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

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10 Conclusion: Elephants never forget

> *"A community of blind men once heard of an extraordinary beast called an elephant and resolved to understand the creature. They sent a number of wise men from their group as emissaries to find the elephant and return with information. Once they found the animal, they each took a part of the animal to feel. One touched its leg, the other a tusk, the third an ear and they left believing they knew the animal. When they were questioned by their fellow blind men, they each offered different interpretations. The one who had felt the leg believed the animal was a pillar, extremely rough to the touch, and yet strangely soft. The one who had felt the tusk described the elephant as hard and smooth, with nothing soft or rough about it; furthermore, the animal was not nearly as stout as a pillar, but rather had the shape of a post. The third, who had held the ear, described it as both soft and rough, but not like a post or a pillar, but rather like a large piece of leather. Each was right in a certain sense, since each of them described the part of the elephant he had examined, but none was able to describe the entire animal."*[1]

10.1 INTRODUCTION

This book has presented the human rights framework as a paradoxical construct, resembling elephants as a majestic yet endangered species. On the one hand, it is amongst the most powerful and exalted of its kind: human rights entitlements instantly appeal to the imagination and articulate a powerful claim to equal dignity and well-being that transcends everyday life and appeals to the human condition. On the other, however, it has proven to be highly vulnerable in the face of contemporary developments of globalisation such as commodification and crimmigration, in particular in its legal articulation as human rights law. The present inquiry has therefore relied upon the notion of 'human rights elephants' to denote the extent to which human rights have been able to remain of relevance as a protection framework in contexts of confinement that are characterised by such contemporary trends of globalisation. In pursuing a comparison with elephants, this book has attempted to show how both the majestic nature of human rights, and their inherent vulnerability, play out in contemporary contexts of confinement that are subjected to developments of commodification and crimmigration.

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1 Saxe, 2007, p. 67, recounting the parable of the Blind Men and the Elephant as attributed to the Pali Buddhist Udana.

The overarching aim of this book has been two-fold. On a local level, it has analysed how commodification and crimmigration impact upon the potential of human rights as a protection framework in the confinement contexts of RPC Nauru and PI Norgerhaven. For both case studies, this has included an identification of their commodification and crimmigration features as well as analysis of responsibility under international human rights law. For RPC Nauru, in addition, analysis has included the way in which human rights as a broader, more holistic mechanism may operate in pursuing protection. At the same time, although analysis of these case studies is intrinsically valuable, it additionally illustrates a bigger story. Thus, this book has attempted to showcase – on a global level – the strengths and vulnerabilities of human rights as a protection framework. It has done so by showing how commodification and crimmigration in confinement are global trends that challenge international human rights law, how global and regional international human rights law frameworks have dealt with such challenges, and how human rights at the macro level can be reconceptualised as a holistic notion consisting of multiple dimensions and layers resembling a 'Brahma' rather than a 'Janus' face. Both levels of analysis have ultimately been connected through the paradigm of the 'glocal' level, which takes into account both global developments and local particularities. As has been shown throughout this book, the reciprocity between these two levels, operating together at the 'glocal' level, informs the implications of commodification and crimmigration for human rights protection. On many occasions, human rights protection in RPC Nauru has for example been highly problematic as a result of the local embedding of global commodification and crimmigration developments, whereas PI Norgerhaven on the other hand may in various respects be argued to constitute a 'best practice' – although particular difficulties also persist in this context.

This concluding chapter will first seek to answer the research questions that have guided this book. As previously explained, each sub-question was dealt with in a separate part of this book, dealing with the human rights elephant 'in the room', the 'tuskless' human rights elephant, and human rights elephants' 'desire paths'. In this concluding chapter, all parts will be drawn together in answering the respective sub-questions and in consequently formulating an answer to the main research question on which this research has been premised. The final part of this chapter, in turn, will offer some reflections on the four key concepts that have guided this inquiry: commodification, crimmigration, international human rights law, and the multi-dimensional notion of human rights. In relation to the latter, particular attention will be paid to what the research conclusions *mean* for the future of the human rights elephant.

As will be proposed, whilst the triangular interplay between commodification, crimmigration, and human rights protection appears typically complex – each consists of a myriad of processes that uniquely operate conjointly on glocal levels – in the end, what transpires is a somewhat paradoxical message

of both hope and concern that arises from human rights understood as being neither squarely within the legal purview, nor a mere myth based on moral conceptions. On the one hand, based on the findings of this research, commodification and crimmigration give rise to significant concern as to the future potential of human rights. On the other hand, akin to a popular saying about elephants, it is proposed that human rights elephants never forget: they continue to hold hope for all as the core promise that they are constituted upon. In doing so they develop organically to ward off challenges – for instance by developing into tuskless entities – and use novel desire paths, or *olifantenpaadjes,* to achieve their goals. Ultimately, the future of human rights as a protection mechanism does consequently not depend solely on the progressive responsibilisation of power bearers, nor on the unbridled expansion of the human rights catalogue, but on a genuine belief that human rights *matter*.

10.2 Answering the sub-questions of this research

This book has been structured in accordance with three sub-questions, each being dealt with in a separate part of this book:

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?*

In seeking an answer to the first sub-question, Part I has shown that both commodification and crimmigration mount a significant challenge to the protection value of human rights *qua* law. It has done so, first, by dissecting the global trends of commodification and crimmigration and by illustrating their presence and impact on the local level of the case studies' contexts.

In relation to commodification, this exercise relied on nodal governance and anchored pluralism theories: whilst the involvement of additional actors beyond the territorial state increasingly results in typically complex, fluid, and hybrid nodal governance systems, this does not mean that the state loses power per se as it may continue to fulfil key anchoring roles. Two particular types of commodification were distinguished: privatisation, drawing private actors with heterogeneous characteristics into the governance equation, and offshoring, engaging third states as relevant governance actors. As has been shown, both of these developments are part of contemporary globalisation trends, although privatisation has been more pervasive in its global outreach than offshoring that, both in relation to prisons and immigration detention facilities, has remained relatively modest in scope to date. Moreover, it has

been detailed how commodification is a core feature of both RPC Nauru and PI Norgerhaven: both involve complex networks of governance that significantly diverge from the idea of power and authority as exercised by territorial states. Still, important differences between both contexts have also been distinguished: for instance, the nodal governance network of RPC Nauru seems much more volatile and elusive than that of PI Norgerhaven due to the non-transparent nature of the governance structures and the additional layer of privatisation that resulted in less tangible power dynamics and continuously changing (contractual) relationships and responsibilities.

Where crimmigration is concerned, Part I has interpreted the notion of crimmigration in accordance with membership theory, developing a broad notion that includes both the criminalisation of immigration detention and immigrant populations and the immigrationisation of prisons and imprisoned populations. As argued, the notion of crimmigration denotes a wide variety of developments through which continuously developing membership categories are enforced on both sides of the physical and symbolic borders of the polity. In particular, this has been framed as a globalisation development given that the ongoing global interconnectedness has led to rapidly changing ideas about belonging to the polity. Instead of relying on classic distinctions between citizens and non-citizens on the basis of formal documentation, it has been argued that contemporary conceptions of membership traverse formal bases of belonging in seeking to in- and exclude certain populations on both sides of the sovereign border. A more complex distinction between citizens and supra-citizens on the one hand, and non-citizens and sub-citizens on the other, thus has been argued to guide contemporary regulation of the polity. Yet, in enforcing such distinctions, authorities have to make creative use – on an ad hoc instrumentalist basis – of more traditional mechanisms that intrinsically differentiate between belonging and non-belonging populations, including prominently those mechanisms native to the systems of criminal justice and migration control. In both realms, it has furthermore been argued, *confinement* may specifically be used as a key instrument to mark out such categories of belonging. Indeed, both prisons and immigration detention facilities provide mechanisms to remove non-belonging populations from the rest of society, both during confinement and afterwards, for instance through the deportation of those without formal citizenship entitlements or through the ongoing segregation of those with formal citizenship entitlements yet lacking informal membership. The employment of such crimmigration strategies as based in rapidly changing membership norms has consequently been traced both globally and has been identified in the case study contexts of RPC Nauru and PI Norgerhaven. Both contexts inhibit crimmigration features, although the specific crimmigration elements differ significantly from one another and arguably have dissimilar normative connotations.

In turn, by maintaining a glocal perspective, it has been argued that both commodification and crimmigration have the potential to challenge the pro-

tection value of international human rights law by subverting accountability under, and the effectiveness and legitimacy of, international human rights law. Indeed, combined, these developments challenge the two Janus faces of international human rights law: whereas commodification challenges the fundamental tenet of territorial state responsibility, crimmigration challenges the fundamental tenet of equal protection. This consequently entails a significant challenge to human rights law accountability, as many contexts of confinement influenced by globalisation developments significantly depart from the idea on which human rights law protection is based, i.e. the protection of equal individuals by and against territorial states as primary power bearers. This, in turn, has the potential of challenging the human rights law system's effectiveness as a whole, which in turn would require the system to be amended in order to remain of relevance as a protection mechanism. However, such endeavour necessarily needs to tread a fine line, as both doing too little, and doing too much, runs the risk of eroding the legitimacy of the international human rights law system as Part I has elaborated upon. Specifically, depending on which track they precisely follow, the system of international human rights law may become illegitimate, delegitimised, or subjected to a legitimacy deficit in accordance with Figure 8 in chapter 2.

In conclusion, commodification and crimmigration challenge the protection value of human rights *qua* law to a significant extent, being global developments that fundamentally provoke international human rights law at the levels of accountability, effectiveness, and legitimacy. This, then, is the elephant in the room: in light of such challenges, can human rights law remain of sufficient relevance as a protection framework in contexts of confinement that are influenced by globalisation developments?

Part II examined the extent to which international human rights law has been able to accommodate the commodification and crimmigration challenges within its framework to ward off challenges to its value as a framework of accountability and to its effectiveness and legitimacy altogether. This Part built upon the elephant in the room identified in Part I, questioning whether the human rights elephant – deprived of its ostensibly most fundamental asset, i.e. its protection capacity grounded in the fundamental tenets of territorial states and equal individuals as its metaphorical tusk – has been able to remain relevant as a protector in contexts of confinement influenced by commodification and crimmigration developments. It has done so by focusing on two somewhat paradoxical attitudes that are arguably indispensable for the international human rights law system to preserve its legitimacy in embarking on such an endeavour: that of *veracity* to international human rights law's fundamental tenets on the one hand, and that of *resilience* in the face of globalisation challenges on the other.

Taking these two attitudes as a starting point, analysis has shown that international human rights law has to a certain extent been able to accommodate globalisation challenges within its system by adhering to both attitudes

simultaneously. When regarding such efforts on a global level, this seems to have resulted in a rather balanced framework that takes into account both international human rights law's fundamental tenets, *and* contemporary globalisation realities. Indeed, the framework of international human rights law adheres to the fundamental premises of equal protection and territorial state obligations, whilst simultaneously allowing for exceptional deviations from these tenets in order to accommodate contemporary realities that at times require the system's dogmas to be bent, although not beyond their breaking point. For instance, crimmigration can to a certain extent be resiliently reconciled with the international human rights law system through the progressive interpretation of accepted interferences, without fundamentally breaching the underlying fundamental tenet of equal protection. Likewise, commodification can to a certain extent be reconciled with international human rights law through resilient efforts by which private human rights norms are pursued, rules of attribution are developed and clarified, and the margins of jurisdictional bounds are reassessed in light of contemporary developments, whilst at the same time remaining – or at least attempting to remain – largely veracious to the fundamental tenet of territorial states as primary duty bearers.

Application of this global framework to local contexts reveals, however, that the reality is more problematic and refractory. At the glocal level, it indeed becomes clear that difficulties persist, even where the bending of fundamental tenets is accommodated by the international human rights law machinery itself. The case studies of RPC Nauru and PI Norgerhaven illustrate these complexities. Thus, on the one hand, application of the globally developed approach as based in both veracity and resilience shows that the international human rights law system remains constrained by the tension that continues to exist between both attitudes. In some situations, such as PI Norgerhaven, this still results in a generally well-balanced system. Indeed, PI Norgerhaven showcases that human rights protection in contexts of confinement involving multiple actors in a nodal structure governing 'crimmigrant' populations can be modelled in accordance with both the required veracity and the required resilience. The case study could even be seen as a best practice of sorts, with many obvious frictions of responsibility being resolved through the interplay between globally developed frameworks and the local embedding of transparent relationships of authority based to an important extent on the involved states' own volition, although also in this context more subtle and advanced difficulties of international human rights law protection persist as the intermezzo at the end of Part II has shown. Indeed, even where an abundance of control is recognised, as is the case in the context of the Norwegian-Dutch cooperation, the fact that confinement is governed in a nodal fashion still raises a number of human rights issues that remain unresolved. Salient in this regard are, as the intermezzo has detailed, the scope of positive obligations on behalf of both nation states involved as well as their arguably unwarranted reliance on extensive and non-rebuttable levels of mutual trust. At least from the perspective of

positive obligations, the abundance of control in PI Norgerhaven hence is not a panacea for all human rights frictions that exist as a result of the facility's commodification features. Furthermore, as chapter 4 highlighted, whilst interferences with human rights entitlements in PI Norgerhaven might be justifiable, this ultimately is a question of proportionality that should be assessed in light of individual circumstances. Again, whilst the Norwegian-Dutch cooperation seems to be a best practice of sorts in this regard given that it is governed by transparent rules on which prisoners can be transferred from Norway to the Netherlands, ultimately human rights difficulties may persist in individual cases, i.e., when limitations of particular rights of certain individuals, for instance resulting from their relocation to the Netherlands, are deemed disproportionate.

As analysis of the case study of RPC Nauru has showcased, however, on other occasions it may prove very difficult for international human rights law to strike a proper balance at the glocal level. Thus, whenever it becomes involved in a so-called cat-and-mouse game, or rat race, with states' policies and practices, its ability to strike a vital balance between veracity and resilience becomes distorted. Where policies and practices continue to develop novel constructs to circumvent resilient efforts of the international human rights law machinery, international human rights law's indispensable veracity prevents it from bending the fundamental tenets beyond their breaking point. As RPC Nauru illustrates, state practices on many occasions are much more agile than the complex, embedded framework of international human rights law and therefore are anticipated to ultimately win the cat-and-mouse game or rat-race: their agile capabilities enables the state to respond with a high level of expediency to resilient efforts of the international human rights law machinery, whereas *vice versa* the international human rights law system does not possess a similar agility to deal with ingenuous state practices with a similar level of efficacy. This holds, on the one hand, true for the challenges posed by commodification: as the intermezzo in Part II highlights, the ambiguity of control and the capriciousness of the nodal governance network make it on many occasions difficult to demarcate human rights responsibilities, and, where nevertheless possible, state authorities and other involved actors may rapidly change the allocation of authority and control within the governance network. In this sense, the exercise of power and authority often is not only hardly tangible, but also frequently outdated, with governance being both obscured and continuously adapted. As chapter 4 has outlined, this on the other hand also holds true for the challenges posed by crimmigration: the state authorities involved may argue that rights are legitimately interfered with, or may amend the nature or intensity of confinement in order to argue that rights are not interfered with at all, as was the case in relation to claims that the right to liberty would be disproportionately interfered with in RPC Nauru. By doing so, states may effectively *use* – rather than evade – the workings of the law in order to argue that they meet their human rights responsibilities, whilst

constantly adapting to – and anticipating – further bending of international human rights law's fundamental tenets.

Thus, in comparison, whereas PI Norgerhaven may be considered to be a best practice in many regards, the context of RPC Nauru appears to be nearly its complete opposite. Still, both case studies show how human rights law difficulties persist in confinement contexts characterised by commodification and crimmigration, whether or not control is ambiguous or in abundance and whether or not state authorities engage in the cat-and-mouse game or rat race. International human rights law, indeed, seems to be only partially able to adapt itself to commodification and crimmigration realities at the glocal level, raising important questions as to the future protection value of human rights in light of the impasse.

These questions in turn informed Part III of this book. This part first addressed some typical responses to the identified human rights impasse, as well as their shortcomings, and subsequently looked beyond the legal paradigm of human rights to examine what other values human rights may have in settings of confinement. It has done so by reconceptualising the notion of human rights on the basis of four schools of human rights,[2] substituting the Janus-faced understanding of human rights for a more nuanced Brahma-faced conceptualisation. Through this exercise, an intricate framework of multiple human rights dimensions that may operate conjointly through the implementation of human rights consciousnesses, vernacularisation mechanisms, and tools has been identified. In this sense, the final Part of this book has discerned a myriad of protection values *beyond* international human rights law's protection value *qua* law: human rights are not necessarily legal deliberative standards, but can also be conceptualised as natural entitlements, protest tools, and discursive expressions. Each of these dimensions, furthermore, may operate separately or conjointly on multiple levels, be it as a ground for consciousness, as a vernacularisation mechanism, or as an instrumental tool. In accordance with such fragmented or hybrid conception, an interdisciplinary analytical framework has been proposed that allows for the holistic assessment of human rights' role and relevance as a protection mechanism. Human rights protection thus does not stop at the margins of the legal doctrine: other protection values than those of human rights *qua* law – based in morality, protest, and discourse – may be discerned that are equally significant aspects, or faces, of human rights protection. Through their complex interaction, a wide variety of unique pathways towards human rights protection can consequently be envisaged. At the same time, however, each of the various human rights dimensions may also be employed to pursue alienation strategies by means of which the protection value of human rights is gradually depleted. As such, the proposed framework is essentially empirical, not normative, in nature:

2 Dembour, 2006, 2010.

it does not spur but tracks endeavours of human rights protection as well as forces that counteract these processes.

Chapter 9 has illustrated how such a holistic analytical framework may be employed in the context of RPC Nauru by synergistically exploring various human rights dimensions with an actor-specific focus. In this sense it is a genuine illustration, not an exhaustive overview of human rights protection in RPC Nauru: certain vernacularisation efforts, as well as the use of potential alienation endeavours, are left out of consideration. Specifically, the analysis shows how various of the human rights dimensions interact in critical masses' efforts to seek the effectuation of protection. Human rights in their various dimension-specific understandings may hence be employed as bases for consciousness, as mechanisms for vernacularisation, and as tools to effectuate protection, implying the existence of various pathways towards actual protection that originate in, are shaped by, and can be traversed by relying on, human rights standards. As this examination hence makes clear, the use of 'global' human rights values in local contexts can consist of unique processes that combine various human rights elements to ultimately foster protection: such protection may flow from unique combinations of dimension-specific consciousnesses, vernacularisation mechanisms, and tools.

That is not to say, however, that such processes are necessarily successful in having a significant or lasting impact: the actual use of particular combinations does not imply effective human rights protection but rather indicates which routes towards protection involved actors *attempt* to traverse. In other words, the fact that actors attempt to travel certain routes does not mean that they necessarily reach their desired end destination. For instance, in the context of RPC Nauru, the various unique combinations that the examined critical masses utilise in attempting to achieve human rights protection do not give rise to overall optimism about their ability to effectively implement firm protection in practice. Indeed, more often than not, such attempts are significantly limited as a result of varying context-specific factors that weaken human rights law, human rights-based discretionary decision making, human rights-focused protest activities, and/or human rights discourse in their capacity as vernacularisation mechanisms.

Moreover, and closely connected to this observation, as mentioned above one should be warry of the fact that the use of unique human rights pathways may also result in progressive human rights *alienation.* Indeed, Part III has at various points emphasised that the proposed holistic framework is, in essence, squarely empirical and does not imply normative content per se: it can be employed to explore both how human rights protection is fostered and how it is diminished. In fact, both of these questions are inherently related: human rights protection is not envisaged to be a zero-sum game but results from the interplay between vernacularisation and alienation efforts, with 'net protection' arising where vernacularisation efforts are hegemonic. In this sense, the promising prospect of multiple dimensions does not necessarily imply the actual

guarantee of human rights but may, in fact, have the opposite effect. That does not mean that the multi-dimensional model of human rights ultimately has no normative potential, however: by making the processes of human rights protection and human rights alienation explicit in terms of their underlying components, normative scope for debate is opened up, allowing a wide variety of individuals and entities to be held accountable for their influences on, and attitudes vis-à-vis, human rights protection.

As the case study of RPC Nauru highlights, crimmigration and commodification elements may frustrate vernacularisation through each dimension, whilst commodification at the same time may open up novel pathways for vernacularisation through each dimension. As such, the complex interplay between commodification, crimmigration, and human rights protection remains of relevance also beyond analysis of human rights *qua* law. Commodification and crimmigration do not only challenge protection based on international human rights law but also have wider implications for protection through the more holistically conceptualised, multi-faceted notion of human rights. Viewed in this light, it appears important to continue to study human rights in conjunction with globalisation developments, not only when human rights *law* is concerned but also where human rights protection based on different dimensions, or an holistic assessment of the synergistic operation of human rights dimensions, is analytically explored. Of course this applies to studies of human rights in confinement, which has been the focus of the present inquiry, but it arguably also applies *mutatis mutandis* to assessments of human rights in different settings.

10.3 Answering the main research question

The inquiry in this book has pursued 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'?*

Whilst a general answer to this question could be formulated based on global developments only, a conclusion on the prospective role of human rights as a protection framework gains particular meaning when taking into account local contextual specificities. As the various parts of this book have shown, global developments and local implementations indeed interact and mutually inform one another in what may be regarded as a circular process. To this end, the book has denoted both trends at the global level as well as local occurrences in the case study contexts of RPC Nauru and PI Norgerhaven, seeking to synthesise both at what has been labelled the glocal level.

This analysis has shown that commodification and crimmigration mount significant challenges to accountability under, and the effectiveness and legitimacy of, international human rights law. The international human rights law machinery has, as outlined above, dealt with such challenges through a mixed veracious and resilient approach, but this has not fully offset the problems associated with both globalisation developments. In particular in situations where states engage in effective contestation of resilient efforts, the international human rights law system seems inapt to deal with the mounted challenges without encroaching upon its own legitimacy. This seems to result in a nearly inevitable human rights impasse, with the international human rights law machinery at times not being able to secure its future legitimacy as a protection framework without treading, precisely, its legitimacy.

However, this book has emphasised that human rights are not necessarily legal constructs that should be understood as incorporating moral and legal aspects (the 'Janus face' conception of human rights), but that they should rather be conceptualised as incorporating a variety of dimensions that operate at multiple levels simultaneously and that may be united in an overarching, fragmented framework of protection (the 'Brahma face' conception of human rights). In developing this reconceptualisation, this book has drawn on human rights notions developed in the literature in order to come up with an intricate framework of protection that incorporates (the interplay between) various human rights consciousnesses, vernacularisation mechanisms, and tools. Regarded this way, a whole new domain of human rights protection is opened up *beyond* international human rights *qua* law. This, in turn, provides novel pathways to ensure human rights protection (but also to frustrate it through alienation strategies), including in contexts of confinement that are characterised by commodification and crimmigration. Indeed, these complex interactions between different dimensions of human rights at different levels amount to unique processes that may be employed in local contexts, allowing for those seeking human rights protection to use the most effective combinations of consciousnesses, vernacularisation mechanisms, and tools.

Ultimately, the extent to which this can be effectively done depends on the glocal level where global notions of human rights, and local particularities, intertwine. Such unique intertwined realities, in turn, inform the extent to which synergistic uses of human rights dimensions will yield the desired results. Whilst this may provide leeway in light of the commodification and crimmigration challenges to international human rights *qua* law, at the same time it should be emphasised that this does not mean that such alternative pathways remain untouched by these very same globalisation developments. To the contrary, chapter 9 has illustrated how both commodification and crimmigration may frustrate vernacularisation through *each* of the four dimensions – none of the dimension-specific vernacularisation mechanisms is,

in this sense, necessarily pristine.[3] Moreover, as continuously emphasised, understanding human rights in such fragmented way does not only open up scope for novel pathways of protection, but also for the progressive alienation of human rights entitlements. Employed in pursuit of protection, the holistic framework may indeed yield significant results in the development of ingenious human rights safeguards, although not necessarily so; employed in pursuit of alienation, it may have the exact opposite effect. The framework itself is, as stipulated above, not normatively charged and therefore can, depending on the way in which it is utilised, be used for various normative ends.

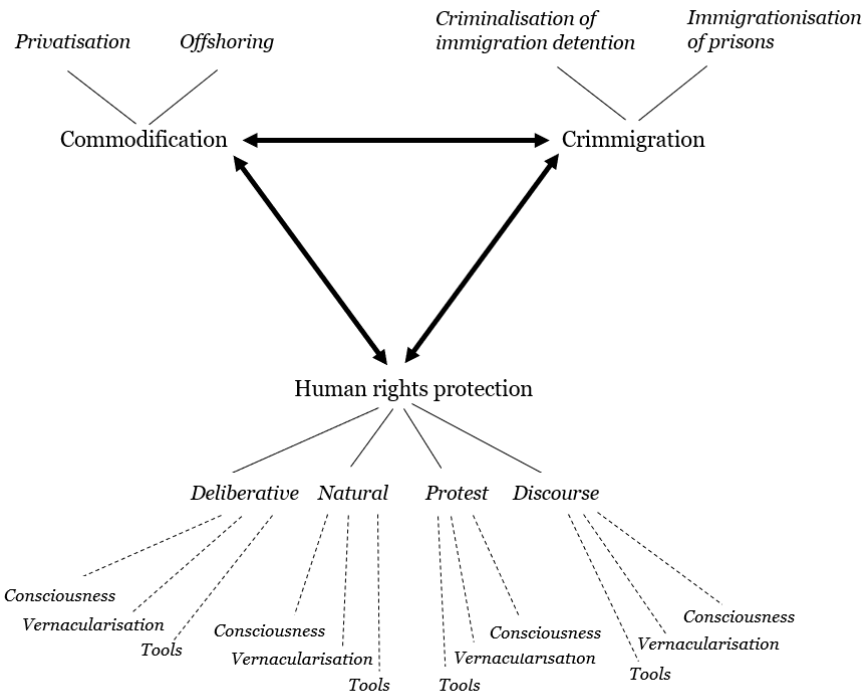

Figure 12: Complex triangular interplay.

3 As pointed out above, however, commodification at the same time may enable vernacularisation.

The analytical model presented in chapter 8 and applied to the context of RPC Nauru in chapter 9 allows for an examination of the thick processes of commodification, crimmigration, and human rights protection in all their complexities at the glocal level. Figure 12 illustrates such thick processes. Whilst a global triangular interplay can be discerned between commodification, crimmigration, and human rights, analysis of local contexts reveals not only that commodification and crimmigration are multi-faceted trends that consist of different legs, but also that holistic human rights protection may follow different trajectories on the basis of different contextual realities. Whilst it is important to recognise the triangular interplay between the three core concepts of this book in order to realise how various local occurrences are interconnected, it is at the same time imminent for analytical purposes to recognise that such triangular interplay is typically highly complex and incorporates a significant level of hybridity and heterogeneity. By analytically examining the glocality of such interplay, then, it becomes possible to take into account both what the implications of specific forms of commodification and crimmigration are for the various variants of human rights protection at the local level, and what this in turn means for the larger problematic interaction between commodification, crimmigration, and human rights protection at the macro level.

To what extent, then, can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by commodification and crimmigration? On the basis of the foregoing, and in light of the comprehensive scope of holistic human rights protection as envisaged here, the short answer would be that they could do so to a large extent. Indeed, operating synergistically, human rights seem to provide a significant potential for protection, as they offer a myriad of alternative trajectories that could be relied upon. The more nuanced answer, on the other hand, would be: it depends. It depends, more specifically, on the interplay between global developments and local implementations. Whilst human rights could remain of relevance as a protection framework in contexts of confinement that are characterised by commodification and crimmigration, whether they in a particular situation are effectively able to guarantee protection indeed depends on a number of complex factors, including the progressive development of global trends, the local particularities of specific contexts of confinement, the content of prevailing human rights consciousnesses, the embedding and use of human rights vernacularisation mechanisms and tools, and the levels of human rights protection and/or alienation pursued in a multi-stakeholder field. This book has provided a framework to assess such glocal realities and, in reaching this conclusion, encourages further research in a wide variety of case studies in order to further indicate the interrelationship between commodification, crimmigration, and human rights.

As the case studies of RPC Nauru and PI Norgerhaven have made clear, not only are the combinations of commodification, crimmigration, and human

rights at the local level unique, but they also have widely varying implications for human rights protection. This book has shown, partly on the basis of continuous reflection on both case studies, that human rights can remain of relevance in contexts of confinement where these elements are combined, and that the potential protection capacity of human rights is much more encompassing than legal studies may sometimes lead to believe, but above all this book has outlined the breadth and depth of human rights protection that remains vastly underexplored. As such, the conclusion that 'it depends' may not be the most satisfactory, but is the most genuine answer that can be provided here and functions as a proper beginning, rather than a definite end, of inquiries into a more holistic understanding of human rights. This book, therefore, ultimately attempts to fulfil an agenda-setting function by calling for further research into the full-fledged potential of, the contemporary threats to, and the inherent limitations of, human rights as a multi-dimensional, Brahma-faced phenomenon.

10.4 Reflections

In this final part of the conclusion, a number of reflections on the core concepts of this book – commodification, crimmigration, international human rights law, and 'human rights elephants' – will be offered in light of the research findings propounded above.

10.4.1 Commodification

In dealing with commodification in chapter 2, this book relied predominantly on the frameworks of 'nodal governance' and 'anchored pluralism'. It argued *inter alia* that both frameworks are not incompatible per se, as nodal governance is predominantly concerned with an empirical enquiry whereas anchored pluralism has a strong normative orientation. They can consequently be combined by developing concepts such as 'state-directed nodal governance' or 'anchoring nodes'.[4] The benefit of such an approach is that it allows for an examination of multi-actor environments through analysis of stakeholders' mentalities, technologies, resources, and institutional structures, whilst simultaneously acknowledging the vitality of the anchoring capacities of the state. In this sense, combining both frameworks opens up scope to critically dissect the role and operation of the state as one of many nodes in multi-actor governance contexts whilst at the same time recognising the *primus inter pares* position of state authorities and their regulatory capacities. On this basis, analysis in

4 See also Søgaard et al., 2016, p. 136.

chapter 2 *inter alia* interpreted the role of the Australian and Nauruan state authorities in the context of RPC Nauru as being central to a complex, fluid, and opaque web of nodal governance actors.[5]

At the same time, however, one should be wary of overly simplified interpretations of nodal governance networks. Whilst it may be true that Australia and Nauru have assumed central and leading roles in RPC Nauru, this does not mean that anything that happens within the confines of these facilities can automatically be attributed to either of both countries, either in a general sense or in terms of responsibility for internationally wrongful acts as examined in chapter 6. To the contrary, nodal governance theory in particular stresses that the typical complexity of nodal governance frameworks stands in the way of making general or abstracted claims as to the question who effectively governs in a particular context. Power and authority in nodal governance settings, it should be recalled, result from networked interactions rather than from the activities of a singular leviathan: they are, consequently, everywhere.[6] To say that those confined in RPC Nauru are completely within the control of Australia or Nauru would henceforth ignore the empirical nodal reality as was chronologically mapped in chapter 2,[7] and would accordingly fail to address the more intricate complexities of power that govern the facility.

However, it appears that scholarship dealing with RPC Nauru frequently fails to take into account precisely these intricacies that crucially characterise the governance arrangements in place. Even more so, many commentators – both within and outside of academia – have implicitly or explicitly maintained that RPC Nauru is in effect *Australian* and that all power and authority exercised within the facility amount to governing exercises by, or on behalf of, Australia. Many commentators thus refer to notions like '*Australia's* offshore detention regime' and '*Australian* offshore processing' without further emphasising or elucidating the intricate networks of governance that shape the reality of offshore processing.[8] This is not merely an issue of narrative or grammar but amounts to a structural framing exercise with far-reaching implications for the way in which RPC Nauru is conceived of. Such narratives maintain that private actors involved in RPC Nauru function merely as Australia's hands in exercising power and control, and that Nauru is a mere puppet state of Australia, therewith oversimplifying the complexity of nodal governance involved. Hence, by continuously emphasising that RPC Nauru *is* Australian, many commentators neglect not only the distinct position of private actors within the governance framework – having their own mentalities, resources,

5 Since the nodal governance framework of PI Norgerhaven did not involve private actors, the centrality of state actors in this context was already a given.
6 Holley & Shearing, 2017, p. 167; J. Wood & Shearing, 2006, p. 2.
7 See Figures 2-6 in chapter 2.
8 See e.g. Fleay & Hoffman, 2014; Heemsbergen & Daly, 2017; Narayanasamy et al., 2015; Neil & Peterie, 2018; Nethery & Holman, 2016.

technologies, and institutional structures – but also that of Nauru as the sovereign state within whose territory the facility is located.[9] In framing RPC Nauru as being typically and uncomplicatedly Australian, these commentators adhere to an approach that has many similarities to the approach taken by the Australian government in arguing that RPC Nauru is *not* Australian – a position that in turn is often criticised and refuted by precisely these commentators.[10] Indeed, both the Australian government's framing of RPC Nauru as essentially non-Australian, and commentators' framing of RPC Nauru as essentially Australian, oversimplify the complexity of the governance network and obscure the many ways in which power and authority in this network are typically negotiated, controlled, amplified, reduced, amended, and ultimately exercised. The result of both types of framing is that a proper understanding of the way in which RPC Nauru is being dynamically operated is obscured for the sake of argumentative – or at times even activist or opportunistic – purposes.

The topic of medical transfers from RPC Nauru to mainland Australia illustrates how such generalised understandings of power and authority misconstrue governance realities. Over the past years, one of the most unwaveringly contentious aspects of RPC Nauru has been the way in which medical needs that cannot be properly addressed by the local Nauruan hospital have been dealt with. For years, Australia has maintained that medical transfers to mainland Australia will only occur in exceptional circumstances, as it has been agreed upon with Nauru that hospital services are primarily provided for by the Republic of Nauru Hospital.[11] A special body within the Australian government consisting of DHA officials – the Transitory Person's Committee – reviews all medical transfer requests from offshore processing facilities. Sustained criticism has been voiced in this regard, however, in particular as a result of a number of incidents relating to the Australian government's overall reluctance to authorise medical transfers.[12] Such criticism has, however, overwhelmingly been directed at the Australian government only. On the one hand this may appear a logical result of the fact that it is the Australian government that has taken the lead in deciding upon transfer requests, but on the other hand this misapprehends the more dynamic processes that are involved in medical transfer decisions.

Thus, for one, it is important to consider the vital role of private contractor IHMS: the Australian government considers medical transfers on the basis of their assessments and recommendations, and IHMS thus fulfils an important role in initiating transfer requests. At the same time, it should be noted that IHMS operates on the basis of a service contract with the Australian government

9 See, for a notable exception, Andrew & Eden, 2011.
10 See e.g. Dastyari, 2015c, p. 692; Gerard & Kerr, 2016; Vogl, 2018.
11 DIBP, *Regional Processing Centre in Nauru*, supra n 239 of chapter 2.
12 See e.g. Aubusson, 2018; Smee, 2019.

and that Australia can thus be regarded as responsible for the way in which IHMS carries out its contractual obligations on Nauru. Moreover, the Australian government has "put extreme limitations on the type of patients" that IHMS can refer for medical transfer and it therefore seems that IHMS' technologies and resources to effectuate such transfers are subservient to those of the Australian government.[13] Still, it is important to take IHMS' position into account, as it shows how some medical transfer needs do not even reach the decision-making bodies within the Australian government. For instance, IHMS doctors have been reported to not even file a request for transfer as they believe such request would be denied by the Australian authorities.[14]

In addition, the fact that criticism has focused almost solely on Australia misapprehends the position of the Nauruan authorities in the processing arrangements generally and in medical transfer decisions in particular. Indeed, over time, the Nauruan government started to present itself more and more as an autonomous key actor in the nodal governance system with significant technologies to steer the course of events. This is *inter alia* illustrated by the aftermath of the *Migration Amendment (Urgent Medical Treatment) Bill 2018* that was introduced by independent MP Kerryn Phelps and that was passed by the Australian parliament in February 2019 in what was seen as a major defeat for the Coalition government.[15] This bill sets out the conditions for medical transfers from Nauru and Manus Island and stipulates that if two or more treating doctors advise that a person should be evacuated, the person has to be evacuated, unless the responsible Australian minister vetoes such transfer on the basis of a disagreement with the clinical assessment, threats to national security, or a transferee's substantive criminal record combined with a serious risk of criminal conduct. Whenever a medical transfer is refused on the basis of the first ground, i.e. that of disagreement with the clinical assessment, an independent Health Advice Panel will conduct a second assessment and may override the minister's veto. These streamlined procedures only apply to asylum seekers and refugees already on Nauru and Manus Island, not to new boat arrivals. As a response to the fact that this bill was passed, the Australian government announced that it would re-open the detention facilities at Christmas Island in order to send all medical transferees there first.[16] Of key importance for present purposes, however, is the fact that the *Nauruan* government introduced new legislation that likely hampers the effectiveness of the streamlined process outlined above. Nauruan parliament indeed passed a Regulation in February 2019 that outlaws non-authorised telemedicine for Nauruan

13 Doherty, 2018a.
14 Clark, 2016.
15 For the first time since 1941, a sitting Australian government lost a vote on a substantial piece of legislation in the House of Representatives.
16 H. Davidson, 2019.

residents.[17] Furthermore, another Regulation passed around the same time regulates that all overseas medical transfer referrals must go through the Republic of Nauru Hospital, are to be assessed by the Overseas Medical Referrals Compliance Committee consisting of registered health practitioners and other members approved by the responsible Nauruan minister, and have to be authorised by the minister.[18] In effect, this means that it becomes more difficult for those on Nauru to seek advice or counselling from doctors in Australia and that the Nauruan government assumes a more significant decision-making role in relation to transfer requests. Even where the Australian government approves medical transfers, where Australian Federal Courts order such transfers, or where – under the new Australian legislation – the Health Advice Panel overrides the Australian minister's veto in a particular case, the Nauruan Overseas Medical Referrals Compliance Committee and the Nauruan minister thus retain control over medical transfers as a result of Nauru's exercise of prescriptive jurisdiction.

Whilst the newly introduced Nauruan laws have been duly criticised,[19] and whilst the Nauruan government has defended such legislative exercises as part of its sovereign prerogative and as being "for the betterment of its country",[20] what this ultimately shows is that the dynamics within the governance network are much more complex and intricate than some appear to assume or admit. Overemphasising that RPC Nauru would be squarely Australian indeed gives rise to the idea that the power and authority to transfer individuals from RPC Nauru to Australia for medical purposes is within the sole prerogative of the Australian government, whereas in fact this obscures the technologies, mentalities, and institutional structure of the Nauruan authorities within the larger governance matrix. Especially in light of the fact that the Nauruan government has seemingly contested and conflicted with ongoing developments in Australia that impact upon the governance realm, using its legislative technologies in a determined effort, it becomes clear that properly valuing the complexity and hybridity of the nodal governance arrangements in place is of vital importance not only to understand the way in which RPC Nauru is being governed, but also how its operation may effectively be challenged.

Comparison to the case of PI Norgerhaven further elucidates why calling RPC Nauru an 'Australian' facility is not helpful either for analytical purposes or to command change. Contrary to the literature on RPC Nauru, authors writing about PI Norgerhaven have seldomly called this facility a fully 'Norwegian' prison. Rather, PI Norgerhaven has throughout been identified as the

17 Health Practitioners (Telemedicine Prohibition) Regulations 2019, 22 February 2019.
18 Health Practitioners (Overseas Medical Referrals Compliance) Regulations 2019, 15 February 2019.
19 See e.g. Conifer, Sawlani, & Dziedzic, 2019.
20 H. Davidson, 2019.

hybrid construct that it is: commentators have always emphasised that the prison facility is the result of unique penal cooperation that, as Liebling & Schmidt point out, "is neither 'Dutch' nor 'Norwegian'".[21] This, in turn, has led various commentators to scrupulously analyse the dynamics of the governance arrangements in order to reach conclusions on the way in which power and authority are, or should be, balanced and the extent to which both states' authorities have, or should have, ways to cooperate, conflict, and contest within the broader governance framework.[22] There is hence a marked difference between PI Norgerhaven and RPC Nauru in this regard: in the context of the former it seems almost absurd to speak about a squarely Norwegian facility as this clearly obscures the importance of the Dutch authorities as governance actors, whereas in the context of the latter it is almost commonplace to speak about a squarely Australian facility without due regard for the mentalities, resources, technologies, and institutional structures of the Nauruan authorities. This is even more confusing when considering that those confined in PI Norgerhaven remain subjected to the Norwegian penal system, whereas those confined in RPC Nauru are subjected to the Nauruan asylum processing system. From this perspective it is even less clear why RPC Nauru would be considered to be markedly Australian even though it functions as part of the Nauruan asylum processing system, whereas PI Norgerhaven – functioning as part of the Norwegian penal estate – is, rightfully, considered to be a hybrid.

This discrepancy may be explained from the perspective of the salient geopolitical relationships between Norway and the Netherlands on the one hand and between Australia and Nauru on the other. Whereas Norway and the Netherlands are generally considered to be equally footed on the geopolitical stage, therewith having by and large similar leverage as equal partners, a significant power imbalance exists in the relationship between Australia and Nauru. Indeed, if it were not for the financial aid received from Australia in exchange for hosting the RPC, Nauru would likely have faced bankruptcy at the beginning of this century as has been discussed in the introductory chapter of this book.[23] The hegemonic power that Australia exercises over Nauru – and, for that matter, to a large extent also over PNG – has to an important extent shaped the existing power relations in play, and it therefore does not come as a surprise that Nauru's volition to be involved in offshore processing is frequently questioned. However, as the above illustration of medical transfers in the context of RPC Nauru makes clear, this does not mean that Nauru consequently has no role to play in the governance network. To the contrary, whilst it may lack significant resources and as such may be con-

21 Abels, 2016; Johnsen et al., 2017; Liebling & Schmidt, 2018; Pakes & Holt, 2015, 2017; Struyker Boudier & Verrest, 2015; Todd-Kvam, 2018; Van Berlo, 2017b.

22 See e.g. Abels, 2016; Struyker Boudier & Verrest, 2015; Van Berlo, 2017b.

23 Connell, 2006; Firth, 2016, p. 297; McDaniel & Gowdy, 2000, pp. 192–193; S. Taylor, 2005; Thomas, 2014.

sidered to be a relatively 'weak' node in the governance equation, it at the same time possesses strong and unique technologies – such as the sovereign prerogative to exercise prescriptive jurisdiction – that enable it to have a lasting impact on the course of governance in accordance with its distinct mentality. Such mentality, in turn, may be based on a wide variety of concerns, such as moral judgment, sovereign reaffirmation, blatant opportunism, or pragmatic considerations.

The fact that inter-state cooperation is based on a significant power imbalance hence does not mean that the weaker state operates as a mere puppet of the hegemonic state. The Nauruan government in fact issued a press release with the title "Nauru is not Australia" in order to emphasise its self-standing position and prerogative.[24] More than once, the Nauruan government has furthermore proven to play key roles in shaping governance at RPC Nauru. This includes the introduction of regulations concerning medical transfers as illustrated above, but also broader trends by which Nauru has gradually assumed more extensive responsibilities within the facility as illustrated in chapter 2. Therefore, future analysis would benefit from a proper understanding of the facility as being an ultimate hybrid, similar to the way in which PI Norgerhaven has been understood in the literature. This does not only benefit analytical purposes by overcoming overly simplistic conceptions of the governance system of RPC Nauru, but also helps in reimagining – on a normative level – the future of RPC Nauru specifically and of broader offshore confinement developments more generally.

Likewise, the important role of private actors in a wide variety of nodal governance arrangements should be duly acknowledged. As chapter 2 has shown, the involvement of private actors in intricate frameworks of governance complicates proper assessment of responsibility, including in the realm of international human rights law. When analysing these types of governance structures, it is of key importance to distinguish the institutional structures, mentalities, technologies, and resources of private actors from the way in which the overarching governance network operates more generally. As Andrew & Eden likewise emphasise, "[t]he relative invisibility of the non-state actors […] provides an official narrative that sees the state as the central actor in the management of illegitimate 'others'".[25] By continuously keeping in mind the interests and mentalities of private actors, their resources and technologies, and the way in which they are internally structured, a wealth of information about the way in which governance materialises can be accessed which would otherwise remain unnoticed. For instance, in the context of RPC Nauru, the roles that the Salvation Army and Save the Children have played in their attempt to contest the system 'from the inside' would remain obscured if their actions would simply be regarded as actions of 'Australian welfare workers':

24 Government of Nauru, 2015b.
25 Andrew & Eden, 2011, p. 232.

including their institutional structure, mentality, resources, and technologies within the scope of analysis opens up room for an enhanced understanding of the extent to which resistance within the governance framework may, or may not, be successful. Likewise, by explicitly looking at the specifics of garrison and support service providers, issues of corporate responsibility have been raised that otherwise would not have surfaced, and innovative pathways to steer the course of events have been elucidated that otherwise would have remained out of sight. Consider, for example, the way in which welfare workers in RPC Nauru pressured managers of garrison providers to pursue disciplinary action by threatening to expose that various security guards had inappropriate relationships with those confined, as explored in chapter 9. The availability of such technology to steer governance only becomes observable when explicitly recognising the various actors' institutional structures and mentalities. Whereas for some purposes it may be opportune to use shortcuts in order to typify governance networks, such as reference to 'Australian' facilities, proper analysis should therefore take the full range of governance actors into account and should be vigilant not to oversimplify the way in which governance arises not from the actions of one dominant actor, but from the networked interactions between various nodal stakeholders.

10.4.2 Crimmigration

The concept of 'crimmigration' seems to be both straightforward – as a contraction, it clearly identifies the fields it is concerned with – and highly opaque. The concept indeed lacks a clear, uniform definition that is consistently applied across disciplines and jurisdictional contexts.[26] Chapter 3 of this book therefore commenced with a reconceptualisation effort, reconceptualising 'crimmigration' as a broad notion encapsulating a wide variety of trends by which membership entitlements are (re)distributed on the basis of shifting categories of membership inspired by globalisation realities. As was argued, it makes sense to conceive of crimmigration in this broad way as it allows for a myriad of developments, both in the realms of migration control and in in that of crime control, to be conceptually linked and to be empirically examined in conjunction. The way in which the notion has been subsequently used in this book illustrates the advantages of such an approach: whilst the crimmigration elements of RPC Nauru and PI Norgerhaven are fundamentally different, con-

26 This is not always clearly recognised in the academic literature. Some, for instance, have developed new contractions to denote novel fields of scholarship at the intersection of related fields, whilst referring to 'crimmigration' as a clear and useful analytical tool with a uniform definition. See for instance, on the intersection of consumer protection and criminal law ('crimsumerism'), Kornya, Rodarmel, Highsmith, Gonzalez, & Mermin, 2019, p. 112.

ceiving of crimmigration as a mechanism to distribute and enforce membership entitlements helps in getting a clear understanding of the way in which both contexts are intimately linked insofar as the carving out of membership is concerned. In other words, by understanding crimmigration as an 'ad hoc instrumentalist' notion that describes how authorities grapple with the enforcement of new and informal categories of membership,[27] it becomes possible to conceptually link distinct contexts that appear to be largely unrelated in terms of their rationalities, set-up, and operation, and to empirically assess how they enforce novel categories of belonging either through comparable or through dissimilar mechanisms and strategies.

Crimmigration is thus, contrary to what others have occasionally claimed, not a 'theory',[28] nor is it a normative construct per se. It is rather an empirical notion that opens up scope for novel analytical pathways towards exploring the role of membership conceptions and entitlements in an era of globalisation. Whilst the implications of various crimmigration trends may be worrying from a legal and sociological perspective – the ad hoc instrumentalist use of migration control and crime control as pragmatic instruments to enforce novel membership boundaries raises a lot of fundamental questions *inter alia* as to legal protection and social marginalisation – it henceforth stretches too far to denounce particular developments simply *because* they can be captured under the umbrella term of crimmigration. Put differently, simply because certain trends may be labelled 'crimmigration developments', this does not mean that such developments are therefore normatively flawed as an inevitable consequence – rather, it are the problematic implications of such empirical trends that need to be further dissected in order to reach solid normative verdicts.

This understanding of crimmigration as essentially denoting empirical developments has not always guided academic literature in the emerging field of 'crimmigration scholarship'. Some, for instance, speak about the "disturbing features of 'crimmigration'" as if crimmigration constitutes a clear-cut homogeneous phenomenon with clear normative dimensions.[29] Others speak about crimmigration being 'grim': "[t]he growing body of scholarship studying practices of crimmigration seems to paint a rather grim picture: to a greater or a lesser extent, crimmigration seems to be present in many national contexts".[30] Yet others frame crimmigration as "a response that has very little regard for the principle of the rule of law and the humanistic tradition of European nations" and that "has exceeded all constitutional and international

27 See also Sklansky, 2012.

28 See e.g. Azeredo Alves, 2017; Ellis, Brooks, Lewis, & Al Hashemi, 2011; Hartry, 2012, p. 20; Hermansen, 2015, p. 11; Hudson, 2018.

29 Arriola & Raymond, 2017, p. 15.

30 Van der Woude & Van der Leun, 2017, p. 28. Likewise, Menjívar et al. argue that there is a 'dramatic' expansion of 'crimmigration': Menjívar et al., 2018, p. 8.

law limits and has led to a situation that is legally, socially and politically unbearable".[31] Some even advocate for a more normatively charged understanding of crimmigration,[32] at times proposing it to be diametrically opposed to a 'no borders' politics.[33] Menjívares, Gómez Cervantes, & Alvord for instance maintain that "crimmigration scholarship *should* take a critical stance".[34] Likewise, García Hernández argues that "[a]s the source of intellectual insight into crimmigration law's many tentacles, scholars are uniquely well-positioned to identify its normative commitments, demand its demise, and identify a path toward a post-crimmigration legal regime".[35]

These types of normative injections into empirical determinations, even before regard is had to the actual implications of specific forms of crimmigration in particular contexts, should however be a cause of concern. Conflating empirical findings with normative significance indeed runs the risk of transforming crimmigration into a hollow notion, with the ad hoc use of instruments by state authorities being rendered largely insignificant in favour of normative exclamations denouncing the use of all measures that may resemble 'crimmigration' as such. Admittedly, the term 'crimmigration' itself may not be very helpful in this regard, as it seems to be normatively charged precisely by pointing out how criminal law (or crime control) and migration law (or migration control) increasingly converge: if such development were not problematic in a general sense, the term itself would most likely not have come up in the first place. As others have highlighted, "in order for something to die, it must first be named, identified and 'birthed'".[36] In fact, when coining the term, Stumpf even talked about a so-called 'crimmigration *crisis*'.[37] The term has moreover been provided with a number of definitions that highlight normative implications: according to some, for instance, the underlying rationale behind the process of crimmigration is "to catch dangerous individuals – i.e. immigrants as well as criminals",[38] which instantly draws normative aspects into the definition of crimmigration, whereas this book has advocated a more neutral understanding of the term as comprising ad hoc instrumentalist uses of migration control and crime control in carving out membership more generally. By extension, it is argued here that since crimmigration is no proper theory but a collective term to denote a plethora of developments, its normative significance – both in general and in relation to specific contexts – should not be assumed. It is the basis on which it operates, and the results that it yields, that may be normatively reflected upon, but such reflection cannot be based

31 Šalamon, 2017, pp. 252–253.
32 Garner, 2015; Menjívar et al., 2018, p. 9.
33 Aiken et al., 2014, p. xi.
34 Menjívar et al., 2018, p. 9 (emphasis added).
35 García Hernández, 2018, p. 199.
36 Kornya et al., 2019, p. 112.
37 Stumpf, 2006.
38 Van der Woude, 2016, p. 53.

simply on the determination that 'crimmigration' is in play. When applying such latter approach, the differences between the normative shades of the causes and implications of different crimmigration trends would indeed be unjustifiably faded in favour of one overly generalised, normative reflection of disapproval whenever the 'crimmigration' label is attached.

This is even more so now that crimmigration has transcended its original legal connotation and encapsulates a variety of levels, including those of policy, discourse, and enforcement.[39] The notion of crimmigration may offer a useful shortcut to discuss these developments, but this should not run the risk of undue conflation of the (normative) specifics of each of these levels on which crimmigration plays out. The use of crimmigration on each of these levels has, as this book has also illustrated, unique implications for *inter alia* legal protection and social (dis)enfranchisement. The merger of crime and migration as a matter of law is indeed accompanied by fundamentally different challenges than such merger as a matter of policy, discourse, or enforcement. Of course these levels may ultimately be synergistically linked – discourse may inform law and policy, law may inform enforcement, and so on – yet it is henceforth necessary to not only distinguish specific contexts of crimmigration, but also to maintain a proper distinction between the various levels on which it may operate. Ultimately these levels could, and arguably should,[40] be regarded in synergy, yet such endeavour continuously has to take into account that different levels – each with their own characteristics, challenges, and implications – are at play.

Although this book has advocated a rather broad reconceptualisation of the 'crimmigration' nomenclature, it has attempted to avoid falling into such trap where normative implications are *prima facie* connected to empirical observations of crimmigration. Rather, this book has used the notions of accountability, effectiveness, and legitimacy to examine the normative implications of crimmigration for the system of human rights protection. By setting such benchmarks, this book has tried to outline a nuanced picture of how crimmigration impacts upon human rights protection both generally and in relation to RPC Nauru and PI Norgerhaven. In relation to that latter case study, for instance, this book observed that crimmigration occasionally may operate rather constructively as it provided FNPs detained in PI Norgerhaven with more extensive opportunities to enjoy their right to family life. Such observations do not diminish the conclusion that crimmigration in this context also continues to significantly challenge human rights protection, yet do contribute to a more holistic and rich understanding of how specific crimmigration

39 J. Brouwer et al., 2018; J. Brouwer, van der Woude, et al., 2017; Di Molfetta & Brouwer, 2019; Doty & Wheatley, 2013, p. 435; Franko Aas, 2011; Van der Woude & Van Berlo, 2015, p. 63; van der Woude & van der Leun, 2017; van der Woude et al., 2014.

40 J. Brouwer et al., 2018, p. 448; Van der Woude & Van Berlo, 2015, p. 63; van der Woude et al., 2014.

elements in specific case studies operate, which in turn allows for evidence-based normative assessment.

Ultimately, the conflation of crimmigration's empirical and normative aspects may derive from the fact that, as pointed out above, no consensual definition of 'crimmigration' exists. The term has been employed to describe a wide variety of developments, from very narrow ones – such as particular attempts to criminalise migration in particular national contexts – to very broad ones – including the marking out of membership in contemporary globalised societies as explored in this book. As a starting point, it is important that those engaging in crimmigration debates continue to define what they are referring to when they employ this nomenclature, at least up until the point that a more consensual definition has been articulated. Otherwise, the precise object of study remains somewhat opaque whenever issues are regarded "through the lens of crimmigration".[41] The present book has proposed a particular reconceptualisation that may, or may not, gain traction and that could inform future research agendas covering both the empirical and normative implications of membership politics in globalised societies. Of course, this leaves room for different interpretations of 'crimmigration', potentially even for interpretations that have been heavily influenced by normative considerations, yet for the sake of a genuine and transparent academic debate it is important that such interpretations are continuously made explicit. Otherwise, the notion of crimmigration would amount to little more than a catchphrase with different non-explicated meanings depending on which academic dialect one speaks. This would be particularly problematic given that 'crimmigration scholarship' essentially involves an eclectic and interdisciplinary discussion conducted by scholars that speak different disciplinary languages and that analyse different geographical contexts to begin with. If, in such interdisciplinary context, common terminologies and understandings for prominent concepts such as crimmigration are lacking, dissonance or even outright misunderstanding lurk: those participating in the discussion would not so much be *lost* in translation, as they would *lack* a translation in the first place.

10.4.3 International human rights law

Although international human rights law has been a central element of this book, its importance has simultaneously been contextualised in a broader matrix of human rights protection, of which international human rights law is but one dimension. This does not mean, however, that the ongoing relevance of international human rights law as a self-standing framework, with its

41 See e.g. Dekkers, 2019, p. 22.

internally-geared logic and systemic features, is called into question. To the contrary, the system of international human rights law remains one of the most vital and convincing articulations of human rights – in this sense, the fact that it has almost become reflexive to refer to human rights law when discussing human rights is hardly surprising and its pervasiveness should accordingly not be underestimated.[42] Consequently, legal scholars and lawyers continue to play vital roles in the development of human rights norms, especially where such norms are endangered as a result of changing social realities and contextual circumstances.

The ambitious – and sometimes courageous – efforts by human rights law scholars in seeking to fulfil such roles are laudable and ought to be encouraged. Faced with contemporary developments of globalisation, including commodification and crimmigration, various strands of human rights scholarship have over the past decades indeed explored – either with explicit reference to these developments or on a more implicit basis – the interrelationship between such globalisation trends and the framework of international human rights law. In doing so, legal scholars focus often on the necessary changes that need to be implemented in order to secure international human rights law's ongoing relevance as a protection framework. As such, their work on many occasions focuses on particular interpretations of international human rights law that ought to make the system, as it were, 'globalisation-proof'. These contributions as such pursue a reformist agenda that stretches beyond mere descriptive analysis.

On the one hand, notable examples of reformist endeavours focusing on the intersection of international human rights law and various contemporary reconfigurations of power, which in this book have been captured by the notion of 'commodification', include the works of respectively Jägers, Milanovic, and Vandenbogaerde.[43] As chapter 5 highlighted, such scholarship ostensibly applies a functional approach to human rights, often not only looking at the *lex lata* but, importantly, also at the *lex ferenda*. Jägers for example examines corporate human rights obligations not simply by describing the system of international human rights law, but by actively searching for room to accommodate such private obligations. She does so by deliberately advocating a broad interpretation of human rights provisions.[44] Likewise, in the context of extraterritorial jurisdiction, Milanovic argues that the existing models for extraterritorial jurisdiction are insufficient to provide bases for the extraterritorial application of international human rights law that are "stable in the long run".[45] Therefore, on normative and reformist rather than descriptive grounds, he proposes an alternative model that would entail that "the state obligation

42 T. Evans, 2005.
43 Jägers, 2002; Milanovic, 2011; Vandenbogaerde, 2016.
44 Jägers, 2002, p. 256.
45 Milanovic, 2011, p. 263.

to respect human rights is not limited territorially; however, the obligation to secure or ensure human rights is limited to those areas that are under the state's effective overall control".[46] Whilst Milanovic makes a convincing case why such distinction on the basis of positive and negative obligations ought to be accepted as a guiding model of extraterritorial jurisdiction, it has to be recognised that this effort is by and large of a *de lege ferenda* nature in that it develops a model that is arguably clear, predictable, and balanced in light of contemporary realities, yet has no firm basis *de lege lata*. As Milanovic himself recognises, the development of such an alternative model is primarily grounded in concerns for the effectiveness of international human rights law.[47] Looking specifically at the ECHR, he even recognises that the implementation of his preferred model "would require a radical rethink of Strasbourg's approach, and to a lesser extent also that of other human rights bodies".[48] In the context of human rights accoutability in multi-actor regimes, Vandenbogaerde in a similar vein sets out to develop a model of shared accountability in international human rights law, and in doing so, he likewise relies on a functionalist approach that is largely based in considerations *de lege ferenda*.[49] In introducing his quest, he thus articulates that

> "from […] observations or empirical reality, we fully concur with others that international human rights law will be marginalized even further *if it is not adapted to our independent world*. The problem statement of this book is that human rights law will lose its legitimacy as a corrective to power. This is considered worrying because already today human rights law is marginalized […]. *The challenge is to make human rights law and its accountability mechanisms compatible with reality*. […] The goal of this book is to […] [explore] *the possible contours and viability of a multi-duty-bearer accountability framework* in the field of ESC rights."[50]

Similar to the aforementioned contributions, his work is hence geared towards enhancing international human rights law's effectiveness as a system that corrects the exercise of power.[51] By identifying 'building blocks' for a multi-duty-bearer accountability framework, it transcends mere descriptive reflection on international human rights law's state of the art in order to explore how the system of international human rights law can be adapted to contemporary realities.[52]

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46 Milanovic, 2011, p. 263.
47 Milanovic, 2011, p. 210.
48 Milanovic, 2011, p. 211.
49 Vandenbogaerde, 2016.
50 Vandenbogaerde, 2016, p. 16 (emphasis added).
51 And, arguably, towards enhancing its legitimacy, although this book has maintained a somewhat different view by arguing that simply adapting the human rights law system to contemporary realities does not necessarily solve its legitimacy problems.
52 Vandenbogaerde, 2016, p. 300.

On the other hand, examples of reformist scholarly work exploring the relationship between international human rights law and various developments that in this book have been labelled as developments of 'crimmigration' include the contributions of amongst others Kesby (on prisoners' human rights) and Dembour (on migrants' human rights).[53] Kesby's work is somewhat implicit reformist in nature, in that it does not set out an agenda for reform as such but rather highlights, in the context of prisoner disenfranchisement, that international human rights law's efficacy in questioning disenfranchisement has only been a partial victory.[54] Thus, her work incorporates clear normative reflections as to the position of international human rights law in contemporary confinement contexts:

> "international human rights law and domestic human rights principles serve as a break but not a bar on exclusion from the rights of citizenship on the grounds of deviancy. The 'political equality' of some prisoners remains tenuous, their membership of the political community uncertain. Imprisonment may no longer automatically signify exclusion from the political community, and yet exclusion persists, resurfacing within the body of serving prisoners."[55]

As she by extension outlines, international human rights law's approach reveals that imprisonment alone cannot justify disenfranchisement, yet "the equality of citizenship is forgone if disenfranchisement is considered to be a proportionate measure", which is deemed normatively unjustifiable at least from an Arendtian perspective.[56]

By comparison, in the context of immigration detention and of migration more generally, Dembour reflects on the human rights protection of migrants by comparing case law from the ECtHR with that of the IACtHR, based on the observation that contemporary policies and practices are at odds with the protection of migrants as individuals with inherent human rights entitlements.[57] As she observes throughout her book, "it has always been and continues to be extremely difficult – indeed too difficult – for migrants to have violations of their human rights recognized and denounced by the European Court of Human Rights", whereas the IACtHR "seems far more inclined to push for the recognition of migrants' rights".[58] These considerations align with the reconceptualisation of human rights as a multi-dimensional concept as set forth in the present book, which is not surprising given that the Brahma-faced model presented in chapter 8 was heavily inspired by Dembour's previ-

53 Dembour, 2015; Dembour & Kelly, 2011; Kesby, 2012, pp. 67–91.
54 Kesby, 2012, p. 77.
55 Kesby, 2012, p. 77.
56 Kesby, 2012, p. 90.
57 Dembour, 2015; Dembour & Kelly, 2011.
58 Dembour, 2015, p. 1.

ous work.[59] However, on the basis of these descriptive conclusions, Dembour consequently takes a strong normative turn by arguing that the approach taken by the ECtHR – which, in chapter 4 of this book, has been presented as an attempt to balance the interests of veracity and resilience – is "tamed" and that the ECtHR consequently does not locate "the tipping point in law between suffering which is considered legitimate and suffering which is considered illegitimate" early enough.[60] The ECtHR's case law, in which a variety of legitimate interferences with human rights entitlements including those of migrants have been accepted, is thus argued to be problematic and out-of-sync with contemporary realities. As Dembour maintains, this holds not only true for the way in which the ECtHR has dealt with the substance of the Convention, but also for procedural barriers that migrants may encounter in lodging human rights proceedings. On this basis, she argues that the ECtHR has to change its case law as well as its procedures.[61] Even more so, Dembour concludes that the ECtHR's approach as it currently stands "appears comfortable with disregarding the demands of human rights ethics – so much so that it even condones rightlessness – the very antithesis to human rights".[62] What is particularly interesting for present purposes is that she thus presents the approach taken by the ECtHR as the antithesis of human rights protection, whilst she simultaneously continues to rely on the international human rights law system in pursuing reformist endeavours rather than on human rights protection through other, concurrent human rights dimensions. In the European context, the *lex lata* is thus combatted with the *lex ferenda*, paradoxically to a certain extent by relying on the *lex lata* as applicable in the context of the IACtHR. In other words, notwithstanding profound and pervasive criticism of the European system, answers to the identified normative problems are being sought *within* the system, relying unabatedly at the potential for internal reform, rather than on the *outside*, relying on other vernacularisation mechanisms or human rights tools to foster migrants' human rights protection.

In addition to these examples of scholarship at the intersection of international human rights law on the one hand and commodification or crimmigration on the other, some authors have begun to explore the overlap between all three of these concepts. For instance, some have focused in their analytical work on the relationship between international human rights law on the one hand and the effectuation of crimmigration mechanisms trough commodification practices on the other.[63]

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59 Dembour, 2006, 2010. See also Van Berlo, 2017b.

60 Dembour, 2015, p. 503.

61 Dembour, 2015, pp. 505–508.

62 Dembour, 2015, p. 511.

63 For example, in the context of the EU, the human rights implications of effectuating crimmigration rationales through nodal governance networks have – albeit often implicitly – been examined by amongst others Gkliati, 2018; Liguori, 2019; Oudejans et al., 2018; Pijnenburg, 2018. In addition, in the US context, the way in which human rights entitlements are

Some of these efforts, regarded as hegemonic responses to the human rights impasse identified in this book, were already briefly reflected upon at the beginning of chapter 8. These strands of scholarship are based on a genuine belief that the answers to the impasse are to be found *within* the system of international human rights law itself, and that such impasse can ultimately be overcome by amending and/or expanding the system's scope, rationale, and/or operation. First, it should be reiterated that these attempts are laudable in the sense that they place human rights norms front and centre and have the system's protection value at heart. Furthermore, no criticism of such endeavours can reasonably be based on the observation that authors pursue reformist agendas as such: one of the key elements of academic scholarship is that it does not only describe existing complexities but that it also contributes to future alignment on the basis of normative choices. Still, as was also highlighted in chapter 8, these efforts are not always satisfactory as they may have a counter-effective influence on human rights protection and may jeopardise the larger human rights project. For instance, various scholars have denoted risks associated with the continuous expansion of the human rights catalogue, pointing for instance to the fact that such expansion leaves states with a wide discretion to apply cherry-picking strategies when engaging in human rights protection and to justify state policies and practices more generally.[64] More pressingly, reformist approaches do not always seem to take into account that international human rights law cannot bend beyond its breaking point. Indeed, on the basis of international human rights law's veracity to its fundamental tenets and resilience in the face of contemporary realities, even under the most innovative approaches – being tailored to present-day circumstances – a certain leeway continues to exist for state actors to deflect responsibility and to interfere with particular entitlements. Put differently, unless one is prepared to say that *all* actors have human rights obligations vis-à-vis *all* individuals, therewith doing away with the fundamental tenets of territorial states as duty bearers, and that no interferences with human rights entitlements can *ever* be justified, threshold criteria will continue to govern the system of international human rights law, allowing states to – either deliberately or accidentally – refrain from meeting the relevant criteria and to consequently evade responsibility in relation to certain individuals. Through nodal governance arrangements, for instance, states have significant opportunities to increasingly distance themselves from potential rights violations, therewith impeding effective assessment of, e.g., effective and overall control over territory or person or, for that matter, any similar criterion. Likewise, through crimmigration measures such as an enhanced reliance on confinement, a certain depletion

gradually depleted through the operation of crimmigration rationales in private prison facilities specifically has been examined by *inter alia* Brewer & Heitzeg, 2008a; Witherspoon, 2007.

64 Hafner-Burton & Tsutsui, 2007, p. 414; Koskenniemi, 2011, p. 134; Posner, 2014a, 2014c.

of rights can be justified as long as the relevant proportionality thresholds are met. Again, unless one is prepared to give up on the existence of these thresholds – which, as outlined in chapters 2 and 3, would not only distort the balance between veracity and resilience but would also run the risk of eroding the system's legitimacy as a whole – the international human rights law system cannot be modelled in such a way that it will inevitably prevail in the ongoing cat-and-mouse game in the long run.

Notwithstanding the commendable commitment of the aforementioned contributions, it is therefore important to maintain a vigilant and reserved stance in light of the international human rights law system's legitimacy that appears to be at stake. It is, indeed, of crucial importance that the system maintains its integrity by continuously keeping in mind the needs to be both resilient and veracious – being too resilient to the detriment of veracity, just like being too veracious to the detriment of resilience, runs the risk of distorting the system's legitimacy overall. International human rights law in this sense cannot be moulded, in a chameleon-like fashion, in accordance with demands arising from social reality without due regard to its fundamental tenets. It is a powerful yardstick, but one that comes with a principled basis and that has been shaped in accordance with certain key conceptions of what it is supposed to regulate. It can, and should, therefore not be used to solve all ills of this world: to do so would mean that the system's legitimacy is eroded from within. Rather, it has to tread a fine line in order to not lose its legitimacy on account of being either too veracious or too resilient.

This is, however, not always an easy task as the case law of the ECtHR as examined in chapter 7 has illustrated. Indeed, the search for protection has led the ECtHR's case law on extraterritorial jurisdiction to be characterised by a number of complexities and apparent paradoxes. Whereas the ECtHR has purportedly outlined two distinct models of extraterritorial jurisdiction, chapter 7 has addressed six complexities that have arisen as a result of the Court's case law and that cast doubt on the coherency and clarity of its approach. In fact, these complexities add to the more general criticism that, in a number of cases clearly involving questions of extraterritorial application, the ECtHR did not even raise the question of jurisdiction *at all*.[65] Whether looking at the seemingly inconsistent approach taken in the Cyprus cases, the ambiguous standards used in cases of extraterritorial military detention, the arguably obscure application of the 'public powers' criterion in notably *Banković* and *Al Skeini*, or the seemingly conflated use of tests of attribution and jurisdiction, what these complexities show is that the Court has had significant difficulties to draw a firm and consistent line delineating the Convention's scope of application in cases where states operate at the fringes of the applicable tests of effective and/or overall control as developed under the spatial and personal

65 Den Heijer, 2011, pp. 47–49.

models of extraterritorial jurisdiction. This goes to show that even the ECtHR, interpreting the Convention as a living instrument, has had significant difficulties in reconciling its case law on extraterritorial jurisdiction with a coherent, consistent, and principled approach, taking into account both the need to be veracious to the Convention's fundamental tenets and the need to be resilient in the face of contemporary challenges.

International human rights law hence allows for normative reflection and steering, but *within bounds*. These bounds, in turn, are set by the fundamental tenets underlying the international human rights law system. This means that the system allows for resilience on the basis of normative argumentation, but that such resilience can at the same time not transgress the boundaries that veracity dictates. In this sense, international human rights law ultimately allows for manoeuvring that can best be classified as 'limited resilience': it may continue to be a living doctrine, but cannot bend beyond its breaking points as set by the fundamental tenets.

Therefore, international human rights law should, in order to remain legitimate, *always* be developed in accordance with a principled, nearly organic approach – whether it concerns accepted interferences, the development of private obligations, the interpretation of attribution rules as developed under public international law, or the development of extraterritorial jurisdiction models. In relation to private human rights obligations, this for instance means that whilst endeavours to provide for such obligations are laudable, it is as a matter of principle important to maintain an appropriately reserved stance until a firm, binding legal basis for responsibility has been organically articulated. Whilst international developments towards such binding obligations are in full swing, the system is not there yet and private obligations are, consequently, as of yet not part of the catalogue of binding international human rights norms.[66] This does not mean that one cannot address private actors' social and/or corporate responsibilities and their voluntarily adopted standards of human rights, but in doing so one should be reluctant to rely on arguments that private parties should obey such standards *as a matter of binding international human rights law.* Throughout, the difference between the *lex lata* and the *lex ferenda* should hence be emphasised and should be front and centre to any substantial consideration. This also requires, for example, clear acknowledgment that *Drittwirkung,* or horizontal application of human rights norms, essentially concerns obligations of *states* rather than or private actors: the fact that states can be held responsible for failing to uphold their positive obligations should not be misinterpreted to mean that private actors suddenly have become human rights duty bearers as a matter of public international law.[67]

66 See, on the zero draft of *the 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises'*, footnote 46 of chapter 5 and accompanying text.

67 See, for the exception of the CFREU, section 5.3. of chapter 5.

At the same time, one may rely on the multidimensional framework of human rights as set out in chapter 8 of this book to pursue human rights protection even in areas that may not fall within the protection purview of international human rights law. In using this framework, as this book has shown, one does not necessarily have to abide by the fundamental tenets that constrain the operation of international human rights law, therewith opening up a broad potential for protection through the synergistic use of dimension-specific consciousnesses, vernacularisation mechanisms, and tools. It is this multidimensional, Brahma-faced conceptualisation of human rights, and its meaning for the 'human rights elephant', that this chapter will now turn to in providing some final reflections.

10.4.4 Final notes on the 'human rights elephant'

This chapter began with recounting the parable of the Blind Men and the Elephant. It tells a story of how different people, having explored different parts of the same phenomenon, may hold completely different and even opposing views as to its nature, structure, and substance. None of them is strictly speaking *wrong*, as they each truthfully explain the parts that they explored, yet each is ultimately *incomplete* as none grasps the bigger picture.

This parable seems to serve appropriate metaphorical purposes in the context of what this book has labelled the 'human rights elephant'. Indeed, this book has been structured in accordance with an elephant metaphor to describe various relevant aspects of human rights protection in the face of contemporary globalisation developments. Parallels have been drawn throughout this book between elephants and human rights, pointing out that both are endangered species as a result of contemporary globalisation developments, that both face significant challenges when deprived of their primary assets for protection, and that both may follow alternative 'desire paths' to ultimately reach their destinations. As Part III of this book has furthermore pointed out, the human rights elephant is necessarily a holistic entity that comprises various dimensions and allows for multiple desire paths to be followed simultaneously. This, in turn, closely connects to the parable recited above: whilst various disciplines, amongst which most prominently that of legal scholarship, have explored human rights, they often have only explored *parts* of the more holistic, multi-dimensional entity without due regard for – and on many occasions even without recognising the existence of – the larger phenomenon. Whereas lawyers may hence, for example, have focused on the human rights elephant's *tusks* as its primary protection mechanism, their focus on the problematic implications of depriving the human rights elephant of its tusks for human rights protection has neglected the fact that the human rights elephant may also act as a protector through *other* means, for instance through the use of its trunk, legs, or intelligent decision making, and therefore does not die per

se. More specifically, this means that even where international human rights law as a protection mechanism is bound to meet its limits, protection may – albeit not necessarily – still flow from other, concurrent dimensions. Furthermore, in Part III it has been argued that such protection is typically complex and may involve the combined use of dimension-specific consciousnesses, vernacularisation mechanisms, and tools.

Hence, even where human rights *law* is regarded as the tusks of the human rights elephant, being frequently regarded as its most sublime and powerful protection mechanism, it is not necessarily justified to regard the deprivation of human rights elephants' tusks as 'the end' of human rights protection as such.[68] One should not close the eyes, akin to the blind men exploring the mythical elephant, for the other parts of the human rights elephant from which protection may flow. This book therefore finishes with a call for human rights scholars from all disciplinary backgrounds, but in particular for legal scholars, not to be blind to the bigger picture that the human rights elephant constitutes. Human rights are much more majestic than legal conceptions may suggest, just like elephants are much more majestic than the individual descriptions of the blind men in the parable led to believe. Human rights protection, furthermore, may be many-fold, and it seems that we are only at the beginning of holistically exploring the full potential that can be achieved through the proper and genuine nurturing of human rights elephants.

This book has engaged with various strands of scholarship in order to explore the core of human rights protection. Whilst the triangular interplay between commodification, crimmigration, and human rights protection appears typically complex and intricate – each consists of a myriad of processes that operate synergistically in unique ways on glocal levels – in the end, what transpires is a message of hope that arises from human rights understood as being neither squarely within the legal purview, nor squarely a myth based on moral conceptions. Akin to a popular saying about elephants, it is proposed that human rights elephants *never forget*. Specifically, they never forget those that they protect: at their core they continue to hold hope for all as the core promise that they are constituted upon. They continue to be present, for those that direly need them, although they are not always as visible or as tangible as one would hope or require them to be. At times they appear to be lost, especially in the face of seemingly insurmountable challenges, yet in reality they continue to underly social interaction in a myriad of ways. They provide hope, guidance, ideals, and a way to express precisely that what is lacking in various contemporary realities. In doing so they develop organically to ward off challenges and to secure their continued existence, for instance by develop-

68 Compare Douzinas, 2000; Hopgood, 2013; Wacks, 1994. See also Lettinga & Van Troost, 2014.

ing into tuskless entities,[69] and they use innovative novel desire paths, or *olifantenpaadjes*, in attempts to achieve their goals.

Admittedly, there is always a risk that human rights are misused with improper motives, and it is therefore key to remain vigilant. Even elephants can be trained to be malevolent or submissive to improper causes. In this sense, the multidimensional understanding of human rights does not only give rise to hope but also to concern, as human rights elephants may be tamed in such a way that their vernacularisation potential and/or instrumental value is dimmed or, even, that they are used as part of alienation strategies that lead to the exact opposite of the ideals underlying the human rights idea. Observers should thus continuously remember that human rights can be instruments of protection as much as they can be instruments of repression.

Ultimately, the future of human rights as a protection mechanism does not depend solely on the progressive responsibilisation of power bearers, nor on the ongoing expansion of the human rights catalogue or on the reduction of accepted interferences, but on a genuine belief that human rights *matter*. Indeed, whenever the importance of the human rights promise grounded in human dignity and equality is accepted and internalised through strong and unwavering human rights consciousnesses, such consciousnesses may potentially be vernacularised through a variety of mechanisms and tools to the detriment of strategies pursuing human rights alienation.[70] In this sense, this conclusion slightly differs from the quote by Agatha Christie with which she finished her novel *Elephants can Remember*: "[e]lephants can remember, but we are human beings and mercifully human beings can forget."[71] Instead, humanity is called upon *not* to forget, but rather to continuously confirm and ingrain in collective consciousness, the idea that human rights as standards of human dignity and equality are a vital part of modern societies and that they, ultimately, matter. Whilst human rights elephants never forget their

69 Compare Raubenheimer & Miniggio, 2016.

70 As such, there is a marked difference between the distinct *empirical* relevance of the proposed multidimensional understanding of human rights, and the *normative* nature of the human rights promise. The former deals with the way in which human rights are used, or misused, whereas the latter concerns a moral pledge based in justice and human dignity. Here, the assumption is hence that the human rights ideal at its core strives towards the morally 'good', defined from a human dignity perspective, yet that in the empirical world human rights may be understood in different ways and may be (mis)used for a wide variety of purposes and with varying levels of success. In this sense, human rights processes may be 'hijacked' in practice for the benefit of particular agendas, yet this does not necessarily distract from the normative power of the human rights promise. The empirical use of human rights based on a normative understanding that human rights – as standards of human dignity – truly matter consequently appears to be the key to success, although such success still depends on the extent to which particular vernacularisation mechanisms and instruments can effectively be utilised. In sum, the normative promise of human rights may function as a catalyst of empirical protection where such promise, in its purest form, is able to capture one's mind and heart.

71 A. Christie, 1973.

promise, they indeed need human support in order to be continuously reaffirmed, upheld, and fought for. That is not to say that an unwavering human rights consciousness *will* necessarily result in local change and steadfast guarantees, as analysis of RPC Nauru has illustrated, but it is a first and crucial step towards durable human rights protection.

"Legend suggests that when elephants instinctively know their time on this earth is coming to an end, they begin their final migration to a place known as an elephant's graveyard. Here, among the dry bones, the elephants lie down, breathe their last breaths, and die".[72] Different from the legendary perception of elephants' final days at so-called 'elephant graveyards', it seems appropriate to conclude that human rights elephants do not direct themselves to a quiet and lonely spot where they can die in solitude, away from the social group in which they once played central roles. As analysis indeed shows, human rights continue to reinvigorate themselves, through a myriad of pathways towards protection. Where they encounter difficulties, they continuously seek to find existing, or create novel, desire paths around them. Their protection constitutes, in this sense, an endeavour that continuously needs to be negotiated in the face of uphill challenges – challenges that, quite paradoxically, reinforce the ultimate existential legitimacy of the human rights cause. Yet they are, also, a *hopeful* endeavour, as even the most uphill battles allow for some room for volition based on a genuine human rights consciousness.

In the end, the human rights elephant may not be able to look everyone in need of its protection straight in the eyes, as at times its endeavours may be too little, too late. Even the strongest elephant may succumb in the face of the most volatile forces that attempt to poach its pristine assets. Still, elephants never forget: even when considered deprived of their strongest asset, their tusks, they continuously remember, hold hope for, and seek alternative ways to shelter, those that they have vouched to protect. In seeking to understand this unconditional loyalty, one at the same time cannot ignore that elephants are at times captured, conditionalized in particular social settings, and employed by others for self-centred reasons that do not only clash with, but also mute, elephants' sense of loyalty. Indeed, as mentioned above, human rights elephants may be coached into malevolence or submission. Alas, *in extremis*, elephants can be used in the most advanced pursuit of cruelty, as historic antecedents of the use of elephants in warfare attest.[73] None of these illicit uses should distract, however, from the inalienable values that are entrenched in human rights elephants: faith in what is just, hope for the future, and unconditional love for those that they protect.

For human rights elephants in their natural and non-domesticated capacity, far away from potential misuse or malevolent nurturing, it is indeed always, and has always been, about these unconditional values. Whilst human rights'

72 Stadtmiller, 2014, p. 185.
73 Kistler, 2007.

level of endurance remains to be tested, and their ultimate destiny remains unknown, their holistic and full-fledged potential has not nearly enough been scrutinised both normatively and empirically in order to herald the end of human rights. Let this book be an incentive for further empirical analysis of, and reflection on, the multidimensional power of human rights as a normative prospect. Let it, furthermore, be a clear call for a strong belief in the idea that human rights matter, or *should* matter. Indeed, in nearly biblical terms, the trumpeting of human rights elephants resembles religious litany that has a true potential of capturing people's minds and hearts – as for the human rights elephant it are faith, hope, and love that remain, but the greatest of these is love.