DEVELOPING A VULNERABILITY ANALYSIS IN IMMIGRATION CASES: BRINGING MIGRANTS TO THE CORE OF THE EUROPEAN COURT OF HUMAN RIGHTS’ ASSESSMENTS

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1. Introduction
This draft paper forms part of ongoing research on the role of international human rights adjudication in the development of a human rights-based approach to international migration governance, with a focus on the European Court of Human Rights (ECtHR). In this paper, I posit that the immigration control paradigm that underpins the Court’s approach in migrant cases does not support good migration governance in that it constrains protection for migrants. I contend that the significance accorded to the government immigration power frustrates the recognition of migrants as fully fledged ECHR subjects and produces migrant and migration narratives that fail to capture the complexities and realities of international migration. In response to these shortcomings and drawing on the work of Fineman and Turner, I explore the deployment of a vulnerability analysis in the ECtHR’s decision making with a view to upholding a human rights and migrant-centred reasoning which, in turn, would support the development of a human rights-based approach to international migration governance in Europe and further afield.

2. Human Rights and International Migration Governance: the Role of International Human Rights Adjudicating Bodies
International migration is a global human phenomenon; “virtually everything to do with migration (...) can be viewed through a human rights lens.” This creates a very strong linkage between international migration governance and human rights, which has prompted calls for the development of a human rights-based approach to migration governance. Advocates of this approach point out that good migration governance demands full compliance with migrants’ human rights. Actors in international migration governance, whether states, ‘national human rights institutions, local authorities, regional organizations and processes and international organizations’, or non-governmental actors such as civil society organisations accept that migration governance has a

human rights dimension. However, this (apparent) consensus masks disagreements, at times profound, on the centrality of human rights to migration governance. The strongest resistance to a human rights-based approach to international migration governance emanates from those actors which seek to affirm their immigration power, namely states – in particular immigration states – but also supranational organisations such as the EU. In contrast with the EU, Mercosur’s initiatives in the field of migration governance are ‘informed by a rights-based approach to extra-regional migrants’ in South America (Diego Acosta Arcarazo and Andrew Geddes, ‘Transnational diffusion or different models? Regional approaches to migration governance in the European Union and Mercosur’ (2014) vol. 16(1) European Journal of Migration 19, pp. 37-38).

The GAMM states that ‘[t]he human rights of migrants are a cross-cutting dimension, of relevance to all [...] its pillars’ (European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global approach to Migration and Mobility, COM(2011) 743 final, 18.11. 2011, p. 6). The GAMM is based on four pillars said to be of equal importance: organising and facilitating legal migration and mobility; preventing and reducing irregular migration and trafficking in human beings; promoting international protection and enhancing the external dimension of asylum policy; and maximising the development impact of migration and mobility (European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global approach to Migration and Mobility, COM(2011) 743 final, 18.11. 2011, pp. 6-7).

Good international migration governance is understood to be principled, but also viable, coherent and sustainable as well as knowledge-based. Advocates of a human rights-based approach hold the view that good migration governance cannot be achieved without human rights at its core. The Global Commission on international Migration points out that a principled approach to migration governance requires that states fully comply with their IHRL obligations towards migrants. The
recognition of migrants’ human rights is also central to ‘a viable and sustainable migration system’.\(^\text{13}\) Moreover, good migration governance requires a comprehensive knowledge base of the dynamics of international migration.\(^\text{14}\) Paradoxically, while migration policy narratives commonly problematise human rights for migrants, ‘there is a significant knowledge gap in relation to migration and human rights’.\(^\text{15}\) Yet ‘providing a more accurate and rights based picture of migration – by documenting the economic and social contributions of migrants [and] investing the wider public impact of denying them access to essential services (…), for example’ – is essential to good migration governance.\(^\text{16}\)

I contend that international human rights adjudicating bodies have a key role to play in the development of a human rights-based approach, which is central to good governance. An approach to international human rights adjudication that progresses the recognition of migrants as fully-fledged IHRL subjects irrespective of their immigration status and motives for migrating is to be encouraged on two accounts. It is in keeping with the universal premise of IHRL and it finds support in the global phenomenon that is human mobility. Indeed, the latter makes migrant and migration categories – voluntary or forced, regular or irregular, temporary, seasonal, long-term or permanent – extremely difficult to sustain.\(^\text{17}\) It follows that, in addition to facilitating the development of a principled approach to international migration governance, the recognition of all migrants as IHRL subjects in international human rights adjudication contributes to a viable and coherent model of migration governance. I posit that international human rights adjudication can further contribute to good migration by shedding light on the dynamics of international migration. Adjudication provides international human rights bodies with an opportunity to investigate migrants’ relationships with the state, its community and its institutions as well as scrutinise migration policies in the light of states’ IHRL obligations. It follows that international human rights adjudication can help fill the knowledge gap on migration and human rights.

I do accept that an inclusive construction of the IHRL subject combined with in-depth scrutiny into the exercise of the government immigration power is not without challenges for international human rights adjudicating bodies. These challenges are rooted in the state-centred nature of IHRL; states are the primary actors in the creation, implementation and enforcement of international law which gives rise to acute tensions between sovereign states, citizenship and human rights.\(^\text{18}\) Consequently, while human rights are in theory attached to the person, IHRL assumes that the IHRL subject enjoys some degree of membership in the nation-state determined by her legal status

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This paradox pervades the whole IHRL framework; tensions between human rights protection and the government immigration power permeate international human rights instruments, but they are also present in international human rights adjudication as the ECtHR’s approach in migrant cases shows. The nationalistic nature of the IHRL subject partly explains why IHRL struggles to extend protections to migrants. Soysal points out that ‘inasmuch as the ascription and codification of rights move beyond national frames of reference, post-national rights remain organized at the national level.’ Thus, rather than challenge the idea of citizenship as closure and reconceptualise this concept in view of its universal premise, IHRL makes recognition as a fully-fledged subject contingent on one’s legal status in the nation state. Protection gaps, however, are not solely attributable to the nationalistic nature of the IHRL subject. The IHRL subject is shaped by the liberal rights theory and as such is an abstract legal subject who is invulnerable.

I further recognise that embracing a human rights-based approach to international migration governance can place international human rights adjudicating bodies on a ‘colliding course’ with those governance actors which seek to affirm their immigration power. However, because it brings together a wide range of actors and views, tensions and conflicts form an integral part of governance irrespective of the field and one of its main purposes is to accommodate diverse and opposing interests.

In the next section, I explore the human rights paradigm in the ECtHR’s case law and consider its implications for the protection of migrants’ human rights.

### 3. The ECtHR, Migrants and the Government Immigration Power

Compared with other international human rights instruments, the ECHR fares quite well in that it does not recognise the doctrine of nationality. According to Article 1 ECHR, the rights and freedoms

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25 For example, while the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families confers basic social on all migrants irrespective of their immigration status, enhanced social rights are only bestowed on regular migrants (General Assembly resolution 45/158 of 18 December 1990, entry into force 1 July 2003). A further example of IHRL’s struggle to regard migrants as fully-fledged human rights subjects may be found in the European Social Charter (original and revised version): rights are granted ‘foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned’ (Point 1 of the Appendix to the European Social Charter and Revised European Social Charter). The European Committee of Social Rights, however, has extended protections to irregular migrants, albeit in exceptional circumstances (European Committee of Social Rights, International Federation of Human Rights Leagues (FIDH) v. France, 7 October 2004, Collective complaint No. 14/2003; European Committee of Social Rights, Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, Decision on the merits 20 October 2009; European Committee of Social Rights v. the Netherlands, Complaint No. 27/2013, Decision on the merits 10 March 2016; European Committee of Social Rights v. France, Fifth Periodic Report of France, 2009, p. 69).
enshrined in the Convention are bestowed on ‘everyone’ within the jurisdiction of the High Contracting Parties. It follows that migrants who can show some physical presence in the territory of an ECHR state can, in theory at least, avail themselves of the protection of the Convention and ‘considerations of nationality, residence of domicile [should] be irrelevant’ to the determination of an ECHR. Yet, despite the inclusive personal scope of the Convention, the tensions that exist between sovereign states, citizenship and human rights are deeply embedded in the ECtHR’s case law. I attribute this paradox to the Court’s ‘reversal’ in migrant cases which puts the state’s right to control immigration before human rights. The Court’s approach frustrates the recognition of migrants as fully fledged migrants. Moreover, the limited scrutiny into the exercise of the government immigration power and the lack of investigation into migrants’ institutional and societal interactions that come with the Court’s approach produce migrant and migration narratives that are shaped by policy discourse and detached from the realities and complexities of international migration.

3.1. Migrants as ECHR Subjects

Since its judgment in Addulaziz, Cabales and Balkandali v. the United Kingdom, the first in a migrant case, the ECtHR has constantly affirmed the state’s right to control immigration as the foundational principle in migrant cases and repeatedly held that ‘Contracting States have the right, as a matter of well-established international law[29] (...) to control the entry, residence and expulsion of aliens.’ Human rights only come first in the Court’s reasoning in a small number of migrant cases, which generally involve children. The state’s right to control immigration is said to be subject to the state’s treaty obligations, including its ECHR obligations. However, I posit that this ‘human rights safeguard’ is ineffectual in

28 ECtHR, Addulaziz, Cabales and Balkandali v. the United Kingdom, App. nos. 9214/80, 9473/81, 9474/81, judgment (GC), 28 May 1985, para. 67.
29 A majority of scholars concur that the state’s right to control immigration is a well-established international customary law (see e.g. Hélène Lambert, The Position of Aliens in relation to the European Convention on Human Rights, Human Rights Files, No. 8 (revised), Council of Europe publishing, 2001, p.11). This right, however, has been challenged. For example, Schotel argues that the rule of law places limits on state powers, including their power to exclude ‘normal migrants’ without justification, namely migrants who do not have a legal right to admission (Bas Schotel, On the Right of Exclusion, Law, Ethics and Immigration Policy (London and New York: Routledge, 2012).
30 ECtHR, Hirsi Jamaa and Others v. Italy, Appl. no. 27765/09, judgment, 23 February 2012, para. 113. Other authorities include: ECtHR, Sufi and Elmi v. the United Kingdom, App. nos. 8319/07 and 11449/07, judgment, 28 June 2011, para. 212; and ECtHR, Aswat v. the United Kingdom, App. no. 17299/12, judgment, 16 April 2013, para. 40.
31 ECtHR, Rodrigues Da Silva and Hoogkamer v. The Netherlands, App. no. 50435/99, judgement, 31 January 2006, para. 44. See also ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. no. 13178/03, judgment, 12 October 2006.
32 ECtHR, Addulaziz, Cabales and Balkandali v. the United Kingdom, App. nos. 9214/80, 9473/81, 9474/81, GC Judgment, 28 May 1985, para. 67; ECtHR, Sufi and Elmi v. the United Kingdom, App. nos. 8319/07 and 11449/07, judgment, 28 June 2011, para. 212; and ECtHR, Hirsi Jamaa and Others v. Italy, Appl. no. 27765/09, judgment, 23 February 2012, para. 113.
countering the Court’s ‘reversal’. While the ECtHR has extended protections to migrants in a range of circumstances, the prioritisation of the state’s right to control immigration over human rights creates an exclusionary rather than inclusionary ‘mind-set’ that inhibits migrants’ recognition as fully-fledged ECHR subjects. This is, for example, manifest in Article 8 ECHR family and immigration cases.

In these cases, the ECtHR’s affirmation of the state’s right to control immigration explains the its eagerness to identify those obligations that Article 8 ECHR cannot beget in respect of migrants. Accordingly, the Court has constantly held that ‘Article 8 does not entail a general obligation for a State to respect immigrants’ choice of the country of their residence and to authorise family reunion in its territory.’34 Similarly, the Court has stated that ‘[t]he duty imposed by Article 8 (...) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.’35 The Court has further stressed that ‘in principle, Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory’.36 The ECtHR has also specified that ‘[w]here a Contracting State tolerates the presence of an alien in its territory (…)[,] this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country.37 This is in line with the ECtHR’s well-established view that persons who have been living unlawfully have normally no entitlement to a right of residence.38 Elsewhere I have demonstrated how the Court’s approach in cases on the expulsion of the seriously ill keeps irregular migrants at the margins of the ECHR protection regime.39

The significance of the state’s right to control immigration is not confined to identifying ECHR obligations, it is also critical to determining whether states have complied with their obligations. Thus immigration-related factors such as a history of breaches of immigration law40 or knowledge of

34 See e.g. ECtHR, Biao v. Denmark, App. no. 38590/15, judgment, 25 March 2014, para. 31.
35 ECtHR, Addulaziz, Cabales and Balkandali v. the United Kingdom, App. nos. 9214/80, 9473/81, 9474/81, GC Judgment, 28 May 1985, para. 68.
36 ECtHR, Jeunesse v. the Netherlands, App. no. 12738/10, judgment, 3 October 2014, para. 164. See also ECtHR, Djokaba Lambi Longa v. the Netherlands (dec.), App. no. 33917/12, 9 October 2012, para. 81.
37 ECtHR, Jeunesse v. the Netherlands, App. no. 12738/10, judgment, 3 October 2014, para. 166.
38 ECtHR, Jeunesse v. the Netherlands, App. no. 12738/10, judgment, 3 October 2014, para. 166. The ECtHR has exceptionally accepted that Article 8 could entail an obligation to regularise irregular stay in cases that did not involve children. These, however, are not ‘traditional’ immigration cases in that they are concerned with measures adopted pursuant to the 1994 Treaty on the Withdrawal of Russian Troops (ECtHR, Silvenko v. Latvia, Application no. 48321/99, judgment (GC), 9 October 2003; ECtHR, Sisojeva and Others v. Latvia, Application no. 60654, judgment, 16 June 2005; and ECtHR, Sisojeva v. Latvia, Application no. 60654/00, judgment (GC), 15 January 2007). See D. Thym, ‘Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?’, vol. 57(1) International & Comparative Law Quarterly (2008) pp. 87-112
39 Sylvie Da Lomba, ‘Vulnerability, irregular migrants’ health-related rights and the European Court of Human Rights’ (2014) 21(4) European Journal of Health Law 339. I show that, in addition to failing irregular migrants as ECHR subjects, the Court’s approach in N v. the United Kingdom retreats from cornerstone of the ECHR system such as its socio-economic dimension and the absolute nature of Article 3 ECHR (ECtHR, N v. the United Kingdom, N v. The United Kingdom, App no. 26565/05, Judgment (GC), judgment, 27 May 2008).
40 ECtHR, Biao v. Denmark, App. no. 38590/15, judgment, 25 March 2014, para. 31; and ECtHR, Ajayi and Others v. the United Kingdom (dec.), App. no. 27663/95, 22 June 1999.
one’s precarious immigration status at the time family life was created weigh heavily on the Court’s assessments. For example, where such factors are present, ‘the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances’. Importantly, in *Jeunesse v. the Netherlands*, the Court entrenched its immigration control approach by emphasising that ‘[t]he corollary of a State’s right to control immigration is the duty of aliens (…) to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence.’

I posit that the ECtHR’s ‘reversal’ that gives precedence to the state’s right to control immigration over human rights makes migrants a distinct category of ECHR subjects. The Court’s approach places ‘inbuilt’ limits on the range of obligations that the ECHR may generate in respect of migrants and makes their recognition as ECHR subjects contingent on their immigration status. This creates a hierarchy between migrant and non-migrant ECHR subjects as well as a hierarchy among migrants themselves, which can confine those with a precarious immigration status to the fringes of the ECHR protection regime. Moreover, in addition to hindering protection for migrants, the ECtHR’s ‘reversal’ perpetuates the idea that migrants and migration can fall into neatly defined categories; yet it is well-established that attempts at compartmentalising and fragmenting human mobility is an unsustainable endeavour.

### 3.2. The government Immigration Power and the ECtHR’s Narrative in Migrant Cases

Above I have shown how the state’s right to control immigration is a primary determinant of the range of obligations that the ECHR may generate in migrant cases and as such is central to the recognition of migrants as ECHR subjects. Here I consider two further upshots of the significance afforded to the state’s right to control immigration: the Court’s minimal scrutiny into the exercise of the government immigration power and its lack of inquiry into migrants’ social, economic and institutional relationships.

The notion that immigration control is an inherent state prerogative is entrenched in the ECtHR’s migrant case law. As a result, the Court exercises very limited scrutiny into the exercise of the government immigration power and grants states a wide margin of appreciation in this domain. I accept that the Court’s deference to the state’s judgment is not peculiar to migrant cases. For example, the Court has constantly held that states are better placed to make assessments on the prioritisation and distribution of resources; for this reason, the Court exercises minimum scrutiny over states’ policy choices. Accordingly, the Court has repeatedly stated that states enjoy a wide

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46 ECHR, *Hatton and others v. the United Kingdom*, App. no. 36022/97, judgment, 2 October 2001, para. 96; ECHR, *Pentiacova and Others v. Moldova*, App. no. 14462/03, Decision on admissibility, 4 January 2005. In *Connors v. the United Kingdom*, the Court stated that

[In spheres such as housing, which play] a central role in the welfare and economic policies of modern societies, it will respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation’ (ECtHR, *Connors v. United Kingdom*, App. no. 66746/01, Judgment, 27 May 2004, para. 82).
margin of appreciation in the economic and social spheres.\textsuperscript{47} This is not to say that the ECtHR never assesses states’ policy choices in light of their ECHR obligations. For instance, in \textit{Kjartan Ásmundsson v. Iceland}, having scrutinised the respondent state’s policy decisions on pensions, the Court found that it had breached the applicant’s right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the ECHR.\textsuperscript{48} It remains the case that the Court’s minimal scrutiny into respondent states’ policy decisions can hamper protection; for example, in welfare cases, it has certainly fettered the development of the socio-economic domain of the ECHR.\textsuperscript{49} In my opinion, what makes the ECtHR’s deference to the state’s judgment in migrant cases a particular concern is that it occurs in the context of a prioritisation of the state’s right to control immigration over human rights. Here, I show how the primacy of the state’s right to control immigration inhibits scrutiny into the exercise of the government immigration power and obviates any investigation into migrants’ institutional and societal interactions, with detrimental consequences for migrant protection and international migration governance.

To illustrate my point, I look at two assumptions that are commonly given credence in migration policies and permeate the ECtHR’s reasoning in migrant cases: basic social rights for migrants as a pull factor and migrants as a burden on national resources. These assumptions, especially the latter, are made in respect of all migrants, whether regular or irregular, settled or short-term. For example, these assumptions underpin the reasoning of the majority in \textit{N v. the United Kingdom}; in this judgment, the Court unreservedly adheres to the states’ viewpoint that irregular migrants place an undue burden on state resources\textsuperscript{50} and endorses the idea that welfare provision for this group encourages irregular migration. In this instance, a refused asylum seeker who was HIV-positive claimed that her deportation to Uganda would violate Article 3 because she would not have access to the treatment she needed there. The majority stressed that to find the respondent state in breach of Article 3 would amount to requiring states ‘to alleviate [unavoidable social and economic disparities between countries] disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.’\textsuperscript{51} This, in the Court’s opinion, would place ‘too great a burden on Contracting States’.\textsuperscript{52} The dissenting judges opined that the majority were concerned that finding the UK in breach of Article 3 ECHR ‘would open up the floodgates to medical

\textsuperscript{47} E.g. ECtHR, \textit{Dhahbi v. Italy}, App. no. 17120/09, judgment, 8 April 2014, para. 46. The ECtHR has stressed that states’ margin of appreciation is particularly wide in respect of ‘issues invol[ving] an assessment of [national] priorities in the context of the allocation of limited resources’ (ECtHR, \textit{Pentiacova and Others v. Moldova}, App. no. 14462/03, Decision on admissibility, 4 January 2005).


\textsuperscript{49} In \textit{Airey v. Ireland}, the ECtHR asserted that there could be “no water-tight division” between civil and political rights and social and economic rights and, on this basis, held ‘that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation’ (ECtHR, \textit{Airey v. Ireland}, App. no. 6289/73, judgment, 9 October 1979, para. 26).

\textsuperscript{50} ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, para. 44. See also ECtHR, \textit{Dhahbi v. Italy}, App. no. 17120/09, judgment, 8 April 2014, para. 52.

\textsuperscript{51} ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, Judgment (GC), 27 May 2008, para. 44. In an earlier case, the ECtHR had found that the removal of a seriously ill foreign national upon completion of his prison sentence would violate Article 3 in the light of the applicant’s ‘very exceptional circumstances’ (ECtHR, \textit{D v. The United Kingdom}, App. no. 30240/96, Judgment, 2 May 1997). The applicant was in the final stages of AIDS; he would not have access to the necessary treatment in the receiving State; and he would have no support there (ECtHR, \textit{D v. The United Kingdom}, App. no. 30240/96, Judgment, 2 May 1997, paras. 52 and 53). In \textit{N v. the United Kingdom}, while the Court concurred with the applicant that her deportation would cause her condition to deteriorate and would significantly shorten her life expectancy, the Court held that her case did not disclose ‘exceptional circumstances’: she was not ‘critically ill’; she was ‘fit to travel’; and treatment was available in Uganda, although cost made access uncertain (ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, paras 50, 51, 47 and 48).

\textsuperscript{52} ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, para. 44.
immigration and make Europe vulnerable to becoming the “sick-bay” of the world.\footnote{ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 8.} Elsewhere I have shown how the ECtHR’s approach in \textit{N v. the United Kingdom} departs from principles central to the ECHR system.\footnote{Sylvie Da Lomba, ‘Vulnerability, irregular migrants’ health-related rights and the European Court of Human Rights’ (2014) 21(4) \textit{European Journal of Health Law} 339, p. 360. First, it undermines the fundamental and absolute nature of Article 3 ECHR on two accounts. The Court introduces a higher severity threshold. In this respect, the dissenting judges opined that, although the applicant was not terminally ill, ‘[t]here was no doubt that in the event of removal to Uganda the applicant [would] face an early death after a period of acute physical and mental suffering’ (ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 23). Consequently, they found that the applicant’s deportation would violate Article 3 (ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 24). They stressed that there was no basis for increasing the severity threshold ‘where the harm stem[med] from a naturally occurring illness and a lack of adequate resources in the receiving country’ (ECtHR, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 5). In \textit{Yoh-Ekale Mwanje v. Belgium}, six out of seven judges expressed the view that ‘this extreme severity threshold – to be close to dying’ - could not be easily reconciled with the letter and spirit of Article 3, which guaranteed an absolute right inherent in human integrity and dignity, and called on the Court to reconsider its approach (ECtHR, \textit{Yoh-Ekale Mwanje v. Belgium}, Application no. 10486/10, judgment, 20 December 2011, ECHR, Partly Concurring Opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto De Albuquerque, para. 6). Moreover, the ECtHR balanced the applicant’s absolute right not to be subjected to ill-treatment against resource and immigration policy considerations. Yet it is well-established in the Court’s case law, including expulsion cases, that Article 3 rights cannot be balanced against societal interests, no matter how legitimate these may be (ECtHR, \textit{Chahal v. the United Kingdom}, App. no. 22414/93, judgment, 15 November 1996, para. 79; ECtHR, \textit{Othman (Abu Qatada) v. United Kingdom}, App. no. 8139/09, judgment, 17 January 2012, para. 185; and ECtHR, \textit{Aswat v. United Kingdom}, Application 17299/12, judgment, 16 April 2013, para. 49). In \textit{N v. the United Kingdom}, the ECtHR unconvincingly attempted to find support for its balancing exercise in its case law. Citing its judgment in \textit{Soering v. United Kingdom}, the Court emphasised that ‘[i]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’ (ECtHR, \textit{N v. the United Kingdom}, App. no. 26565/05, judgment (GC), 27 May 2008, para. 44, citing ECtHR, \textit{Soering v. United Kingdom}, App. no. 14038/88, judgment, 7 July 1989, para. 89). However, the Court omitted to mention that, in \textit{Soering v. United Kingdom}, it had also asserted that ‘the object and purpose of the Convention as an instrument for the protection of individual human beings require[d] that its provisions be interpreted and applied so as to make its safeguards practical and effective’ (ECtHR, \textit{Soering v. United Kingdom}, App. no. 14038/88, judgment, 7 July 1989, para. 87). Secondly, the ECtHR’s approach retreats from its integrated approach to interpretation which underpins the development of the socio-economic domain of the ECHR (ECtHR, ECtHR, \textit{Airey v. Ireland}, App. no. 6289/73, judgment, 9 October 1979, para. 26). Finally, the Court’s approach in \textit{N v. the United Kingdom} backtracks from its broadening of Article 3 protection in \textit{D v. the United Kingdom} in that it significantly constrains the application of this provision to contexts where the state cannot be held responsible, directly or indirectly, for the risk of ill-treatment (ECtHR, \textit{D v. The United Kingdom}, App. no. 30240/96, judgment, May 1997, para. 49).} In respect of short-term and
irregular migrants, the ECtHR has observed that ‘a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding.’\textsuperscript{56} In the same judgment, the Court stressed that that ‘the applicants [who were children] were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services’.\textsuperscript{57} While the Court is quick to implicitly pass judgment on adult irregular migrants, it does not consider the part that immigration laws and policies may play in creating and perpetuating ‘illegality’.\textsuperscript{58} Similarly in Dhahbi \textit{v. Italy}, the Court noted that, in contrast with short-term and irregular migrants, the applicant who was in possession of a lawful residence and work permit ‘did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry public services such as social insurance schemes, public benefits and health care’.\textsuperscript{59}

The ECtHR’s reluctance to investigate the exercise of the government immigration power explains its failure to explore migrants’ relationships with the state, its community and its institutions. As a result of this lack of investigation, the Court’s accounts of migrants’ interactions are not knowledge-based; rather they are constructed by reference to migration policy assumptions. As a result, migrant and migration narratives are shaped by migration policy discourse and objectives that make immigration status the primary determinant of migrants’ interactions and often antagonise nationals and migrants’ interests,\textsuperscript{60} especially when it comes to short-term and irregular migrants.. Thus the assumption that a precarious immigration status suggests a remote connection with the nation state is embedded in the ECtHR’s reasoning in migrant cases.\textsuperscript{61} What makes the Court’s reliance on these policy assumptions even more problematic is that these are contested assumptions. For example, Western States’ dependence on an irregular migrant workforce does not sit well with these migrants’ depiction as non-contributors.\textsuperscript{62} Likewise, there is little evidence to sustain the notion that
welfare provision for migrants significantly encourages immigration\textsuperscript{63} and that migrants place an undue burden on national resources.\textsuperscript{64}

It follows from the above that the ECtHR’s limited scrutiny into the exercise of the government immigration power and its lack of investigation into migrants’ interactions make for narratives that fail to capture the realities of international migration, problematise migrants and migration and essentialise migrants’ experiences on the basis of their immigration status.

Having shown that the Court’s ‘reversal’ constrains protection for migrants and prevents the Court from fulfilling its role as an actor in international migration governance, I investigate the deployment of a vulnerability analysis in the ECtHR’s case law as a means to bring migrants firmly within the ECHR regime and enable the Court to contribute to the development a human rights-based approach to international migration governance.

4. Vulnerability Analysis

In this section I draw on the work of Fineman and Turner and posit that vulnerability can be reclaimed as a foundation and tool of IHRL law to make it more responsive to the protection needs of migrants and other IHRL subjects. I then consider the deployment of a vulnerability analysis in the ECtHR’s case law, with a focus on migrant cases.

4.1. IHRL and Vulnerability

First I argue that the reconceptualisation of vulnerability as a foundation of IHRL must rest on an universalistic understanding of citizenship based on personhood if protections are to be extended to migrants. This reconceptualisation seeks to reconcile the international human rights regime with its universal premise. I then show how a vulnerability analysis provides international human rights adjudicating bodies with a potent tool to both recognise and respond to human vulnerability, including migrants’.

4.1.1. Fineman’s vulnerability analysis

At the core of Fineman’s vulnerability theory is a strong rebuttal of the liberal tradition’s construction of the human subject as an invulnerable actor.\textsuperscript{65} She emphasises that ‘[e]very actual human being, no matter how strong and independent he or she may seem, is both presently and has been in the past reliant on others and on social institutions.’\textsuperscript{66} Vulnerability is thus understood to be ‘universal and constant, inherent in the human condition.’\textsuperscript{67} On this basis, Fineman convincingly posits that the vulnerable subject must replace the liberal subject.\textsuperscript{68} Importantly, Fineman recognises that vulnerability is also particular. She acknowledges that individuals ‘have different forms of embodiment and also are differently situated within webs of

irregular migrants’ right to health care in France, the UK and Canada’ (2010) vol. 28 (1) Netherlands Quarterly of Human Rights 6, p. 8).


economic and institutional relationships. Consequently, vulnerability ‘is experienced uniquely by each [individual] and this experience is greatly influenced by the quality and quantity of resources [they] possess or can command.’ Thus, far from pointing to a paradox in Fineman’s theory, her conceptualisation of vulnerability as both universal and particular captures lived vulnerability in all its diversity. Thus Fineman’s vulnerability analysis must be distinguished from the vulnerable group approach; indeed the latter fails to offer an all-encompassing understanding of human vulnerability as it is context-specific and as such inherently exclusionary. A further difference lies in the fact that, unlike the vulnerable group approach, Fineman’s analysis recognises the generative dimension of vulnerability. She stresses that ‘[human] vulnerability [also] presents opportunities for innovation and growth, creativity, and fulfilment. It makes [individuals] reach out to others, form relationships, and build institutions.’ Recognising the generative nature of vulnerability amounts to acknowledging that ‘people always possess sources of resilience in the face of their vulnerabilities.’ While Fineman accepts that vulnerability can result in ‘weakness, or physical or emotional decline’, she warns against reducing vulnerability to harm and equating vulnerability to weakness. The construction of vulnerable groups commonly stereotypes and stigmatises the populations concerned because it reduces vulnerability to negative experiences. Moreover, although it does not totally eradicate the risk of paternalistic responses to vulnerability, Fineman’s vulnerability analysis minimises the risk of paternalism inherent in the construction of vulnerable groups. Critically, Fineman posits that the affirmation of the vulnerable subject calls for a responsive state. Fineman observes that ‘it is through institutions that [individuals] gain access to resources with

71 The ECtHR has deployed the vulnerable group approach in respect of various populations; these include: members of the Roma community (EctHr, D.H. and Others v. The Czech Republic, App. no. 57325/00, judgment (GC), 13 November 2007); persons with mental disabilities (EctHr, Alajos Kiss v. Hungary, App. no. 38832/06, judgment, 20 May 2010); asylum seekers (EctHR, M.S.S. v. Belgium and Greece, App. no. 30696/09, judgment (GC), 21 January 2011); and persons in detention (EctHR, Salman v. Turkey, App. no. 21986/93, judgment, 27 June 2000). On the ECtHR’s vulnerable group approach, see L. Peroni, A. Timmer, ‘Vulnerable groups: the promise of an emerging concept of European Human Rights Convention Law’, International Journal of Constitutional Law 11(4) (2013) 1056.
which to confront, ameliorate, satisfy, and address [their] vulnerability.'\textsuperscript{78} Whether individuals can access the resources they need depends on their 'location within webs of social, economic, political, and institutional relationships that structure opportunities and options.'\textsuperscript{79} It follows that 'individuals are dependent not only on each other but also on the institutions and political structures [they] build.'\textsuperscript{80} This, in Fineman’s view, demands a redefinition of the relationship between the state and its institutions, and the individual with a view to making the state ‘more responsive to, and responsible for, vulnerability.’\textsuperscript{81} Fineman accepts that societal institutions cannot eradicate vulnerability and recognises that institutions are themselves vulnerable.\textsuperscript{82} ‘Significantly, the counterpoint to vulnerability is not invulnerability, for that is impossible to achieve, but rather the resilience that comes from having some means with which to address and confront misfortune.’\textsuperscript{83} Thus, the State’s duty to respond to vulnerability operates as an asset-conferring mechanism: the State has an obligation to redistribute resilience-building resources.

However, and this points to a weakness and paradox in Fineman’s theory, whilst the premise of her vulnerability analysis is universal, the obligation that human vulnerability places on the state is very much located within the bounded nation state. Fineman construes her vulnerability analysis as ‘an articulation of a duty for the State to actively assume broad societal responsibility in regard to ensuring equality for citizens and others to whom it owes some obligation.’\textsuperscript{84} Critically, Fineman does not specify who these ‘others’ are. Writing in the US context, she suggests that these ‘others’ should include ‘non-citizens who are resident, long-term visitors, or those who have some other connection with the State which makes the state responsible for them’.\textsuperscript{85} However, Fineman does not elaborate on the nature of this ‘other connection’. For example, she does not explore whether irregular residence can create such a connection. Thus, while Fineman’s vulnerability analysis eschews the invulnerable subject, it does not challenge the ‘nationalistic’ subject. It follows that migrants’ inclusion in the redistribution of resilience-building assets is a matter left to the state’s construction of national membership. Consequently, Fineman’s analysis is ill-equipped to respond to migrants’ vulnerabilities, especially those with a precarious immigration status. For this reason, I posit that the theorisation of vulnerability as a foundation of IHRL must be underpinned by an universalistic idea of citizenship.

4.1.2. Vulnerability as a Foundation of IHRL and the Reconceptualisation of Citizenship

Drawing on Turner’s work, I posit that vulnerability can be reclaimed as a foundation of IHRL. The theorisation of vulnerability as a foundation of IHRL affirms the vulnerable human as the IHRL subject, with the consequence that IHRL is better equipped to recognise and respond to lived vulnerability. However, whether protections can extend to all migrants is contingent on the construction of the IHRL subject being detached from one’s legal status. For this reason, I contend


that the reconceptualisation of vulnerability as a basis of IHRL must rest on an universalistic understanding of citizenship based on personhood.

The theorisation of vulnerability as a foundation of IHRL prompts an investigation into the suitability of vulnerability as ‘the common basis of (…) human rights’.\(^\text{86}\) In this respect, Turner observes that ‘[t]he idea of vulnerable humanity recognizes the obviously corporeal dimension of existence; it describes the condition of sentient, embodied creatures who are open to the dangers of their environment and are conscious of their precarious circumstances.’\(^\text{87}\) Because it is inherent in being human, vulnerability can be reclaimed as a foundation of IHRL. The reconceptualisation of vulnerability as a foundation of IHRL also assumes that vulnerability is ‘relevant’ to all human rights. Some take the view that vulnerability is essentially concerned with social and economic rights because these are the rights that seek to protect individuals against their embodied vulnerability.\(^\text{88}\) However, I concur with Grear that ‘embodied vulnerability offers a more all-embracing theoretical foundation for human rights’\(^\text{89}\) in that it acknowledges that some civil and political rights are deeply linked to human vulnerability.\(^\text{90}\) For this reason, I posit that vulnerability can be reclaimed as a foundation of IHRL. However, in contrast with Turner, I posit that the theorisation of vulnerability as a foundation of IHRL must recognise its generative nature.\(^\text{91}\) I share Fineman’s view that a truncated and essentially negative understanding of vulnerability overlooks human resilience and risks reducing the vulnerable subject to a “victim” of her embodiment and circumstances.\(^\text{92}\)

The reconceptualisation of vulnerability as a foundation of IHRL profoundly alters the nature of the IHRL subject in that it eschews the liberal ‘invulnerable’ subject and places the vulnerable human subject at the core of the international human rights regime. However, the affirmation of the vulnerable IHRL subject alone cannot close the protection gaps in the international human rights regime. Indeed, these gaps are in part attributable to the ‘nationalistic’ nature of the liberal subject. I accept that the theorisation of vulnerability as a foundation of IHRL based on an universalistic idea of citizenship cannot fully disentangle protection from the exercise of the Government immigration power. This is the case because the deployment of a vulnerability analysis cannot totally obviate the state-centred nature of IHRL. Thus, a vulnerability analysis cannot purport to achieve equality between nationals and non-nationals with the consequence that protection standards may vary with one’s legal status in the nation-State. What a vulnerability analysis premised on universal citizenship can do, however, is compel states to recognise migrants as fully-fledged IHRL subjects and as such ‘constrain [them] to meet certain minimum conditions ‘in respect of these IHRL subjects.\(^\text{93}\) Importantly, these minimum conditions must be consistent with the construction of migrants as fully-fledged IHRL subjects. In other words, the exercise of the Government immigration power must not confine migrants to the margins of the international human rights regime.

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4.1.3. **Vulnerability as a Tool of IHRL**

With the vulnerable subject at its core, IHRL becomes concerned with building IHRL subjects’ resilience to vulnerability through the identification of human rights obligations. A vulnerability analysis thus provides international human rights adjudicating bodies with a powerful tool to both recognise and respond to human vulnerability. The recognition of lived vulnerability requires that international human rights adjudicating bodies examine how social, economic, political and institutional interactions shape human vulnerability. A vulnerability analysis must therefore entail an investigation into the state’s role in constructing and fostering disadvantage. This, in turn, begs the question of the standard of scrutiny into states’ policy choices. In this respect, I posit that a vulnerability analysis demands a substantive standard of scrutiny. Accordingly, human rights bodies are expected to fully scrutinise states’ policy decisions in view of their human rights obligations.

A number of objections have been levelled at such level of scrutiny in matters of social policy resource allocation in the context of social rights adjudication. These objections, however, could also be raised in migrant cases. The primary objection is concerned with legitimacy. ‘Th[is] objection is formally based on the idea of sovereignty but encapsulates the notion that national democracy processes are better suited to matters of social policy.’ It follows that international human rights adjudicating bodies are deemed to lack the necessary legitimacy to make decisions on state social policy, especially in respect of resource distribution. Consequently, the international adjudication of social rights is seen as an encroachment on the state’s power. Another objection pertains to these bodies’ lack of expertise to deal with the complex matters that arise in social rights complaints. Critics of social rights adjudication further point out that adjudicating bodies lack the legitimacy and expertise to tackle questions which have repercussions beyond individual cases and contend that polycentric issues are best left to the state’s executive and legislative powers. These objections can be raised in relation to extensive scrutiny into states’ migration policy decisions. The legitimacy argument is certainly implicitly in the ECtHR’s affirmation of the government immigration power and its ensuing reluctance to look into migration policy decisions. Likewise the expertise and polycentric arguments could be made in respect of migration matters. However, in my opinion, these objections lack teeth. The legitimacy objection does not sit well with states’ acceptance of international human rights obligations and submission to the jurisdiction of international human rights bodies. Significantly, the legitimacy objection is premised on a

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misleading account of these bodies’ adjudicating function. Their role is not to make policy decisions; rather their role is to ascertain whether states’ policy choices are consistent with their IHRL obligations. For example, the European Committee of Social Rights has emphasised ‘that it is not the task of the Committee to substitute itself in determining the policy best adapted to the situation’ (European Committee of Social Rights, European Roma Centre v. Bulgaria, Complaint No. 31/2005, Decision of 18 October 2006, para. 37). Its role is confined to assessing whether States’ social policy decisions are congruent with their Charter obligations (See e.g. European Committee of Social Rights, Autism-Europe v. France (2003), Complaint No. 13/2002, para. 53; European Committee of Social Rights, European Roma Rights Centre v. Bulgaria (2006), Complaint No. 31/2005, para. 37; and European Committee of Social Rights, Marangopoulos Foundation for Human Rights (MFHR) v. Greece (2006), Complaint No. 30/2005, para. 204). In Autism-Europe v. France, the European Committee of Social Rights rejected the complainant organisation’s argument that funding for the education of autistic children and adults should come from the education budget, which would have amounted to ring fencing funding (European Committee of Social Rights, Autism-Europe v. France (2003), Complaint No. 13/2002, para. 54).


Moreover, when international human rights adjudicating bodies lack technical knowledge, they can be trained and resort to experts’ opinions. I further posit that polycentric concerns are overstated. First, while social and immigration-related claims often raise complex issues, these are not necessarily polycentric in nature. Secondly, polycentricity is not confined to these types of claims and courts have handled polycentric concerns in other contexts. Thirdly, dealing with polycentric issues does not morph human rights adjudicating bodies into policy-makers; their role remains confined to examining states’ policy choices in view of their human rights obligations. I contend that this argument can be made in the context of vulnerability-based inquiries into states’ migration policy decisions.

The deployment of a vulnerability analysis in IHRL prompts an investigation into the web of relationships that ‘structure opportunities and options’ with a view to recognising lived vulnerability. However, vulnerability as an effective IHRL tool requires that international human rights adjudicating bodies respond to lived vulnerability through the identification of human rights obligations, notably positive obligations. With a vulnerability analysis, IHRL obligations become resources to help build IHRL subject’s resilience. Critically, the deployment of a vulnerability analysis requires that international human rights adjudicating bodies redefine themselves as asset-conferring institutions. This, in turn, demands that states mobilise the resources necessary to the implementation of their IHRL obligations. For example, the European Committee of Social Rights has held that compliance with the European Social Charter requires that Contracting Parties meet their obligations, notably positive obligations.
obligations ‘within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources’. The Committee has further underlined that ‘where the implementation of the rights proves highly complex and costly, the States Parties must endeavour to achieve the aims of the Charter according to a reasonable timetable, securing measurable progress and making optimum use of such resources as can be mustered.’ The Committee, however, has not clarified the concept of ‘maximum available resources’; yet it is vital that this concept fully encompasses states’ resources. This point has been made in relation social and economic rights on the ground that their realisation often also depends on investment in basic infrastructure. This argument is also relevant in the context of the deployment of a vulnerability analysis and is not confined to the realisation of social and economic rights.

Having showed that vulnerability can be reclaimed as a foundation and tool of IHRL, I explore the development of a vulnerability analysis in the ECtHR’s case law, with a focus on migrant cases.

4.2. The Deployment of a Vulnerability Analysis in the ECHR’s Case Law

First I examine how a vulnerability analysis transforms the ECHR subject and extends subjecthood to migrants. I then consider how it alters the Court’s assessments.

4.2.1. The Vulnerable ECHR Subject and Migrants

I contend that the deployment of a vulnerability analysis transforms the ECHR subject in two fundamental ways. First, vulnerability becomes an attribute inherent in the ECHR subject. Secondly, recognition as a fully-fledged ECHR subject is detached from one’s legal status in the nation state with the consequence that subjecthood is extended to migrants.

A vulnerability analysis places the vulnerable subject at the centre of the ECHR system and therefore eschews the ‘invulnerable’ ECHR subject. Importantly, the reconceptualisation of vulnerability as both universal and particular provides a basis for the recognition of ECHR subjects’ individual vulnerabilities. It follows that, in contrast with the ECtHR’s vulnerable group approach, a vulnerability analysis can fully capture lived vulnerability. Presently, while the ECtHR accepts that certain ECHR subjects are vulnerable, its context-specific approach to human vulnerability is inherently exclusionary. Secondly, because the vulnerable ECHR subject is constructed in


109 For example, in Horie v. the United Kingdom, the Court held that New Travellers could not be considered a vulnerable group and therefore be afforded the same level of protection as vulnerable nomadic populations because ‘they live[d] a nomadic lifestyle through personal choice and not on account of being born into any

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opposition to the ‘invulnerable’ ECHR subject, the former is regarded as an ‘atypical’ subject. Moreover, because the ECtHR’s vulnerable group approach does not account for the generative nature of vulnerability, the ECHR vulnerable subjects are stereotyped and stigmatised.\(^{111}\) Lastly, and this is of particular relevance to migrants, recognition as an ECHR vulnerable subject as per the Court’s approach can be based on matters unrelated to vulnerability. For example, while the applicant’s circumstances in \textit{N v. the United Kingdom}\(^{112}\) squarely fit the ECtHR’s understanding of vulnerability as something closely linked to harm and suffering, her immigration status frustrates her recognition as a fully-fledged ECHR subject.

Because a vulnerability analysis uncouples recognition as an ECHR subject from one’s legal status in the nation state, it compels the ECtHR to reconsider its immigration control paradigm and ‘reverse its “reversal”’. It requires that the Court put human rights before the state’s right to control immigration.\(^{113}\) I accept that a vulnerability analysis cannot totally obviate the state-centred nature of IHRL, including the ECHR, with the consequence that the Convention cannot always guarantee equality between nationals and non-nationals. However, with the deployment of a vulnerability analysis, the state’s right to control immigration ceases to shape the ECHR subject. I posit that matters relating to the government immigration power should be confined to the assessment of breaches of ECHR qualified rights. I come back to this issue in the next subsection. I further contend that uncoupling the construction of the ECHR subject from one’s legal status brings coherence to the ECHR system. First, the recognition of migrants as fully-fledged ECHR subjects finds support in the text of the ECHR. It follows from Article 1 ECHR that location within the jurisdiction of Contracting States alone brings individuals under the protection of the ECHR. Secondly, the deployment of a vulnerability analysis brings coherence to the ECtHR’s integrated approach to interpretation and ensuing application of the ECHR to socio-economic domain. The Court’s reluctance to regard migrants as fully-fledged ECHR subject makes the application of the Convention to socio-economic circumstances contingent on applicants’ legal status. Accordingly, whether Article 3 protection can extend to situations where the State is not responsible for the risk of harm\(^{114}\) and have extraterritorial effect in socio-economic circumstances\(^{115}\) is set against the exercise of the government immigration power.\(^{116}\) Lastly and importantly, the prioritisation of human rights over the state’s right to control immigration gives meaning to the ECtHR’s affirmation that Contracting States’ right to regulate immigration is subject to their ECHR and other treaty obligations.\(^{117}\)

\textbf{4.2.2. Vulnerability and the ECtHR’s Assessments in Migrant Cases}

ethnic or cultural group’ (ECtHR, \textit{Horie v. the United Kingdom}, App. No. 31845/10, Decision on admissibility 1 February 2011, paras. 28 and 29).

\(^{111}\) The ECtHR reduces vulnerability to notions of harm and suffering which not only overlooks its generative dimension, but also stereotypes and stigmatises ECHR vulnerable subjects. For example, the Court has held that asylum seekers formed ‘a particularly underprivileged and vulnerable population group in need of special protection’ because they were dependent on State support to meet their basic needs (European Court of Human Rights [GC], \textit{M.S.S. v. Belgium and Greece}, App. no. 30696/09, Judgment of 21 January 2011, paras 251 and 253). This statement, however, disregard their resilience and agency.

\(^{112}\) ECtHR, \textit{N v. the United Kingdom}, \textit{N v. the United Kingdom}, App no. 26565/05, judgment (GC), 27 May 2008.

\(^{113}\) This is akin to the pro homine approach adopted by the Inter-American Court of Human Rights. See e.g. \textit{Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants}, OC-18/03, Inter-American Court of Human Rights (IACrHR), 17 September 2003, available at: http://www.refworld.org/docid/425cd8eb4.html (accessed 29 May 2016).

\(^{114}\) ECtHR, \textit{D v. the United Kingdom}, App. no. 30240/96, judgment of 2 May 1997, para. 49.

\(^{115}\) ECtHR, \textit{M.S.S. v. Belgium and Greece}, App. no. 30696/09, judgment (GC), 21 January 2011, paras. 214-234.


\(^{117}\) See e.g. ECtHR, \textit{Chahal v. the United Kingdom}, Application no. 22414/93, judgment, 15 November 1996, para. 73; ECtHR, \textit{Boultif v. Switzerland}, Application no. 54273/00, judgment, 2 August 2001, ECHR, para. 46; and ECtHR, \textit{Aswat v. United Kingdom}, Application 17299/12, judgment, 16 April 2013, para. 49.
The deployment of a vulnerability analysis requires that the ECtHR both recognises and responds to ECHR subjects’ vulnerabilities so that the ECHR system can help them build resilience. A vulnerability analysis first demands that the ECtHR recognises ECHR subjects’ vulnerabilities. It follows that an investigation into the relationships between the ECHR subject, the state, its community and its institutions must underpin the Court’s assessments of ECHR breaches. Significantly, these assessments must entail an inquiry into the state’s role in creating and perpetuating disadvantage. While such a development is critical to the protection of migrants’ ECHR rights, its merits extend to all ECHR subjects. Such an inquiry requires that the Court adopts a substantive standard of scrutiny into states’ policy choices, including decisions on migration policy and resource allocation. Paradoxically, while it is clear from the Court’s reasoning that migrants’ societal and institutional interactions are central to its assessments and findings, the Court does not explore these interactions. Rather the Court’s reasoning and ultimately its conclusions are premised on respondent States’ assumptions as regards migrants’ relationships. For example, in the case of irregular migrants, their construction as ‘outsiders within’ means that their interests and those of ‘members’ in the national community are systematically antagonised.

Paradoxically, while the ECtHR does not deploy the vulnerable group approach in respect of irregular migrants in welfare cases, their ECHR rights are set against the vulnerability of the state, its institutions and its community. I contend that an investigation into migrants’ societal and institutional interactions provides the ECtHR with a knowledge base that enable it to make informed assessments while shedding light on the realities and complexities of international migration.

Having recognised ECHR subjects’ vulnerabilities, the ECtHR must help them build resilience. This signifies an important change in the function of the ECtHR in that a vulnerability analysis transforms the Court into an asset-conferring institution. The resilience-building assets distributed to ECHR subjects take the form of ECHR obligations. Importantly, this redefinition of the ECtHR’s role requires that the Court more readily identifies positive obligations. This, for example, would signify a change in the Court’s approach in immigration and family cases. Above I note that the Court has focused on those obligations Article 8 ECHR does not beget in respect of migrants. Conversely, because it asserts the primacy of human rights over the state’s right to control immigration and requires assessments to be based on an inquiry into migrants’ relationships, a vulnerability analysis requires that the Court identifies obligations that prevent families from being or becoming dislocated. The deployment of a vulnerability analysis would also compel the ECtHR to uphold migrants’ right to private life. In expulsion cases, the Court places the emphasis on migrants’ right to respect for family life to the (quasi-)exclusion of their right to respect for private life, thereby excluding consideration of potential deportees' social integration, regardless of their family status.

118 ECtHR, N v. the United Kingdom, App no. 26565/05, judgment (GC), 27 May 2008, para 44. See also ECtHR, S.H.H. v. The United Kingdom, App. no. 60367/10, judgment, 29 January 2013.


120 See e.g. ECtHR, Beldjoudi v. France, App. no. 12083/86, judgment, 26 Match 1992 and ECtHR, Nasri v. France, App. no. 19465/92, judgment, 14 July 1995.

121 This point was mooted by Judge Martens in his concurring opinion in Beldjoudi v. France at paragraph 3 (ECtHR, Beldjoudi v. France, App. no. 12083/86, judgment, 26 Match 1992). The Court’s judgment in C v. Belgium suggested a change in the Court’s approach in that it considered both the applicant’s right to respect for family and private life (ECtHR, C v. Belgium, App. no. 21794/93, judgment, 26 May 1996). However, in subsequent cases, the Court reverted to its ‘usual’ approach (e.g. ECtHR, Mokrani v. France, App. no. 52206/99, judgment, 15 July 2003). In Boultif v. Switzerland, the Court incorporated factors relating to ‘private life’ into the concept of ‘family life’ (ECtHR, Boultif v. Switzerland, App. no. 54273/00, judgment, 2 August 2001).
A vulnerability analysis would further compel the ECtHR to reassess the significance that it accords to immigration policy as well as other types of considerations such as resource matters. I posit that, with a vulnerability analysis, such considerations could only be considered in relation to qualified rights such as Article 8 ECHR. Thus a vulnerability analysis would preclude the Court from engaging in balancing exercises in respect of absolute rights. It follows that an *N v. the United Kingdom*-type approach would not be permissible in that it sets ECHR subjects’ Article 3 rights against immigration control and resource considerations. Moreover, while a vulnerability analysis does not preclude the ECtHR from striking a ‘fair balance (...) between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights,’ the Court’s balancing exercises must be based on an inquiry into lived vulnerability. Critically, balancing exercises cannot fetter recognition as a fully-fledged ECHR subject. Thus, while resource and immigration policy considerations can be balanced against irregular migrants’ qualified rights, the Court’s assessments cannot as a result confine them to the margins of the ECHR system. A vulnerability analysis has also significant implications for the ECtHR's assessments of Article 14 ECHR complaints; this provision prohibits discrimination in relation to the enjoyment of ECHR rights. I have already stressed that a vulnerability analysis cannot guarantee equality between nationals and non-nationals. Consequently, the breadth of ECHR obligations placed on states may still vary with ECHR subjects’ legal status in Contracting States. However, the room for differentiation on account of one’s legal status is significantly lessens. For example, the Court’s reasoning in *Dhahbi v. Italy* strongly suggests that differences in treatment in respect of welfare provision can be justified on the basis of one’s immigration status. In contrast, a vulnerability analysis demands that the existence of an objective and reasonable justification for differences in treatment be ascertained in the light of a vulnerability-based investigation. Significantly, a differentiation in treatment based on one’s immigration status - or other status - can no longer be considered as objectively justified if it frustrates recognition as a fully-fledged ECHR subject. Moreover, a vulnerability analysis demands that the ECtHR assesses whether States have realised their ECHR obligations to the maximum of all their resources. Thus, the Court’s overreliance on the scarce resource argument must give way to a comprehensive investigation into states’ resource-based arguments. Finally and importantly, a vulnerability analysis compels the ECtHR to reconsider the margin of appreciation conferred on States, so that the degree of latitude enjoyed by States does not inhibit the Court’s responses to lived vulnerability.

Timmer observes that a vulnerability analysis is not without risks for the ECtHR; she notes that ‘the Court’s very protection of (...) unwanted people renders the Court vulnerable and unwanted itself.’ I concur with Timmer that, as an institution, the ECtHR is vulnerable, and I do not dispute that making the ECHR system more responsive to lived vulnerability, especially migrants’, at a time when immigration is highly problematised, national resources limited and levels of welfare provision

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123 ECtHR, *Dhahbi v. Italy*, App. No. 17120/09, judgment, 8 April 2014, paras. 52 and 53. The Court found that the respondent State’s refusal to grant family social benefits to a permanent migrant worker because he was not an EU citizen violated Article 8 ECHR (right to respect for private and family life) in conjunction with Article 14 ECHR.
varied across ECHR states, present the ECtHR with difficult challenges. However, I take issue with the idea that the Court’s vulnerability is unavoidably set against the vulnerability of ‘unwanted people’. Rather, I posit that lowering protection standards for migrants poses a greater risk to the ECHR system. This risk is manifest in N v. the United Kingdom where the ECtHR’s reasoning erodes the fundamental and absolute nature of Article 3, a cornerstone of the ECHR system, to the detriment of all ECHR subjects.

5. Conclusion
The deployment of a vulnerability analysis in the ECtHR’s case law has a profound impact on how the ECHR system relates to migrants and on the level of protection they are afforded. Crucially a vulnerability analysis reinstates human rights as the Court’s starting point in migrant cases and as such supports an inclusionary approach. With the state’s right to control immigration ceasing to be the cornerstone in migrant cases, the ECtHR recognises all migrants as fully-fledged ECHR subjects. The reconceptualisation of vulnerability as a foundation and tool of IHRL transforms the ECHR system in two fundamental ways. First, the theorisation of vulnerability as a foundation of IHRL fundamentally alters the nature of the ECHR subject. It places the vulnerable subject at the centre of the ECHR system with the consequence that vulnerability becomes the norm rather than an affliction associated with certain groups. Moreover and importantly for migrants, because the theorisation of vulnerability as a foundation of IHRL is premised on the idea of universalistic citizenship, the construction of the ECHR subject is detached from one’s legal status in the nation state. It follows that the ECHR system can recognise migrants present in Contracting States as ECHR subjects irrespective of their immigration status. Secondly, because it involves an inquiry into applicants’ institutional and societal relationships and transforms the ECtHR into an asset-conferring institution, a vulnerability analysis equips the Court with the means to recognise and respond to the vulnerabilities and ensuing protection needs of all ECHR subjects.

Importantly, a vulnerability analysis enables the ECtHR to make a meaningful contribution to the development of a human rights-based approach to international migration governance: it promotes migrants’ human rights as the cornerstone of governance and furthers knowledge and understanding the dynamics of international immigration. With the ECHR binding on all EU Member States and the EU in the process of acceding to the EU, the deployment of a vulnerability analysis in the ECtHR’s case law can compel the EU to develop a more human rights-centred approach to international migration governance.

127 Representatives of the Council of Europe and the EU finalised the Draft Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 2013 (European Union and Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, 47+1(2013)008rev2, Strasbourg, 10 June 2013). In December 2014, the Court of Justice of the European Union delivered an opinion which held that the Draft Accession Agreement was incompatible with EU law (Court of Justice of the European Union, Opinion 2/13, 18 December 2014).