau & Esparza, 2016, p. xi; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620. Human rights and human dignity are however not necessarily equivalent concepts, nor can human dignity only be achieved via the path of human rights Donnelly, 1982.

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

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

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

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

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

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

1.4 Research design

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

1.4.1 Case study selection

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

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

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

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

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

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

1.4.2 Methods

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

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

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

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

1.4.2.1 Review of literature and documents

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

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

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

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

60 Arksey & Knight, 2011, pp. 21–22.

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

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

1.4.2.2 Doctrinal legal analysis

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

1.4.2.3 Semi-structured interviews

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

62 See, for a denied Freedom of Information Request, https://www.righttoknow.org.au/request/administrative_arrangements_ando (last accessed 30 May 2019).
63 Federal Court of Australia, *ELF18 v Minister for Home Affairs* [2018] FCA 1368.
64 Duncan & Hutchinson, 2012, p. 85.
65 Duncan & Hutchinson, 2012, p. 110.
66 Arksey & Knight, 2011, p. 32.
67 Arksey & Knight, 2011, p. 32.

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

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

1.4.3 Qualitative interviews: RPC Nauru

1.4.3.1 Access to the research site

As will be further highlighted below when contextualising the case study, RPC Nauru is embedded in a policy framework that is characterised by significant amounts of secrecy. Accordingly, conducting interviews in this context has proven a strenuous task. For the exploratory work that preceded, and led up to, the present research, I attempted to visit Nauru in order to interview the Nauruan authorities on a range of issues pertaining to the geo-political position of Nauru. In doing so, I contacted several academics who had previously visited, or who were closely monitoring developments on, Nauru. They in turn referred me to their contacts on island, as a result of which I ultimately got in touch with an official within the Nauruan government. As he responded to my research request, "[d]oing research on Nauru is not a restricted activity".[69] He furthermore informed me that I would need to be sponsored in order to be granted a visa for research purposes, and advised me to gain sponsorship from the University of the South Pacific ('USP'), campus Nauru. I was granted sponsorship by the USP accordingly and received a Nauruan visa, issued by the Principal Immigration Officer of the Republic of Nauru, through them in February 2014.[70] I accordingly booked my flights to and from Nauru with Nauru's national airline (Our Airline), with the outbound flight being scheduled for May 2014 and the return flight being scheduled for June 2014.

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

68 Galletta, 2013, p. 45.
69 E-mail received on 13 January 2014.
70 E-mail received on 26 February 2014.
71 E-mail received on 31 March 2014.

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

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

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

72 E-mail sent on 24 April 2014.
73 E-mail received on 30 April 2014.
74 E-mail received on 17 October 2015.
75 E-mail received on 23 October 2015.
76 E-mail received on 19 January 2016.
77 See also Van Berlo, 2014a.

1.4.3.2 Ethical considerations

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

1.4.3.3 Before the interviews

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

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

78 Whilst they did do so in the context of research ethics for nurses, the issues they address also apply here: see Fouka & Mantzorou, 2011.
79 Sigona, 2014; Smets, Mazzocchetti, Gerstmans, & Mostmans, 2019.

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

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

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

80 See notably Boochani, 2017, 2018; Nagaveeran, 2015.
81 Sigona, 2014, pp. 369–370; Temple & Moran, 2006, pp. 14–17.
82 See also Arksey & Knight, 2011, pp. 126–127.
83 It might, in addition, prejudice their legal status, as various respondents have pointed out.
84 See e.g. Corbett, Gunasekera, Maycock, & Isaacs, 2014; De Boer, 2013; Doherty & Marr, 2016; Harding-Pink, 2004; D. Isaacs, 2015a, 2015b; N. Martin, 2018; McCall, 2018; Sundram & Ventevogel, 2017.
85 UNHCR, 2018.
86 Doherty & Marr, 2016.
87 Hunt, 2010, pp. 45–49.
88 Hunt, 2010, p. 46.
89 Hunt, 2010, pp. 46–47.

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

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

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

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

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90 Fouka & Mantzorou, 2011, p. 5, see similarly Arksey & Knight, 2011, pp. 126–127; Brinkmann, 2013, pp. 51–52.
91 Ford & Reutter, 1990, p. 188.
92 Mahler, 1986, p. 8.
93 Sigona, 2014.
94 Hunt, 2010, pp. 46–47.

Recruitment process

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

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

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

95 Van Berlo, 2014b.

96 T. Miller & Bell, 2014.

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

Recruited respondents

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

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

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

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

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

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

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

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

1.4.3.4 During the interviews

Choice for individual interviews

Respondents were as a rule interviewed individually rather than collectively.[101] The choice for individual interviews was based on the sensitivity of the research topic, the personal nature of respondents' testimonies, and the potential implications as a result of the Border Force Act 2015.[102] In light of these considerations, a choice for individual interviews was appropriate: "when studying aspects of people's lives that are personal, sensitive, or even taboo, it is preferable to use individual interviews that allow for more confidentiality and often make it easier for the interviewer to create an atmosphere of trust and discretion".[103]

Topic list

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

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

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

103 Brinkmann, 2014, p. 289.

104 Compare Boeije, 2010, p. 67.

Timeframe, location, communication media, and duration

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

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

Rapport, trust, and openness

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

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

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

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

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

107 Hunt, 2010, pp. 46–47.

108 See also T. Miller & Bell, 2014.

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

1.4.3.5 After the interviews

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

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

109 Kaiser, 2009, p. 1637.

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

1.4.4 Qualitative interviews: PI Norgerhaven

1.4.4.1 Access to the research site

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

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

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

Whilst initially a positive response was received,[111] DJI rejected the research application in February 2016 as it would constitute a too significant burden on the organisation. I consequently narrowed my request down to four interviews only: with the Belgian and Norwegian prison governors and with the two Dutch Staff and Facility Managers. In March 2016, I was however informed that my requests were denied both in relation to PI Norgerhaven and in relation to PI Tilburg. In relation to PI Norgerhaven, it was mentioned that the full initial request had been forwarded to the Norwegian Project Manager who had rejected the application.[112] In relation to PI Tilburg, the stated reason for rejecting the narrowed request was that in light of the forthcoming closure of the facility, "division management does not consider it to be a good signal to cooperate with the research".[113] The request for access was reiterated a few months later, but was again denied.[114] Notwithstanding DJI's commitment to an open dialogue with academia[115] and the goal of increasing detention-related knowledge that underlies the cooperation agreement between DJI and the Institute of Criminal Law and Criminology (Leiden University), it proved henceforth difficult to gain access.

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

1.4.4.2 The interviews

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

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

111 E-mail received on 12 January 2016.
112 E-mail received on 14 March 2016.
113 E-mail received on 18 March 2016 (original in Dutch).
114 E-mail received on 6 September 2016.
115 Van den Hurk & Jorna, 2016, p. 45.

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

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

1.5 Introducing the case studies: from Nauru to Norgerhaven

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

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

116 Compare Boeije, 2010, p. 67.

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

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

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

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

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

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

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

1.5.1.1 The lead-up to Operation Sovereign Borders

Migration and migration control have been key aspects of the origin and development of Australia as a sovereign nation.[118] Concerns over irregular migration have featured prominently in the Australian political context since the late 1800 onwards, when restrictions were implemented to regulate the immigration of Chinese migrants.[119] In 1901, the Immigration Restriction Act was introduced, implementing further restrictions to deter non-Europeans.[120] It formed the basis for the White Australia Policy, favouring white immigrants.[121] Some of these restrictions were abolished in the Revised Migration Act 1958, after which the White Australia Policy was fully abolished in 1972.[122] Focus consequently shifted towards irregular boat arrivals in the early 1990s, with a policy of mandatory detention being introduced in 1992 for all IMAs without a valid visa.[123]

118 See generally also Glynn, 2016; Tazreiter, 2015.
119 Betts, 2001, p. 45; Glynn, 2016, p. 51.
120 Glynn, 2016, pp. 51–52.
121 Jayasuriya, Walker, & Gothard, 2003; Jupp, 2002; Tavan, 2005; Willard, 1923.
122 Glynn, 2016, p. 55.
123 Ghezelbash, 2015, p. 78; Glynn, 2016, pp. 63–64. As Glynn points out, "[m]andatory detention became the norm for all boat people who applied for asylum in Australia. By contrast, migrants who arrived by air on a valid visa and who subsequently applied for asylum were granted a bridging visa. While one asylum seeker who came by boat remained in detention, the other was often entitled to work rights, access to Medicare and other privileges during the assessment of their claim": Glynn, 2016, p. 64.

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

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

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

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

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

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

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

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

129 Glynn, 2016, p. 129.

130 Van Berlo, 2015a, pp. 97–98.

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

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

131 Afeef, 2006; Hyndman & Mountz, 2008; Kneebone, 2006; Mountz, 2011; Rajaram, 2003; Salvini, 2012, p. 21; Van Berlo, 2015a, pp. 97–98; Welch, 2012.
132 Pickering, 2008, p. 174.
133 Pickering & Lambert, 2002, p. 66.
134 Afeef, 2006; Mathew, 2002; Philpott, 2002; Van Berlo, 2015a, pp. 97–98.
135 Afeef, 2006.
136 Van Berlo, 2015a, p. 98, see in particular also Mares, 2002; McNeill, 2003; Philpott, 2002.
137 Glynn, 2016, p. 123.
138 Afeef, 2006; Van Berlo, 2015a, pp. 97–98.
139 Chambers, 2015, p. 407.
140 For example, Dutch politician Geert Wilders based a *'No way, you will not make the Netherlands home'* campaign on Australia's *'No way, you will not make Australia home'* campaign. See also Van Berlo, 2016a.

heavily dependent on Australian financial aid and development funding.[141] This is particularly true in the case of Nauru: having approximately 10.000 inhabitants and comprising approximately 21 square kilometres, it is the smallest sovereign nation in the Pacific (and the smallest country in the world after Vatican City and Monaco) with little political or economic stability. The Nauruan political system has indeed been argued to be too unstable, inexperienced, and polarised to develop a sustainable economy or a solid democratic system based on the rule of law.[142] Moreover, the nation stood at the verge of bankruptcy at the beginning of the 2000s and the financial compensation offered by Australia for hosting the RPC in this sense offered much-needed relief.[143]

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

1.5.1.2 The introduction of Operation Sovereign Borders

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

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

142 Connell, 2006; Firth, 2016.

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

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

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

146 Ghezelbash, 2015, pp. 103–104.

in the RPC in Nauru and PNG, but also that it would expand the existing policy arrangements, turning the Pacific Solution into a military-led operation called Operation Sovereign Borders ('OSB') headed by a senior military commander.[147] The operation fell under the responsibility of the Department of Immigration and Border Protection ('DIBP'), which superseded the Department of Immigration and Citizenship ('DIAC') in September 2013.[148] As part of this policy framework, a campaign with the slogan "*No way, they will not make Australia home*" was launched, focusing on irregular migrants' countries of origin.[149] The case study research in this research will focus on OSB specifically: notwithstanding the interesting features of the Pacific Solution, OSB is of particular interest given that it "ratcheted up"[150] the previous framework and is still into force as of today.

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

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

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

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

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

150 Grewcock, 2014, p. 71.

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

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

1.5.1.3 Controversies relating to offshore processing

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

The July 2013 RPC Nauru incident

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

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

153 Hamburger, 2013, p. 3.
154 Hamburger, 2013, p. 4.
155 Hamburger, 2013, p. 4.
156 Hamburger, 2013, pp. 5–6.
157 M. Isaacs et al., 2013.

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

The February 2014 RPC Manus incident

In February 2014, there was a significant outbreak of violence in RPC Manus after asylum seekers were informed by authorities of PNG and Australia that they would never be resettled in Australia and were likely to stay in the Manus facility for an indeterminate period of time, with asylum processing potentially taking up to five years.[163] As a response to the disturbances, which have also been described as violent protest or a riot,[164] contracted security staff, local PNG police, part of the local Manus community, and some expatriates used severe violence – including attacks with knives and machetes – on asylum seekers, which resulted in the serious injury of more than 60 asylum seekers and the death of Reza Barati, a 23-year-old asylum seeker from Iran, on 17 February 2014.[165] As Robert Cornall found in his 'review into the circumstances surrounding the Manus Island disturbances' ('Cornall Review'), which was commissioned by DIBP, Barati died from cardiac arrest which resulted from severe brain injury.[166] According to eye witnesses, he had been kicked and punched, after which a PNG national "put a very big stone on his head".[167] The injuries of other asylum seekers included notably the loss of an eye respectively a bullet in the buttocks as well as various broken bones and lacerations, with various asylum seekers requiring specialised medical

158 Hamburger, 2013, p. 4.
159 Hamburger, 2013, p. 4.
160 Firth, 2016, p. 288; Hamburger, 2013, pp. 4–5.
161 Firth, 2016, p. 288.
162 AFP, 2013; Hall & Flitton, 2013.
163 O'Brien & Ball, 2016, p. 14; Tan, 2016, p. 95.
164 This is contested, however: different accounts exist as to what caused the violence in the first place: see Larking, 2014, p. 1.
165 Larking, 2014, p. 1; O'Brien & Ball, 2016, p. 14; Penovic & Dastyari, 2016, p. 141.
166 Cornall, 2014.
167 Cornall, 2014, pp. 64–65; Tan, 2016, p. 96.

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

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

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

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

168 Cornall, 2014, p. 8.
169 Safi, 2014.
170 Nethery & Holman, 2016, p. 8.
171 The final version of the Moss Review was published in March 2015: P. Moss, 2015.
172 P. Moss, 2015, p. 12.
173 P. Moss, 2015, p. 3.
174 P. Moss, 2015, p. 42.
175 P. Moss, 2015, p. 69.
176 P. Moss, 2015, p. 70.
177 P. Moss, 2015, p. 9.

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

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

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

178 Doogan, 2015.
179 DIBP, 2017.
180 High Court of Australia, *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1.
181 Gleeson, 2016a.
182 Gleeson, 2016a.
183 Gleeson, 2016a; McBeth, 2016, p. 44.

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

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

Introduction of the Australian Border Force Act 2015

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

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

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

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184 Gleeson, 2016a.
185 Department of Justice and Border Control of the Republic of Nauru, 2015.
186 Department of Justice and Border Control of the Republic of Nauru, 2015; Gleeson, 2016a.
187 Government of Nauru, 2015c. Compare ECtHR, *J.R. and Others v. Greece,* 28 January 2018, Application no. 22696/16, para 86.
188 See also Gleeson, 2016a.
189 *Australian Border Force Act 2015*, No. 40, 2015.
190 *Border Force Act 2015*, section 41.
191 *Border Force Act 2015*, section 4(1).
192 *Border Force Act 2015*, section 4(1). See also Bevitt, 2017, p. 262.

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

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

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

In addition to the open letter, medical practitioners continued to voice their concerns as the secrecy provisions would potentially undermine their ability to perform their professional duties, which ultimately culminated in a constitutional challenge by Doctors for Refugees – a non-profit collaboration of health practitioners – in July 2016.[199] A few months later, the Border Force Act 2015 was amended to excluded medical professionals from the secrecy provisions.[200] Notwithstanding, significant concerns remained as amongst others

193 *Border Force Act 2015*, section 4(1).
194 *Border Force Act 2015*, section 42.
195 Bevitt, 2017, p. 259.
196 Bevitt, 2017, p. 258.
197 Sanggaran et al., 2015.
198 Sanggaran et al., 2015.
199 Bevitt, 2017, p. 258.
200 *Determination of Immigration and Border Protection Workers 2015* (Cth), para. D, as amended by *Determination of Immigration and Border Protection Workers -Amendment No. 1 2016* (Cth).

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

PNG Supreme Court decision in Namah v. Pato

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

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

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

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

201 H. Davidson, 2016c.
202 *Namah v. Pato,* paras. 38-39.
203 *Namah v. Pato,* paras. 52 and 74.
204 *Namah v. Pato,* para. 74.

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

Notwithstanding the judgment, it took both governments approximately five months to present contingency plans for the facility's closure and almost 1,5 years in total to close RPC Manus effectively. The facility was officially shut down on the 31st of October 2017. At that time, 600 transferees were still residing there. Those not granted refugee status were to be transferred to Hillside Haus in the Manus town of Lorengau, in order to prepare for their voluntary repatriation or deportation.[208] Those granted refugee status, on the other hand, were to be moved to one of two open transit facilities in the vicinity of Lorengau to prepare for their settlement in the PNG community or in third countries.[209] This caused significant resistance amongst the transferee population, given that various refugees and asylum seekers had previously experienced significant mistreatment by the local population and police and therefore feared for their safety at the Lorengau facilities.[210] In fact, on the 31st of October 2017 – when the facility was officially shut down – refugees barricades themselves into RPC Manus and refused to leave the facility, notwithstanding the fact that they were cut off from food, water, and electricity.[211] It took another few weeks before the PNG police had removed all transferees from the facility's premises – many by force – with the final transferees being evicted on the 23th of November 2017.[212]

The publication of the 'Nauru Files'

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

205 H. Davidson & Doherty, 2016a.
206 Hasham, 2016.
207 H. Davidson & Doherty, 2016a.
208 Hartcher, 2017.
209 Hartcher, 2017.
210 Fox, 2017.
211 H. Davidson & Wahlquist, 2017; Whiteman, 2017.
212 Baxendale, 2017.
213 Farrell, Evershed, & Davidson, 2016.

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

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

Nauru political developments

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

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

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

214 Farrell et al., 2016.
215 DIBP, 2016.
216 H. Davidson, 2016b.
217 S. Anderson, 2016.
218 Section 11 of Nauru's Immigration Act 2014, No. 1, 28 January 2014.

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

Second, in May 2014, three opposition members of parliament were suspended for giving interviews to international media.[221] In a number of interviews, the MPs had voiced criticism in relation to the dismissal of chief magistrate Law and the obstructed return of Chief Justice Eames to the country. According to Justice Minister Adeang, these interviews had damaged Nauru's development.[222] He stated that the MPs "were suspended due to their deliberate attempts and damaging comments to foreign media undermining the good work of the Waqa Government" .[223] It was claimed that by suspending these opposition MPs, Nauru's parliament had "voted to protect the nation's international standing and future investment".[224] Later, in June 2014, two other opposition MPs were also suspended since they would have behaved "in an unruly manner" in Parliament.[225] The five MPs were indefinitely suspended, which fuelled the already existing frustrations amongst their constituents.[226] The ensuing criticism prompted the Nauruan government to block Facebook in May 2015.[227] A few weeks later, in June 2015, ABC News reported that President Waqa, Minister Adeang, and other government officials were implicated in a bribery scandal involving the Australian phosphate mining company Getax.[228] Ultimately, these developments led to a large protest of

219 Doherty, 2017.
220 Doherty, 2017.
221 ABC News, 2014.
222 ABC News, 2014.
223 Government of Nauru, 2014.
224 Government of Nauru, 2014.
225 Cooney, 2014.
226 Fox, 2015a.
227 Firth, 2016, pp. 292–293.
228 A. McDonald & Cooper, 2015.

hundreds of Nauruan citizens outside the Parliament building in June 2015.[229] During this protest, one of the suspended MPs was arrested for "disrupting the legislature", whilst two other suspended MPs were arrested a couple of days later on account of involvement "in the act of lawlessness".[230] As a response to the protest, the Nauruan authorities furthermore stripped protesters from their old-age pensions.[231] After criticizing Nauru's curbing of free speech in the media, one of the suspended MPs who visited Nauru for four days from his home in New Zealand was detained when he was about to board a plane to Australia and his passport was cancelled.[232] The government of New Zealand decided to suspend its aid budget to Nauru a few months later,[233] and ultimately granted the suspended MP citizenship in order to facilitate his departure from Nauru.[234]

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

229 Fox, 2015a.
230 ABC News, 2015; Fox, 2015a.
231 Fox, 2015b.
232 Firth, 2016, pp. 294–295.
233 Firth, 2016, p. 296.
234 ABC News, 2016.
235 Doherty, 2018b.
236 Supreme Court of Nauru, *Republic of Nauru v. Mathew Basiua & Others* [2018] Criminal Case no. 12 of 2017, para. 370.
237 Doherty, 2018c. Indeed, the Supreme Court of Nauru is not the highest court of appeal and judgments – except for those on constitutional matters – can thus be appealed.
238 *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru* (Nauru, 6 September 1976), available at http://classic.austlii.edu.au/au/other/dfat/treaties/ATS/1977/11.html (last accessed 30 May 2019). See, for a historical overview of Australia's High Court's appellate jurisdiction on Nauru, Murray, 2018.

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

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

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

In 2009, Belgium and the Netherlands started to cooperate intensively in the penal field in an ostensibly unique and novel way. In that year, the Belgian and Dutch governments entered into a Treaty (hereinafter: 'Belgian-Dutch Treaty')[239] under which a Dutch penitentiary institution located in the city of Tilburg ('PI Tilburg') was leased to the Belgian authorities for the detention of approximately 500 Belgian prisoners for an annual payment of 30 million euro.[240] The maximum lease capacity was later extended to 650 prisoners in exchange for an additional 7,9 million euro.[241] The agreement was said to be beneficial for both Belgium, where prisons had been overcrowded by 26.8%, and the Netherlands, where prison capacity exceeded the prison population and the unemployment of prison staff lurked.[242] The first transfers of Belgian prisoners took place in February 2010.[243] By 2011, PI Tilburg hosted more convicted Belgian detainees than any prison in Belgium itself.[244]

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

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

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

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

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

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

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

245 Article 1 sub e Belgian-Dutch Treaty.

246 De Ridder, 2016b, p. 128.

that it was "Belgian"[247] or "(mostly) Belgian",[248] whereas other argue that it was "in essence Dutch"[249] or "an international hybrid".[250]

In 2015, the Belgian government decided to end the lease agreement. This meant that all detainees in PI Tilburg were to be returned to Belgium by 31 December 2016.[251]

1.5.2.2 'The Garden of Norway': Norwegian-Dutch penal cooperation

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

The lease period commenced in September 2015. Administratively, PI Norgerhaven functioned as an annex of Ullersmo Prison in Norway,[253] which is situated in the vicinity of Oslo. In exchange for the use of the prison facility with 242 detention places, Norway payed an annual sum of 25,5 million euros to the Netherlands.[254] Similar to the Dutch-Belgian cooperation, the agreement was beneficial for both countries: it allowed the Dutch government to preserve jobs in the prison system whilst it provided the Norwegian authorities, which were dealing with temporary prison shortages as a result of renovation works, with alternative prison capacity.[255] Since the Norwegian government decided not to prolong the lease agreement, the Norwegian-Dutch cooperation ended on the 31st of August 2018.

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

247 CPT, 2012, p. 7.
248 De Ridder, 2013.
249 League for Human Rights, 2011, p. 4.
250 Levin, 2014, p. 526.
251 Rijksoverheid, 2015a.
252 *Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk Noorwegen inzake het gebruik van een penitentiaire inrichting in Nederland voor de tenuitvoerlegging van bij Noorse vonnissen opgelegde vrijheidsstraffen*; Veenhuizen, 2 March 2015, *Trb.* 2015, 37. The Treaty can be renewed multiple times for at least one year each time, although the Norwegian Parliament decided that the Treaty can only be renewed for a period of maximum two years – until September 2020 latest: see Struyker Boudier & Verrest, 2015, p. 911.
253 Article 1 sub e Norwegian-Dutch Treaty.
254 Article 27 Norwegian-Dutch Treaty.
255 Struyker Boudier & Verrest, 2015, pp. 909–910.

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

1.5.2.3 PI Norgerhaven: from extensive compliments to the occasional controversy

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

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

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

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

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

260 Pakes & Holt, 2017, p. 71.

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

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

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

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

262 Norwegian NGO Forum for Human Rights, 2018.
263 Norwegian NGO Forum for Human Rights, 2018, p. 11.
264 Norwegian NGO Forum for Human Rights, 2018, p. 11.
265 Norwegian NGO Forum for Human Rights, 2018, p. 11.
266 Norwegian NGO Forum for Human Rights, 2018, p. 11.
267 Norwegian NGO Forum for Human Rights, 2018, p. 11.
268 Norwegian NGO Forum for Human Rights, 2018, p. 11; Sivilombudsmannen, 2016, p. 6.

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

1.6 Definitional issues

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

269 Johnsen et al., 2017.

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

271 Johnsen et al., 2017, p. 10.

272 Johnsen et al., 2017, p. 10.

273 Likewise, it speaks about the Regional Processing *Centre* Manus ('RPC Manus').

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

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

1.7 ROADMAP

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

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

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

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

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

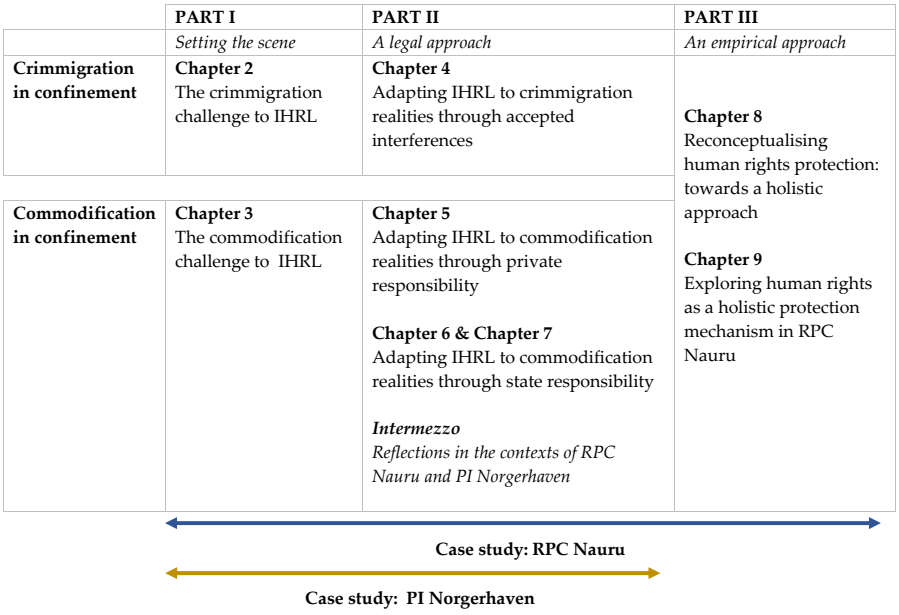

Figure 1: Schematic outline of this book.

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

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

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

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

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

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

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

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

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

279 Frezzo, 2015.

280 Frezzo, 2015.

281 Clément, 2015, p. 564.

282 Clément, 2015, p. 564.