

VULNERABILITY, INTERNATIONAL HUMAN RIGHTS ADJUDICATION AND MIGRATION GOVERNANCE

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Abstract

I posit that the deployment of a vulnerability analysis premised on an universalistic idea of citizenship in international human rights adjudication is critical to good global international migration governance. I contend that the intrinsic human nature of the global phenomenon that is international migration calls for a human rights-based approach to governance. I identify international human rights adjudication as a core migration governance activity and argue that a vulnerability analysis enables regional human rights adjudicating bodies to advance good governance by extending protections to all migrants and producing narratives that help elucidate the dynamics of international migration.

Resumen

Postulo que el despliegue de un análisis de vulnerabilidad basado en una idea universalista de la ciudadanía en la litigación internacional de derechos humanos es fundamental para una buena gobernanza de la migración internacional a nivel mundial. Sostengo que la naturaleza humana intrínseca al fenómeno global que es la migración internacional requiere un enfoque de la gobernanza basado en los derechos humanos. Identifico la litigación internacional de los derechos humanos como una actividad central de gobernabilidad migratoria y sostengo que un análisis de vulnerabilidad permite a los sistemas regionales de protección de derechos humanos promover la buena gobernanza extendiendo su tutela a todos los migrantes y produciendo narrativas que ayuden a dilucidar la dinámica de la migración internacional.

1. INTRODUCTION

In this paper, I theorise vulnerability as a foundation and tool of international human rights law (IHRL) with a view to enabling regional human rights adjudicating bodies to fulfil their role as key actors in good global international migration governance (GIMG). The focus on regional bodies is explained by the prevalence of trans-regional state initiatives in the area of international migration.¹

¹ See Section 2.2 for examples of trans-regional state initiatives in the field of international migration.

I posit that the deployment of a vulnerability analysis premised on an universalistic idea of citizenship fundamentally transforms the IHRL subject, the aim of IHRL and the adjudication process. I show how the proposed approach significantly mitigates the acute tensions that exist between human rights protection and the exercise of the Government immigration power and in so doing extends protections to *all* migrants. Here, I do not challenge the state's right to control immigration;² what I challenge is the notion that states can fully control their borders - it is well-established that borders are inescapably porous -³ and the idea that the state's sovereign right to control immigration can trump the protection of migrants' human rights.

I start by examining the function of human rights in GIMG and make the case for a human rights-based approach to migration governance. Having explored the role of regional human rights adjudicating bodies in GIMG, I investigate the deployment of a vulnerability analysis in regional human rights adjudication with a view to reassessing the significance afforded to the government immigration power and enabling human rights bodies' transformation into good GIMG actors.

2. HUMAN RIGHTS AND GIMG

2.1 DEFINING GLOBAL GOVERNANCE

Global governance is a fuzzy and often poorly defined concept. Ruggie contends that “[g]lobal governance is generally defined as an instance of *governance* in the absence of *government*.”⁴ According to Thakur *et al*, “[i]t consists of formal and informal arrangements that provide more order and stability for a world in constant and rapid flux than would occur naturally - the range of international cooperation without a world government.”⁵ Global governance “highlights the move away from individual nation-states having absolute authority over policy-making towards a situation in which the behaviour of States and other actors is constrained and shaped by a range of institutions which exist beyond the nation-State.”⁶ Actors in global governance include states, national institutions, local authorities, regional and international organisations

² For a critique of the state's right to control immigration, see B. Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Oxon/New York, Routledge, 2012).

³ See e.g.: L. R. Chavez, “The Conditions of Illegality”, 45(3) *International Migration* (2007), p. 192.

⁴ J. G. Ruggie, “Global Governance and ‘New Governance Theory’: Lessons from Business and Human Rights”, 20(1) *Global Governance* (2014), p. 5.

⁵ R. Thakur, B. Job, M. Serrano and D. Tussle, “The Next Phase in the Consolidation and Expansion of Global Governance”, 20(1) *Global Governance* (2014), p. 1.

⁶ A. Betts, “Introduction: Global Migration Governance”, in A. Betts (ed.), *Global Migration Governance* (Oxford, Oxford University Press, 2012), p. 5.

and non-governmental actors.⁷ These actors come with varying degrees of power as well as diverging – if not competing – interests and ideas and one of the purposes of governance is to accommodate this diversity.⁸ It is commonly accepted that global governance is of particular relevance to those issues that cannot be addressed by individual state action because they cross national borders.⁹ Accordingly, global governance has emerged and developed in fields such as international trade, communicable diseases and climate change. Moreover, with globalisation heightening ‘trans-boundary’ interconnectivity”, the need for global governance has significantly grown.¹⁰

Global governance, however, remains an ambiguous concept. The confusion surrounding the concept of global governance stems from the meaning of the term *governance* in the first instance, but also from the meaning of the term *global*. This term may be construed in two ways: “the top level scale of human activity or the sum of all scales of activity.”¹¹ In my view, the latter understanding of the term *global* is preferable as it is congruent with the conceptualisation of global governance as a multi-level process. As Betts convincingly points out, “[w]hat makes governance ‘global’ is not the ‘level’ at which it is identified –whether bilateral, regional, transnational or supranational – but rather the fact that it is constraining or constitutive of the behaviour of [actors in global governance].”¹² Based on this understanding of the term *global*, I investigate the role of regional human rights adjudicating bodies in GIMG. The meaning of the term *governance* is much more confused. Some understand governance as “a specific mode of social interaction whose logic differs from that of both markets and governments.”¹³ In contrast with this narrow conceptualisation, others favour a broader

⁷ Inter-Parliamentary Union, International Labour Organization and United Nations Human Rights Office of the High Commissioner, Handbook for Parliamentarians N° 24, 2015, *Migration, Human Rights and Governance*, p. 136, <www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_415618.pdf>.

⁸ Global Commission on International Migration (GCIM), Report of the Global Commission on International Migration, October 2015, *Migration in an Interconnected World: New directions for Action*, p. 65, <www.queensu.ca/samp/migrationresources/reports/gcim-complete-report-2005.pdf>.

⁹ Thakur, Job, Serrano and Tussle, *supra* n. 5, p. 1.

¹⁰ A. Betts, Global Economic Governance Programme, GEG Working Paper 2008/43, November 2008, *Global Migration Governance*, p. 6, <www.globaleconomicgovernance.org/sites/geg/files/Betts_GEG%20WP%202008_43.pdf>.

¹¹ K. Dingwerth and P. Pattberg, “Global Governance as a Perspective on World Politics”, 12(2) *Global Governance* (2006), p. 188.

¹² Betts, *supra* n. 6, p. 4.

¹³ Dingwerth and Pattberg, *supra* n. 11, p. 188.

definition of governance. For Rosenau, global governance encompasses “systems of rule at all levels of human activity – from the family to the international organization in which the pursuit of goals through the exercise of control has transnational repercussions.”¹⁴ While there is merit in Rosenau’s attempt to offer an all-encompassing definition of global governance, Filkenstein rightly observes that such broadness makes it very difficult to identify what does not form part of global governance and therefore does not help clarify the concept.¹⁵ He convincingly argues that the notion of activity should be central to the concept of global governance; governance is about “doing something.”¹⁶ With governance characterised as an activity, it becomes possible “to identify and examine the processes of influence, decision, and action that shape or determine [a range of government-like activities occurring beyond the nation-state].”¹⁷ Filkenstein further stresses that governance is not confined to rule-making, but covers a much wider array of activities such as implementation and action programmes.¹⁸

2.2. GIMG

As a global and cross-national phenomenon, international migration provides a compelling case for global governance. GIMG both recognises and responds to the inherently trans-boundary and global nature of international migration and to the interdependence of states’ migration policies. Yet, as states continue to regard migration as a core attribute and manifestation of their sovereignty, progress in GIMG has been slow. Although “migration [is] escaping the control of even the most capable governments, global governance of international migration [is] seen as an intrusion on national sovereignty.”¹⁹ It follows that GIMG remains incoherent, fragmented and complex.

Betts’ conceptualisation of GIMG as an ensemble of processes taking place at three levels, namely multilateralism, trans-regionalism and embeddedness, illuminates the intricacies of global governance in this field.²⁰ Multilateralism is thin in the field of international migration. While a significant number of multilateral actions were initiated from around the turn of the

¹⁴ J. N. Rosenau, “Governance in the Twenty-First Century”, 1(1) *Global Governance* (1995), p. 13.

¹⁵ L. S. Finkelstein, “What is Global Governance”, 1(3) *Global Governance* (1995), p. 368.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 368-369.

¹⁸ *Ibid.*, p. 369-370.

¹⁹ K. Newland, “The Governance of International Migration: Mechanisms, Processes and Institutions”, 16(3) *Global Governance* (2010), p. 332.

²⁰ Betts, *supra* n. 6, p. 11-18.

millennium - many of which under the auspices of the United Nations -,²¹ multilateral activity did not result in the development of an effective international migration regime. One notable exception is in the area of refugee protection; the 1951 Convention relating to the Status of Refugees and its 1967 Protocol together with the UN High Commissioner for Refugees provide the international legal and institutional framework for refugee status.²² However, there is no comparable framework for other categories of migrants. Constitutive elements of such a framework do exist, but they do not form a coherent and comprehensive international regime.²³ There is no space to discuss the development of an international migration regime; one major pitfall to avoid, however, is the creation of a regime based on a rigid distinction between forced and voluntary migration and sub-types of migration. These categorisations rest on legalistic and policy-shaped concepts and definitions that are not grounded in the realities and complexities of international migration.²⁴ Considering the failings of multilateralism, states are increasingly turning to trans-regional arrangements; hence my focus on regional human rights adjudicating bodies. Trans-regional governance can be defined as “sets of formal and informal institutions that cut across and connect different geographical regions constituting and constraining the behaviour of States and non-State actors in a given policy field.”²⁵ This is, for

²¹ These actions include: the appointment of a special rapporteur on human rights of migrants by the UN Commission on Human Rights; the adoption of the 1990 UN Convention on the Rights of Migrant Workers and Members of their Families (Migrant Workers Convention), 18 December 1990, 2220 U.N.T.S. 3, entered into force 1 July 2003; creation of the Global Migration Group by the Secretary-General of the UN to coordinate multilateral initiatives in the field of migration; and the 2003 launch of the Global Commission on International Migration in 2003 by the Secretary-General of the UN and several States. For a more comprehensive list of multilateral initiatives, see: Newland, *supra* n. 19, p. 332-333.

²² Convention relating to the Status of Refugees (1951 Convention), 28 July 1951, 189 U.N.T.S. 137, entered into force 22 April 1954; and Protocol Relating to the Status of Refugees (1967 Protocol), 31 January 1967, 606 U.N.T.S. 267, entered into force 4 October 1967. While the Office of the UN High Commissioner for Refugees oversees the implementation of the 1951 Convention and the 1967 Protocol, it lacks authority to issue binding pronouncements on the interpretation and application of these instruments and to bring enforcement actions against states.

²³ S. Castles, “The Factors that Make and Unmake Migration Policies”, 38(3) *International Migration Review* (2004), p. 876-877.

²⁴ Inter-Parliamentary Union, *supra* n. 7, p. 143; and R. Zetter, “Labelling Refugees: Forming and Transforming a Bureaucratic Identity”, 4(1) *Journal of Refugee Studies* (1991), p. 39.

²⁵ Betts, *supra* n. 6, p.17-18, referring to A. Betts, “The Global Governance of Migration and the Role of Trans-regionalism”, in R. Kunz, S. Lavenex and M. Panizzon (eds.), *Multi-Layered Migration Governance: The Promise of Partnership* (Oxon/New York, Routledge, 2011).

example, the path chosen by the EU. With the 1999 Treaty of Amsterdam conferring competences on the then European Community in the field of migration and asylum, the EU has become a prominent actor in trans-regional migration governance. As the most integrated supranational organisation in the world, the EU is unsurprisingly the organisation with the most far-reaching competences in the field of international migration. Other regional organisations such as the African Union and Mercosur have initiated collective actions on migration-related matters at intergovernmental level.²⁶ Embeddedness constitutes the third level in Betts' conceptualisation of GIMG. This anthropological concept refers to "a situation when an area of social life does not exist as a recognized and compartmentalized area but is an integrated part of the larger social system."²⁷ Applied to GIMG, embeddedness refers to activities which are not characterised as migration-related but are nonetheless instrumental in migration governance. For example, initiatives in the fields of international trade, global health, security and human rights contribute to shaping states and other actors' behaviour in the area of international migration.²⁸ There is no doubt that human rights are deeply embedded in GIMG. For example, IHRL contributes to shaping states' behaviour vis-à-vis migrants. While the linkage between human rights and GIMG is not disputed, the significance of human rights in migration governance is. In this respect, I posit that human rights should be brought to the core of GIMG.

2.3. A HUMAN RIGHTS-BASED APPROACH TO GIMG

²⁶ F. Trauner and S. Wolf, "The Negotiation and Contestation of EU Migration Policy Instruments: A Research Framework", 16(1) *European Journal of Migration and Law* (2014), p. 5-6. Mercosur, which is a free trade and free movement regional organisation, has sought to transform the immigration regimes of Southern American States, notably by promoting a framework for the recognition of the right to migrate and migrants' rights. See e.g.: A. Margheritis, "Piecemeal Regional Integration in the Post-Neoliberal Era: Negotiating Migration Policies within Mercosur", 20(3) *Review of International Political Economy* (2012), p. 541; and B. Hines, "The Right to Migrate as a Human Right: The Current Argentine Immigration Law", 43(3) *Cornell International Law Journal* (2010), p. 471. On the African Union's migration framework, see e.g.: H. Klavert, Discussion Paper 108, Maastricht: ECDPM, (2011), *African Union Frameworks for Migration: Current Issues and Questions for the Future*, <ecdpm.org/publications/african-union-frameworks-migration-current-issues-questions-future/>.

²⁷ Betts, *supra* n 6, p. 14.

²⁸ For example, the World Trade Organization has identified migration has one of the major factors shaping the future of world trade (World Trade organization, WTO Publications 2013, *World Trade Report 2013, Factors Shaping the Future of World Trade*, p. 113-134, <www.wto.org/english/res_e/booksp_e/world_trade_report13_e.pdf>. See also World Health Organization, Resolution WHA61.17 *on the Health of Migrants*, 24 May 2008.

I support a human rights-based approach to GIMG on two related grounds: the defining human nature of international migration and the need for good governance. International migration “has human beings at its centre.”²⁹ Thus, “virtually everything to do with migration ... can be viewed through a human rights lens.”³⁰ The very strong linkage that exists between human rights and governance provides a compelling rationale for the development of a human rights-based approach to GIMG.³¹ This approach “works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.”³² It also “provides practical guidance and concrete tools” to realise rights.³³ Importantly, rather than being embedded in GIMG, human rights become its core. All GIMG actors accept, at least in theory, that migration governance has a human rights dimension. However, this (apparent) consensus masks disagreements, at times profound, over the importance of human rights. Markedly, wealthy receiving states acting both individually and collectively have taken issue with the characterisation of human rights as the cornerstone of GIMG on account of competing priorities such as border control, migration containment and security.³⁴ Unsurprisingly, these actors favour the international migration management model. In contrast with a human rights-based approach, the management model places the emphasis firmly on immigration control and containment.³⁵ Ambivalence vis-à-vis human rights, however, should not be construed as an

²⁹ Inter-Parliamentary Union, *supra* n. 7, p. 135.

³⁰ *Ibid.*, p. 140.

³¹ See e.g.: UN, Human Rights, Office of the High Commissioner, 2012, *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration*, <www.refworld.org/docid/5243e8e74.html>.

³² Inter-Parliamentary Union, *supra* n. 7, p. 144.

³³ *Ibid.*

³⁴ For example, while the 2011 EU Global Approach to Migration and Mobility purported to be migrant-centred, there has not been a human rights shift in EU migration governance initiatives (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 November 2011, p. 6). Conversely, Mercosur’s approach to trans-regional international migration governance places much greater emphasis on migrants’ human rights, irrespective of their immigration status (D. Acosta Arcarazo and A. Geddes, “Transnational Diffusion or Different Models? Regional Approaches to Migration Governance in the European Union and Mercosur”, 16(1) *European Journal of Migration and Law* (2014), p. 38-39).

³⁵ UN, *supra* n. 31, p. 9.

unsurmountable obstacle to the development of a human rights-based approach to GIMG. Navigating divergence and conflict is indeed a defining characteristic of global governance.

The conceptualisation of good governance as fair and efficient is an uncontentious claim; however, how good governance can be achieved is. Here, I contend that a human rights-based approach is critical to achieving good GIMG. To demonstrate my point, I draw on the work of the Global Commission on International Migration (GCIM)³⁶ and Betts.³⁷

First, I posit that a human rights-based approach provides the necessary underpinning for fair GIMG. The latter is understood to be principled, equitable and legitimate.³⁸ GCIM convincingly stresses that a principled approach to migration governance requires that states fully comply with their IHRL obligations towards migrants.³⁹ “Treating people without respect for their rights places the act of migration outside the regulation and protection of the law.”⁴⁰ It is well-documented that “[m]igrants whose rights are unprotected are more likely to be subject to abuse and exploitation.”⁴¹ The international migration management model has proved unable to guarantee migrant’s human rights because human rights are set against migration control and containment.⁴²

Fairness is also closely related to the concept of equity which is grounded in the principle of distributive justice. Applied to GIMG, equity requires that the benefits and costs of international migration be distributed equitably across states, which is not the case in today’s world.⁴³ Evidence of inequity is apparent in the field of international labour migration where

Powerful migrant-receiving states are able to take the migrants they want and leave the migrants they do not want. This essentially means that migrant ‘receiving states’ end

³⁶ GCIM, *supra* n. 8; Inter-Parliamentary Union, *supra* n. 7, p. 136; and UN, *supra* n. 34.

³⁷ Betts, *supra* n. 6, p. 23-28.

³⁸ GCIM, *supra* n. 8, p. 53-55; Inter-Parliamentary Union, *supra* n. 7, p. 140; and Betts, *supra* n. 6, p. 26-27.

³⁹ GCIM, *supra* n. 8, p. 53-55. See also Inter-Parliamentary Union, *supra* n. 7, p. 140.

⁴⁰ *Ibid.*, p. 39.

⁴¹ *Ibid.*

⁴² See e.g.: M. Garlick, “Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation”, 29(2) *Journal of Immigration, Asylum and Nationality Law* (2015), p. 192; S. Peers, “The Dublin III Regulation: What Will Be Different?”, 28(1) *Journal of Immigration, Asylum and Nationality Law* (2014), p. 46; and Parliamentary Assembly, Council of Europe, Resolution 2109 (2016), *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016*, <assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en>.

⁴³ Betts., *supra* n. 6, p. 26.

up being the ‘makers’ of migration governance while migrant ‘sending states’ are the ‘takers’ of governance on the terms of the receiving states.⁴⁴

Similarly, with wealthy States eager to significantly curb the numbers of refugees and asylum seekers on their territory and externalise international protection, “the majority of the world’s refugees are hosted by Southern states.”⁴⁵ The management model is also problematic in that it supports top-down processes where migrants, civil society and NGOs as well as poorer sending states struggle to influence the apportionment of migration costs and benefits.⁴⁶ In contrast with this model, a human rights-based approach not only shifts the focus of GIMG on migrants, it also calls for inclusive participation in migration governance.⁴⁷ In addition to giving a voice to ‘weaker’ GIMG actors, inclusive participation supports equitable outcomes, thereby strengthening the linkage between GIMG and development.⁴⁸

Fair GIMG further necessitates legitimacy. In this context, this concept may be understood in two ways: in the normative sense – having “the right to rule” – and in the sociological sense – being “widely believed to have the right to rule.”⁴⁹ Betts points out that legitimacy is central to the “core trade-off within migration governance.”⁵⁰ Legitimacy requires “carrying public support” while demanding that GIMG actors “promote just outcomes and safeguard the rights of ‘outsiders.’”⁵¹ In this respect, I posit that a human rights-based approach equips governance actors with the means to respond to the challenges posed by legitimacy. It provides the necessary underpinning for the protection of migrants’ human rights and the framework needed to discuss ways forward and negotiate conflict among governance actors. With the support of governance actors, especially receiving States, the proposed approach to GIMG can yield activity capable of receiving greater public support.

⁴⁴ *Ibid.* ‘In the area of low-skilled labour migration, Northern states can selectively include or exclude people from the South on their own terms’ (*ibid.*).

⁴⁵ *Ibid.*

⁴⁶ Castles, *supra* n. 23, p. 874.

⁴⁷ Southern states’ demands for greater involvement in multilateral international migration governance are generally based on claims for equity (Betts, *supra* n. 6, p. 26).

⁴⁸ A human rights-based approach to GIMG enables international migration “to become an integral part of national, regional and global strategies for economic growth, in both the developing and developed world” (GCIM, *supra* n. 8, p. 23. On migration and development, see GCIM report (*ibid.*, p. 23-31).

⁴⁹ A. Buchanan and R. Keohane, “The Legitimacy of Global Governance Institutions”, 20(4) *Ethics and International Affairs* (2006), p. 405.

⁵⁰ Betts, *supra* n. 6, p. 27.

⁵¹ *Ibid.*

In addition to fairness, good GIMG demands efficiency. This multifaceted concept encompasses notions of coherence, viability, sustainability and knowledgebase. Efficient GIMG aims to maximise the benefits and reduce the costs of international migration. It is well-established that isolated state activity is ineffectual in achieving this aim.⁵² I contend that a human rights underpinning is the necessary pre-requisite to efficient GIMG. The international migration management model shows that the absence of human rights underpinning yields incoherent, impracticable and unsustainable policies and outcomes. This model perpetuates the ‘myth’ that nation-states can exercise full power over migration; states never had such power and the little they had has been significantly eroded by globalisation.⁵³ Based on this flawed premise, the management model prioritises short and medium-term objectives that are primarily concerned with border and migration control. While I do not claim that these are mere peripheral issues, their characterisation as pillars and primary objectives of international migration systems has made for poor policy-making and ill-conceived initiatives.⁵⁴ Conversely, because it envisages international through a human rights prism, a human rights-based approach causes *all* GIMG actors to re-evaluate and redefine the objectives of GIMG. It triggers an overhaul of GIMG in light of IHRL standards and as such offers “significant support for the development of institutions that can address gaps in migrants’ rights, whether at the national, regional or multilateral level.”⁵⁵ Because it embraces the essence of international migration as a human phenomenon, a human rights-based approach provides an appropriate framework for developing a coherent, viable and sustainable system. This point can be illustrated by reference to international protection. A human rights-based approach compels GIMG actors, and especially (prospective) receiving states to reconsider their characterisation of the refugee question as a migration and border control issue. The EU experience shows that this kind of approach fails to produce efficient and fair responses to present and future international protection needs.⁵⁶ Efficient GIMG further requires a comprehensive knowledgebase. This means that global governance must rest on an in-depth understanding of

⁵² *Ibid.*, p. 25-26.

⁵³ Newland, *supra* n. 19, p. 334.

⁵⁴ For example, the shortcomings of the EU migration management approach are manifest in the EU-Turkey Agreement of 18 March 2016; this agreement has come under strong criticism for, *inter alia*, its failure to ensure that migrants’ human rights are protected (see e.g.: Parliamentary Assembly, Council of Europe, *supra* n. 42).

⁵⁵ Betts, *supra* n. 6, p. 28.

⁵⁶ See e.g.: G. S. Goodwin-Gill, “The Mediterranean Papers: Athens, Naples, and Istanbul”, 28(2) *International Journal of Refugee Law* (2016), p. 276.

the dynamics of international migration; without it, good GIMG cannot materialise as shown by the failings of the migration management model. The latter offers a skewed picture of international migration shaped by policy driven narratives. Conversely, because it acknowledges the intrinsic human nature of international migration, a human rights-based approach provides a sound basis for exploring the realities and intricacies of migration and facilitating the development of a comprehensive knowledgebase.⁵⁷

In sum, a human rights-based approach is critical to achieving good GIMG because it supports both fairness and efficiency. It furthers equitable outcomes congruent with IHRL obligations, thereby fostering legitimacy. Moreover, a human rights-based approach provides the necessary framework for the development of activities that can address present and future migration-related issues.

3. GIMG AND REGIONAL HUMAN RIGHTS ADJUDICATING BODIES

Here, I make the case for the recognition of regional human rights adjudicating bodies as key actors in good GIMG, while acknowledging the factors that constrain their assuming this role.

3.1. REGIONAL HUMAN RIGHTS ADJUDICATING BODIES AS GIMG ACTORS

The role of regional human rights adjudicating bodies in GIMG fundamentally differs with the type of governance model. In the migration management model, their role is peripheral on two accounts. First, international human rights adjudication is not considered a core governance activity, but an embedded one. Secondly, this model sets the protection of migrants' human rights against competing objectives such as border control and migration containment. Below, I show how tensions between human rights protection and the exercise of the government immigration power pervade international human rights adjudication and as such frustrate regional human rights adjudicating bodies' transformation into GIMG actors. On the other hand, a human rights-based approach to GIMG makes international human rights adjudication a staple governance activity and consequently turns adjudicating bodies into significant migration governance actors.

Regional human rights adjudicating bodies have been set up to ensure that states discharge their human rights obligations towards human rights-bearers. In keeping with the universal premise of IHRL and the development of a principled approach to GIMG, regional human rights adjudicating bodies can advance migrants' recognition as fully-fledged IHRL subjects, thereby bringing coherence to the international human rights regime and migration governance. An inclusionary construction of the IHRL subject which offsets immigration status

⁵⁷ Inter-Parliamentary Union, *supra* n. 7, p. 149.

divides is also congruent with the realities and complexities of international migration. The globalisation of human mobility makes migrant and migration categories – voluntary or forced, regular or irregular, temporary, seasonal, long-term or permanent - extremely difficult to sustain.⁵⁸ Critically, reliance on legalistic and flawed constructs not only constrains human rights protection for migrants, it also promotes simplistic and counterproductive accounts of international migration which thwart good governance. In contrast, an inclusive construction of the IHRL subject that recognises the complex nature of migratory flows helps promote coherence, viability and sustainability within GIMG.

I further contend that international human rights adjudication can help shed much needed light on the dynamics of international migration. However, whether international adjudication can fulfil this function and help fill the knowledge gap on the linkage between migration and human rights is contingent on the approach to adjudication. To be more specific, it depends on the importance given to the government immigration power. As shown below, an approach to international human rights adjudication that defers to the state in matters of migration is informed by migration policy discourse and objectives. What is needed is an approach that advances our understanding of the migration-human rights nexus and, more generally, international migration dynamics. Thus, what is needed is an approach that prompts an investigation into migrants' institutional and societal relationships and scrutinises the exercise of the government immigration power. Critically, the proposed approach provides a valuable opportunity to 'test' the (unsubstantiated) assumptions that commonly underpin migration policies and policy narratives⁵⁹ and as such promote evidence-based decision-making.

I accept that the transformation of regional human rights adjudicating bodies into 'activist' GIMG actors is unlikely to receive all-around support. This begs the question of the risks – real or unfounded – that activism may entail for these bodies. This issue arose in respect of the Inter-American Court of Human Rights' (IACtHR) *pro homine* approach in migrant

⁵⁸ *Ibid.*, p. 143.

⁵⁹ A common assumption is that basic social rights for irregular migrants act as a major pull factor (see e.g.: S. Da Lomba, "Immigration Status and Basic Social Human Rights: A Comparative Study of Irregular Migrants' Right to Health Care in France, the UK and Canada", 28(1) *Netherlands Quarterly of Human Rights* (2010), p. 16.

cases.⁶⁰ This approach firmly puts human rights before the State's right to control immigration. Typically, the IACtHR starts by affirming migrants' human rights, irrespective of their immigration status. While the Court recognises the legitimacy of migration policies, this acknowledgment comes last in its reasoning and these policies are subject to full compliance with IHRL.⁶¹ The IACtHR's activism has been both commended and frowned upon.⁶² It has been criticised for threatening the Court's legitimacy, efficiency and ultimately its very existence. Some commentators opine that the IACtHR's approach puts the Inter-American human rights system at risk because it rests on an interpretation of IHRL that has not received state consent.⁶³ Others posit that the Court's "idealized view of human rights law" lacks effective outcomes and take Advisory Opinion 18/03 as an example of the failure of the Court's approach to advance migrants' human rights protection.⁶⁴ They argue that a more "down to earth" approach that focuses on specific issues would prove more effective than ambitious humanistic pronouncements as such an approach is more likely to receive societal and state support.⁶⁵ In defence of the IACtHR's activism, Judge Cançado Trindade stresses that human rights adjudication should not be 'subjected' to the state's will; he eloquently remarks that

It is not the function of the jurist simply to take note of what the States do, particularly the most powerful ones, which do not hesitate to seek formulas to impose their 'will',

⁶⁰ The term *pro homine* is used by Dembour to describe the IACtHR's approach in migrant cases (M-B. Dembour, *When Humans Become Migrants, Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford, Oxford University Press, 2015).

⁶¹ The IACtHR requires compliance with the American Convention on Human Rights (ACHR) as well as other international human rights instruments (ACHR, 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978). See e.g.: IACtHR (Advisory Opinion) 17 September 2003, *Juridical Condition and Rights of Undocumented Migrants*, OC-18/03; IACtHR (Judgment) 24 October 2012, *Case of Nadege Dorzema et Al v. Dominican Republic*, IACtHR (Judgment) 25 November 2013, *Case of The Pacheco Tineo Family v. Plurinational State of Bolivia*; and IACtHR (Advisory Opinion) 19 August 2014, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14.

⁶² Dembour, *supra* n. 60, p. 308-312.

⁶³ G. L. Neuman, "Import, Export and Regional Consent in the Inter-American Court of Human Rights", 19 *European Journal of International Law* (2008), p. 102.

⁶⁴ J. L. Cavallaro and S. E. Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", 102(4) *American Journal of International Law* (2008), p. 821. Advisory Opinion OC-18/03, *supra* n. 66.

⁶⁵ Cavallaro and Brewer, *supra* n. 64, p. 821-824.

including in relation to the treatment to be dispensed to the persons under [their] jurisdiction... Above the will is the conscience.[⁶⁶]

In the same vein, Dembour observes that “timidity in the human rights field yields terrible results for the protection of the human being” and convincingly argues that criticism levelled at the IACtHR’s advisory opinions and judgments for their lack of immediate effect is unfair as judicial pronouncements can seldom produce “instantaneous effects”.⁶⁷ Moreover, one should bear in mind that the IACtHR’s pronouncements “remain references in human rights law, upon which human rights lawyers can rely.”⁶⁸ Significantly, the IACtHR’s *pro homine* approach is fitting with a human right-based approach to GIMG and the recognition of regional human rights adjudicating bodies as key governance actors. This approach has much in common with a vulnerability analysis. In particular, it significantly limits deference to the state in matters of migration. However, in contrast with a vulnerability analysis, a *pro homine* approach does not prompt an in-depth investigation into migrants’ societal and institutional interactions. The IACtHR simply, but importantly, identifies the primary causes of migrants’ vulnerability and briefly comments on the role of the state in the treatment of migrants and the shaping of migratory patterns.⁶⁹

Arguably, the legitimacy objection levelled at the IACtHR’s activism can also be directed at the transformation of regional human rights adjudicating bodies into GIMG actors. Indeed, this process requires interpretations and applications of IHRL that rest on a strong universal underpinning that is likely to attract heavy criticism from (some) states and sections of public opinion. However, two counter-arguments can be made. First, as Judge Cançado Trindade points out, the mission of IHRL is not to ‘please’ states but to uphold the universalistic and humanistic essence of IHRL. Secondly, while legitimate governance requires some degree of public support, it also demands that GIMG actors support just outcomes and safeguard

⁶⁶ IACtHR (Concurring Opinion of Judge A. A. Cançado Trindade) *Advisory Opinion OC-18/03*, *supra* n. 61, para. 87.

⁶⁷ Dembour, *supra* n. 60, p. 312 and 351.

⁶⁸ *Ibid.*, p. 312.

⁶⁹ See e.g.: *Advisory Opinion OC-18/03*, *supra* n. 61, paras. 113-115, 170; and *Nadege Dorzema et Al v. Dominican Republic*, *ibid.*, para. 153. For example, the IACtHR emphasises that “it is not admissible for a State of employment to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them” (*Advisory Opinion OC-18/03*, *supra* n. 61, para. 170).

migrants' rights.⁷⁰ Moreover, the transformation of human rights bodies into GIMG actors prompts an evidence-based approach to international human rights adjudication which promotes "a culture of justification"⁷¹ and therefore fosters legitimacy. The notion that unwarranted activism can alienate states and public opinion to the detriment of human rights protection is not peculiar to the issue of migrants' rights.⁷² Crucially, the greatest risks to human rights systems do not arise from 'unpopular' decisions but from decisions that erode protection standards.

3.2. BARRIERS TO THE TRANSFORMATION OF REGIONAL HUMAN RIGHTS ADJUDICATING BODIES INTO GIMG ACTORS

The barriers to the transformation of regional human rights adjudicating bodies into GIMG actors are rooted in the importance afforded to the government immigration power in IHRL. Its significance has far-reaching consequences in that it contributes to shaping the normative content of IHRL and the IHRL subject; influences approaches to migrants' human rights adjudication; informs migrant and migration narratives in international human rights adjudication; and places hurdles on migrants' access to adjudication. However, this is not to say that the importance accorded to the government immigration power is the same across regional human rights adjudicating bodies. For example, the IACtHR's *pro homine* approach discussed above gives far less weight to the government immigration power than the European Court of Human Rights' (ECtHR) reversal.⁷³ In contrast with a *pro homine* approach, reversals put the state's right to control immigration first and human rights protection second. This type of approach is discussed below.

IHRL's struggles to extend protections to migrants are well known.⁷⁴ These struggles are rooted in the state-centred nature of IHRL; the latter forms part of international law and as such

⁷⁰ Betts, *supra* n. 6, p. 27.

⁷¹ This expression was coined by Etienne Mureinik (E. Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", 10(1) *South African Journal on Human Rights* (1994), p. 32).

⁷² See, for example, the debate in the United Kingdom following the ECtHR's judgment that a blanket ban on prisoners' voting rights was contrary to the ECHR (ECtHR (Judgment) 6 October 2005, *Hirst v United Kingdom*, App. No. 74025/01). See C. R. G. Murray, "Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v United Kingdom*", 22(3) *King's Law Journal* (2011), p. 309.

⁷³ The term reversal is used by Dembour to describe the ECtHR's approach in migrant cases (Dembour, *supra* n. 60).

⁷⁴ See e.g.: A. Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Basingstoke, Palgrave MacMillan, 2010); and M-B Dembour and T Kelly, *Are Human Rights for Migrants?*

is shaped by two interrelated principles, namely the “state consent supernorm”,⁷⁵ “which relates to the state’s primary role in the creation, implementation and enforcement of international law, and national sovereignty.”⁷⁶ Thus, “inasmuch as the ascription and codification of rights move beyond national frames of reference, post-national rights remain organized at the national level.”⁷⁷ It follows that the notion of universal human rights is set against the exercise of the government immigration power with two far-reaching correlated consequences. The government immigration power profoundly shapes the normative content of IHRL with the range of rights conferred on individuals varying with their legal status in the nation-state. For example, the Migrant Workers Convention confers a much wider range of rights on regular migrants than on irregular migrants.⁷⁸ Inevitably, this “duality between universalistic rights” and the bounded nation-state affects the construction of the IHRL subject. Paradoxically, while rights are conferred on persons as human beings, IHRL assumes that the universal subject enjoys some degree of membership in the nation-state.⁷⁹ Thus, rather than challenge the idea of national citizenship as closure and construct the IHRL subject in keeping with its universal premise, IHRL makes recognition as a fully-fledged human rights subject contingent on one’s legal status in the nation-state. The construction of the European Convention on Human Rights (ECHR) subject by the ECtHR typifies the nationalistic nature of the IHRL subject. Its prominent nationalistic dimension is attributable to the state-centred nature of IHRL, but it is exacerbated by the Court’s reversal in migrant cases. This was patent in the ECtHR’s approach in *N v. United Kingdom* which until recently had shaped the Court’s

Critical Reflections on the Status of Irregular Migrants in Europe and the United States (New York, Routledge, 2011).

⁷⁵ A. Buchanan, “From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform”, 111(4) *Ethics* 673 (2001), p. 688.

⁷⁶ S. Da Lomba, “Vulnerability, Irregular Migrants Health-Related Rights and the European Court of Human Rights”, 21(4) *European Journal of Health Law* (2014), p. 347.

⁷⁷ Y. Nuhoğlu Soysal, *Limits of Citizenship, Migrants and Postnational Membership in Europe* (Chicago/London, The University of Chicago Press, 1994), p. 157.

⁷⁸ Migrant Workers Convention, *supra* n. 21. For example, while the former category of migrants is granted enhanced social rights, the latter category is only bestowed basic social rights (respectively Part III and IV of the Convention).

⁷⁹ Da Lomba, *supra* n. 76, p. 345.

case law on the expulsion of the seriously ill.⁸⁰ This much criticised approach⁸¹ was reassessed in an unanimous judgment of the Grand Chamber. In *Paposhvili v. Belgium*,⁸² the Court acknowledges that, by restricting Article 3 ECHR protection to cases where applicants were ‘close to dying’, it had “deprived aliens who [were] seriously ill, but whose condition [was] less critical, of the benefit of that provision.”⁸³ This judgment is to be welcome in that it helps fill the significant protection gap created by the *N v. United Kingdom* approach and brings the Court’s case law on the expulsion of the seriously ill closer to the principles that underpin Article 3 ECHR protection.⁸⁴ This judgement, however, softens rather than overturns the *N v. United Kingdom* approach. The Court does not abandon the notion that the general interest of the community may be balanced against applicants’ protection under Article 3 ECHR; rather it justifies the balancing exercise inherent in the *N v. United Kingdom* approach,⁸⁵ notwithstanding the absolute nature of this provision.⁸⁶ Importantly, the starting point of the ECtHR in *Paposhvili v. Belgium* remains the state’s right to control immigration.⁸⁷ Thus, this judgment does not reverse the ECtHR’s reversal. The European Social Charter provides a

⁸⁰ ECtHR (Judgment) 27 May 2008, *N v. United Kingdom*, App. No. 26565/05.

⁸¹ S. Da Lomba, “The ECHR and the Protection of Irregular Migrants in the Social Sphere”, 22(1) *International Journal of Minority and Group Rights* (2015), p. 39. Criticism has also emanated from within the ECtHR: see ECtHR, (Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann), *N v. United Kingdom*, *supra* n. 80. See also ECtHR (Partly Concurring Opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto De Albuquerque) 20 December 2011, *Yoh-Ekale Mwanje v. Belgium*, App. No. 10486/10. However, while these judges urged the ECtHR to revisit its overly restrictive approach (*ibid.*, para. 6), they explained that the *Mwanje* case had to be decided in the light of the *N v. United Kingdom* approach for the sake of legal certainty (*ibid.*, para. 5).

⁸² ECtHR (Judgment) 13 December 2016, *Paposhvili v. Belgium*, App. No 41738/10.

⁸³ *Ibid.*, para. 181.

⁸⁴ L. Peroni, “Paposhvili v. Belgium: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons” (2016) <strasbourgothers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/>. Elsewhere, I have shown how the *N v. United Kingdom* approach erodes the absolute nature of Article 3 ECHR, unduly increases the severity threshold required to engage this provision and departs from the Court’s well-established integrated approach to the interpretation of the ECHR (S. Da Lomba, “The ECHR, Health Care and Irregular Migrants”, in M. Freeman, S. Hawkes and B. Bennett (eds), “*Law and Global Health: Current Legal Issues Volume 16* (Oxford, Oxford University Press, 2014), p. 149).

⁸⁵ *N v. United Kingdom*, *supra* n. 80, para. 44

⁸⁶ *Paposhvili v Belgium*, *supra* n. 82, para. 178.

⁸⁷ *Ibid.*, para.172.

further example of the nationalistic nature of the IHRL subject;⁸⁸ Charter rights are bestowed on “foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.”⁸⁹ The European Committee of Social Rights (ECSR) has extended protections to irregular migrants when their human dignity is at stake,⁹⁰ but their recognition as Charter subjects remains exceptional whether children or adults.⁹¹ The nationalistic nature of the IHRL subject is not her sole problematic feature. Protection gaps further arise from the conceptualisation of the IHRL subject as an invulnerable subject. This point is examined below in relation to the deployment of a vulnerability analysis in international human rights adjudication.

Tensions between human rights protection and the exercise of the government immigration power also pervade international human rights adjudication. The resilience of human rights adjudication to the state’s right to control immigration varies with the approach taken. For example, the IACtHR and the ECtHR deploy contrasted approaches with these Courts respectively prioritising human rights and the government immigration power. The ECSR’s approach may be described as a ‘soft reversal’ in that the Committee’s ‘*pro homine*’ reading of the European Social Charter’s personal scope is constricted by its affirmation of the government immigration power.⁹² Vastly differing “political, institutional, and social contexts” in Latin America and Europe partly explain differences in approaches to migrants’ human rights adjudication.⁹³ Likewise, procedural differences across human rights systems partly account for one body’s timidity and another’s audacity. Arguably, the lack of binding effect

⁸⁸ European Social Charter, 18 October 1961, C.E.T.S. No. 35, entered into force 26 February 1965; and Revised European Social Charter, 3 May 1996, C.E.T.S. No. 163, entered into force 1 July 1999.

⁸⁹ Point 1 of the Appendix to the European Social Charter and Revised European Social Charter (*ibid.*).

⁹⁰ ECSR (Decision on the Merits) 7 October 2004, *Federation of Human Rights Leagues (FIDH) v. France*, Collective Complaint No. 14/2003; ECSR (Decision on the Merits) 20 October 2009, *Defence for Children International (DCI) v. The Netherlands*, Collective Complaint No. 47/2008; ECSR (Decision on the Merits) 23 October 2012, *Defence for Children International (DCI) v. Belgium*, Collective Complaint No. 69/2011; and ECSR (Decision on the Merits) 10 November 2014, *Conference of European Churches (CEC) v. The Netherlands*, Collective Complaint No. 90/2013.

⁹¹ *Defence for Children International (DCI) v. Belgium*, *supra* n. 90, paras. 35-36.

⁹² *Defence for Children International (DCI) v. The Netherlands*, *supra* n. 90, para. 41. Significantly, the ECSR did not affirm the State’s right to control immigration when it brought irregular migrants under the protection of the European Social Charter for the first time (*International Federation of Human Rights Leagues (FIDH) v. France*, *supra* n. 90).

⁹³ *Dembour*, *supra* n. 60, p. 16.

of the ECSR's decisions means that the Committee is at greater 'liberty' than the ECtHR to develop migrant-friendly interpretations and applications of human rights law. In addition to being contextualised, comparisons must be nuanced. In the same way as a *pro homine* approach cannot guarantee positive outcomes for migrants in all instances,⁹⁴ reversals do not systematically confine migrants to the margins of human rights systems.⁹⁵ However, it remains the case that approaches that take the state's right to control immigration as their starting point beget significant judicial deference in matters of migration, which inhibits scrutiny of the exercise of the government immigration power. This, in turn, makes for decision-making processes and outcomes that are informed by migration policy discourse and objectives.⁹⁶

Critically, approaches to international human rights adjudication profoundly shape migrant and migration narratives. Reversals produce narratives that are informed by migration policy discourse and objectives rather than being evidence-based. Two recurrent policy assumptions that permeate human rights pronouncements are the notions that welfare provision for migrants encourages migration and that irregular migrants deplete national resources.⁹⁷ Yet these are contested claims; there is little evidence that welfare provision acts as a major pull factor.⁹⁸ Similarly, the contention that many migrants abuse national resources is unsubstantiated.⁹⁹ It follows that adjudication narratives essentialise migrants' societal and institutional relationships, problematise migrants and migration and ultimately fail to capture the realities of international migration. Typically, assumption-based narratives offer an antagonising perspective on 'undesirable' migrants and receiving states' respective interests.

⁹⁴ For example, Advisory Opinion 18/03 of the IACtHR did not improve the situation of migrants in Mexico in the short-term (*ibid.*, p. 303).

⁹⁵ For example, the ECtHR has consistently maintained the absolute nature of Article 3 ECHR in expulsion cases (see e.g.: ECtHR (Judgment) 17 January 2012, *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09, para. 185).

⁹⁶ For example, Dembour shows the ECtHR's reversal causes families to be dislocated (*supra* n. 60, p. 96-129). She points out that the Court "[s]hares the States' [f]ear of [i]mmigration" (*ibid.*, p. 115-117).

⁹⁷ See e.g.: *N v United Kingdom*, *supra* n. 85; and ECtHR (Judgment) 21 June 2011, *Ponomaryovi v. Bulgaria*, App. No. 5335/05.

⁹⁸ Da Lomba, *supra* n. 59, p. 9-10.

⁹⁹ For example, Western states' continuing reliance on irregular migrant workforce does not sit well with these migrants' depiction as non-contributors and an undue burden (C. Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times", 67(4) *Modern Law Review* (2004), p. 601). However, "because of their immigration status, irregular migrants' contributions are counted as evidence of their transgression of immigration law requirements rather than being regarded as actual contributions" (Da Lomba, *supra* n. 59, p. 8).

For example, while the ECtHR depicts permanent regular migrants as contributors and consequently worthy recipients of national resources,¹⁰⁰ irregular and short-term migrants are perceived as a burden.¹⁰¹ In contrast with the ECtHR, the IACtHR's *pro homine* approach produces narratives that emphasize the vulnerability of many migrants and identifies the main causes of their predicament in receiving states, including cultural factors that 'justify' human rights violations against them.¹⁰² The construction of vulnerable groups in IHRL, however, is not without problems.¹⁰³ Critically, it is problematic in that it assumes that the 'typical' IHRL subject is invulnerable, which makes her an abstract subject detached from human reality. Below, I explain how, in contrast with a vulnerable group approach, a vulnerability analysis is founded on the concept of universal vulnerability. However, notwithstanding the risks associated with the construction of vulnerable groups, the IACtHR's approach creates narratives that are 'free' from policy claims.¹⁰⁴ While Latin American states' experiences as migrant sending states support more positive outlooks on migrants and migration,¹⁰⁵ it is the Court's unqualified requirement that the exercise of the government immigration power is subject to IHRL that defines its narratives.

Impediments to the transformation of regional human rights adjudicating bodies into GIMG actors further arise from barriers to migrants' access to human rights adjudication. Some of these barriers – such as socio-economic and procedural barriers - are 'status-neutral' and can

¹⁰⁰ See e.g.: ECtHR (Judgment) 8 April 2014, *Dhahbi v Italy*, App. No. 17120/09, para. 84.

¹⁰¹ *Ibid.*; and *Ponomaryovi v Bulgaria*, *supra* n. 102, para. 56. In the latter judgment, the Court stresses that irregular migrant children cannot be held responsible for their parents' unlawful presence in the receiving State and their "laying claim to the use of its public services" (*ibid.*, para. 74).

¹⁰² *Nadege Dorzema et Al v Dominican Republic*, *supra* n. 61, para. 153.

¹⁰³ The construction of vulnerable groups assumes cohesive groups and as such risks essentialising their members' experiences; it can prove exclusionary towards those who do not possess the required group attributes; it comes with negative associations such as harm and suffering that commonly stereotype and stigmatise group members (Da Lomba, *supra* n. 76, p. 344). The vulnerable group approach is also problematic in that it supposes the existence of cohesive groups. Consequently, it can obscure significant differences between members while concealing similarities between members and the wider population (*ibid.*, p. 343). This approach further undermines group members' individual agency and risks being paternalistic (*ibid.*, p. 344). On the problems associated with the construction of vulnerable groups in IHRL, see Da Lomba, *ibid.*, p. 342-345.

¹⁰⁴ See e.g.: Advisory Opinion OC-18/03, *supra* n. 61; *Nadege Dorzema et Al v Dominican Republic*, *supra* n. 61; *The Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* n. 66; and Advisory Opinion OC-21/14, *supra* n. 61.

¹⁰⁵ Dembour, *supra* n. 60, p. 14-16. It is important to note that Latin American states' experiences of migration can differ greatly and that migrants can face hardship in Latin American receiving states.

be experienced irrespective of one's legal status in the nation-state.¹⁰⁶ Other barriers, however, are migrant-specific; they result from acute tensions between access to adjudication and immigration law enforcement. In *Nadege Dorzema et Al v. Dominican Republic*, the IACtHR observes that migrants' vulnerability stems, *inter alia*, from "the legal and factual obstacles that make real access to justice illusory" for many of them.¹⁰⁷ In order to resolve – or at the very least ease – the tensions between access to adjudication and immigration law enforcement, Carens proposes the creation of a "firewall" based on the principle that "no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes."¹⁰⁸ Barriers to migrants' access to adjudication have implications for regional human rights bodies' role as GIMG actors. I accept that the number of migrant cases and the range of migration-related human rights issues that reach adjudicating bodies are not commensurate with the extent of human rights violations faced by migrants across the world, which inevitably constrains human rights bodies' contribution to GIMG. However, this does not negate the value of international human rights adjudication as a means to advance migrants' human rights and good GIMG. Their pronouncements have effects beyond individual cases: they can prompt law and policy reform; support migrants' rights advocacy; draw attention to the human rights violations experienced by migrants and trigger informed debates; and shed light on international migration dynamics.

Regional human rights adjudicating bodies have a key part to play in the development of good GIMG. In particular, they can advance migrants' rights protection and provide valuable

¹⁰⁶ For example, some human rights treaty systems do not provide for a right to individual petition, with the consequence that victims of human rights breaches must rely on other parties to bring their case to international human rights bodies. This is, for instance, the case of the European Social Charter and the ACHR systems. The former provides for a collective complaints procedure that allows certain organisations to raise questions concerning non-compliance of a State's law or practice with European Social Charter provisions with the ECSR; cases before the IACtHR are started by an application presented either by the Inter-American Commission on Human Rights or by a State Party to the ACHR (respectively Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, C.E.T.S. No 158, entered into force 1 July 1998); and Art. 61(1) ACHR). Persons may lodge petitions with the Inter-American Commission on Human Rights (Art. 44 ACHR).

¹⁰⁷ *Nadege Dorzema et Al v. Dominican Republic*, *supra* n. 61, para. 153. The more precarious the immigration status, the greater the obstacles to access to adjudication. Irregular migrants are often reluctant to pursue legal protections and remedies, even when their most basic human rights are at stake, for fear of coming to the authorities' attention (Da Lomba, *supra* n. 81, p. 50).

¹⁰⁸ J. H. Carens, "The Rights of Irregular Migrants", 22(2) *Ethics & International Affairs* (2008), p. 167-618.

insights into the realities of international migration. I accept that the transformation of these bodies into GIMG actors is not without challenges. However, the erosion of protection standards that comes with ‘caving in’ to the government immigration power presents much greater threats to human rights systems.

4. VULNERABILITY ANALYSIS AND A HUMAN RIGHTS-BASED APPROACH TO GIMG

Drawing on earlier work on the reconceptualisation of vulnerability as a foundation and tool of IHRL,¹⁰⁹ I posit that the deployment of a vulnerability analysis in IHRL empowers regional human rights adjudicating bodies to become key GIMG actors.

4.1. THE DEPLOYMENT OF A VULNERABILITY ANALYSIS IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION

Here, I revisit Fineman’s vulnerability theory with a view to theorising vulnerability as a foundation and tool of IHRL.

4.1.1. Fineman’s Vulnerability Theory

Fineman’s vulnerability theory convincingly counters liberal theory understandings of vulnerability as an atypical and negative human trait.¹¹⁰ Her rebuttal of the liberal invulnerable subject is grounded in the realities of the human experience and rests on two critical observations: reliance on others and on institutions is inherent in the human experience,¹¹¹ and vulnerability “is experienced uniquely by each [individual].”¹¹² It follows that vulnerability is both universal and particular.¹¹³ On this basis, Fineman persuasively theorises that the vulnerable subject must replace the liberal invulnerable subject.¹¹⁴

In contrast with the liberal tradition, Fineman’s thesis recognises the generative dimension of vulnerability.¹¹⁵ While Fineman accepts that vulnerability can result in “weakness, or physical or emotional decline”,¹¹⁶ she stresses that “vulnerability presents

¹⁰⁹ Da Lomba, *supra* n. 76.

¹¹⁰ M. A. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition”, 20(1) *Yale Journal of Law & Feminism* (2008), p. 10-12.

¹¹¹ M A Fineman, ‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility”, 20(2) *The Elder Law Journal* (2012), p. 88.

¹¹² Fineman, *supra* n. 110, p. 10.

¹¹³ *Ibid.*, p. 1.

¹¹⁴ *Ibid.*, p. 10-12.

¹¹⁵ Fineman, *supra* n. 111, p. 96.

¹¹⁶ *Ibid.*

opportunities for innovation and growth, creativity, and fulfilment. It makes [individuals] reach out to others, form relationships, and build institutions.”¹¹⁷ Fineman emphasises that “people always possess sources of *resilience* in the face of their vulnerabilities.”¹¹⁸ Thus, the vulnerable subject is not reduced to a ‘helpless victim’ of her vulnerability. Having recognised that human vulnerability is intrinsic in the human condition, Fineman’s theory is concerned with building the vulnerable subject’s resilience. Significantly, she stresses that “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.”¹¹⁹ Central to Fineman’s theory is the observation that “it is through institutions that [individuals] gain access to resources with which to confront, ameliorate, satisfy, and address [their] vulnerability.”¹²⁰ Importantly, the vulnerable subject’s reliance on institutional assets places a duty on the state to respond to vulnerability. The responsive state calls for a redefinition of the relationship between the individual, the state and its institutions to secure individuals’ access to the institutional resources they need to become more resilient. The extent of the state’s duty varies with individuals’ “location within webs of social, economic, political, and institutional relationships that structure opportunities and options.”¹²¹ Importantly, reliance on the responsive state does not negate the vulnerable subject’s own resilience and agency. Indeed, Fineman’s vulnerability analysis recognises the generative dimension of human vulnerability and the vulnerable subject’s innate resilience. Moreover, Fineman accepts that institutions are themselves vulnerable, which constrains the state’s response to human vulnerability.¹²²

Fineman’s vulnerability theory successfully eschews the liberal invulnerable subject. However, for this subject to provide a fitting model for the construction of the IHRL subject, she must be status-neutral. Above, I note how the nationalistic nature of the IHRL subject makes migrants’ inclusion in the international human rights regime contingent on their immigration status. Critically, in the same way as the universal premise of IHRL is set against the exercise of government immigration power, the duty that universal vulnerability places on

¹¹⁷ *Ibid.*

¹¹⁸ L. Peroni and A. Timmer, “Vulnerable Groups: The Promise of an Emerging Concept of European Human Rights Convention Law”, 11(4) *International Journal of Constitutional Law* (2013), p. 1074, referring to Fineman, *supra* n. 111.

¹¹⁹ Fineman, “The Vulnerable Subject and the Responsive State”, 60(2) *Emory Law Journal* (2010-2011), p. 269.

¹²⁰ Fineman, *supra* n. 111, p. 98.

¹²¹ *Ibid.*, p. 99.

¹²² Fineman, *supra* n. 110, p. 12.

the state is located within the bounded nation-state. Fineman does not explore the issue of citizenship. She intimates that the state's duty is owed to "citizens and *others* to whom [the state] owes some obligation"¹²³ and 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."¹²⁴ Consequently, migrants' inclusion in the redistribution of resilience-building assets is contingent on the state's construction of national membership. It follows that the vulnerable subject shares the IHLR subject's nationalistic trait; thus, as it stands, Fineman's theory cannot make IHLR more responsive to migrants' protection needs, especially migrants with a precarious immigration status. However, this is not to say that Fineman's vulnerability theory cannot be instrumental in filling protection gaps in IHLR. On the contrary, I contend that there is great merit in her theory provided that its paradoxical duality is remedied. In this respect, I posit that the theorisation of vulnerability as a foundation and tool of IHLR must be underpinned by an universalistic idea of citizenship.

4.1.2. Reclaiming Vulnerability as a Foundation and Tool of IHLR

The reconceptualisation of vulnerability as a foundation and tool of IHLR seeks to make IHLR responsive to the vulnerabilities of the IHLR subject and, in so doing, fill the protection gaps in IHLR. The concept of vulnerability is not alien to IHLR; IHLR confers specific protection on groups deemed vulnerable. One could (unconvincingly) argue that the vulnerable group approach does not conceptually differ from a vulnerability analysis in that both rest on the notion of universal vulnerability, the former approach implicitly recognising that the 'typical' IHLR subject is 'less vulnerable' than members of vulnerable groups.¹²⁵ This understanding of the vulnerable group approach yields two further assumptions: IHLR is capable of responding to universal vulnerability; and the "pluralization" of IHLR¹²⁶ is congruent with its universal premise.¹²⁷ These three assumptions, however, can be challenged. Contrary to what its advocates assert, the vulnerable group approach does not eschew the liberal invulnerable

¹²³ Fineman, *supra* n. 119, p. 256 (emphasis added).

¹²⁴ *Ibid.*

¹²⁵ This view is, for example, held by an ECtHR judge (Peroni and Timmer, *supra* n. 118, p 1060-1061).

¹²⁶ The term 'pluralization' is used to describe the adoption of population-specific instruments in IHLR (F. Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?", 30 *Human Rights Quarterly* (2008), p. 495).

¹²⁷ *Ibid.*

subject.¹²⁸ Rather it seeks to mitigate the exclusionary dimension of IHRL by providing protection to the ‘atypical’ vulnerable IHRL subject. In other words, rather than provide evidence of the ability of IHRL to respond to universal vulnerability in all its diversity, “population-specific instruments are manifestations of the failures of IHRL to protect the most vulnerable.”¹²⁹

The deployment of a vulnerability analysis first begs the question of the recognition of vulnerability as the common basis of human rights. The rationale for the conceptualisation of vulnerability as a foundation of IHRL lies with its universality. Turner points out that “[t]he idea of vulnerable humanity recognises 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.”¹³⁰ Universality alone, however, cannot make vulnerability a common basis of IHRL; vulnerability must be shown to be relevant to *all* human rights. Criticism has been levelled at the proposed thesis on the ground that vulnerability is essentially relevant to social and economic rights.¹³¹ The assumption here is that responses to vulnerability are primarily found in the realisation of this category of rights. This argument, however, rests on a truncated understanding of lived vulnerability and a rigid categorisation of human rights. Vulnerability cannot be reduced to a socio-economic issue; it is a multifaceted human phenomenon that has multiple and diverse causes¹³² and as such maps on extremely well to a human rights framework. IHRL responses to this complex human predicament must be wide-ranging and encompass the realisation of all human rights. Moreover, in addition to misrepresenting vulnerability, the emphasis on social and economic rights overlooks the indivisible, interdependent and interrelated nature of human rights.¹³³ Critically, it ignores both the role of civil and political rights in the enjoyment of social and

¹²⁸ Grear attributes the failings of IHRL to the centrality of the liberal subject (Grear, *supra* n. 74, p. 43, 96-113, 126.

¹²⁹ Da Lomba, *supra* n. 76, p. 345.

¹³⁰ B. S. Turner, *Vulnerability and Human Rights* (University Park, The Pennsylvania State University Presses, 2006) p. 28.

¹³¹ This view is referred to in Turner (*ibid.*, p. 36).

¹³² Vulnerabilities can, for example, arise from interferences with the IHRL subject’s right to respect for family life and her access to justice.

¹³³ UN General Assembly, Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 5.

economic rights¹³⁴ and the relevance of civil and political rights to protection in the socio-economic sphere.¹³⁵ It follows that vulnerability “offers a[n]... all-embracing theoretical foundation for human rights.”¹³⁶ Importantly, and in contrast with Turner,¹³⁷ I posit that the theorisation of vulnerability as a foundation of IHRL must recognise the generative nature of vulnerability, so that individual agency is acknowledged in both the construction of the IHRL subject and the articulation of the duty of IHRL to respond to vulnerability.

Up to this point, my reconceptualisation of vulnerability as a common basis of human rights closely follows Fineman’s theory. However, if a vulnerability analysis is to succeed in filling protection gaps in IHRL, the vulnerable subject must lose her nationalistic dimension. With this in mind, I posit that the theorisation of vulnerability as a foundation of IHRL must rest on an universalistic understanding of citizenship based on personhood. The aim here is to reconcile the construction of the IHRL subject with the universal premise of IHRL. Below, I show how this reconceptualisation is critical to the recognition of migrants as fully-fledged IHRL subjects.

With the affirmation of the vulnerable subject, IHRL becomes concerned with building resilience. This redefinition of the aim of IHRL entrusts regional and, more broadly, international human rights bodies with a dual function; making IHRL responsive to human vulnerability requires that these bodies recognise and then respond to lived vulnerability. This function first prompts an investigation into the IHRL subject’s societal and institutional relationships accompanied by an inquiry into state policy choices. The former undertaking requires that human rights bodies examine how individuals’ social, economic, political and institutional interactions shape their vulnerabilities. This investigation triggers an inquiry into the role of the state in the construction and perpetuation of disadvantage, which in turn brings about an inquiry into state policy decisions. The latter raises the question of the standard of review. In this respect, I contend that a vulnerability analysis demands that regional human rights adjudicating bodies fully scrutinise states’ policy decisions in the light of their IHRL obligations.

Objections have been levelled at the use of a substantive standard of review, especially in relation to states’ resource allocation decisions and social policy choices. The primary

¹³⁴ Turner, *supra* n. 130, p. 37.

¹³⁵ See e.g.: ECtHR (Judgment) 9 October 1979, *Airey v Ireland*, App. No. 6289/73, para. 26.

¹³⁶ Gear, *supra* n. 74, p. 135.

¹³⁷ Turner, *supra* n. 130, p. 26.

objection rests on the notion that in-depth scrutiny amounts to decision-making and, for this reason, constitutes an illegitimate encroachment on the executive and legislative power.¹³⁸ The legitimacy objection is also linked to the principle of subsidiarity and the margin of appreciation doctrine. According to the former, the role of international human rights adjudicating bodies is subsidiary to that of the state. On this basis, the ECtHR has developed the margin of appreciation doctrine “to avoid trespassing on a State’s sovereignty.”¹³⁹ Importantly, “the wider the margin, the less strict the scrutiny” of states’ policy choices.¹⁴⁰ The width of the margin of appreciation varies with the issue under consideration. For example, the ECtHR has repeatedly granted states a wide margin of appreciation in the economic and social spheres.¹⁴¹ Similarly, the notion that immigration control is an intrinsic state prerogative has led the Court to give states a wide margin of appreciation in migration matters; its width, however, varies with the ECHR rights being considered.¹⁴² There is no space to critique the margin of appreciation doctrine. However, it is important to note that, because it entails a substantive standard of review, the deployment of a vulnerability analysis significantly reduces the margin of appreciation bestowed on states. In-depth scrutiny further exposes a vulnerability analysis to objections based on expertise. The thrust of this objection is that international human rights adjudicating bodies lack the necessary knowledge to deal with matters pertaining

¹³⁸ The legitimacy objection has been raised in the context of social rights adjudication (see e.g.: M. Langford, “The Justiciability of Social Rights: From Practice to Theory”, in M. Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (New York, Cambridge University Press 2008), p. 3, 34.

¹³⁹ M. R. Hutchinson, “The Margin of Appreciation Doctrine and the European Court of Human Rights”, 48(3) *International and Comparative Law Quarterly* (1999), p. 640.

¹⁴⁰ D. McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee”, 65(1) *International and Comparative Law Quarterly* (2016), p. 26.

¹⁴¹ E.g.: *Dhahbi v Italy*, *supra* n. 100, para. 46. The ECtHR has stressed that states’ margin of appreciation is particularly wide in respect of “issues involv[ing] an assessment of [national] priorities in the context of the allocation of limited resources” (ECtHR (Decision) 4 January 2005, *Pentiacova and Others v Moldova*, App. No. 14462/03).

¹⁴² For example, the ECtHR “has recognised a particularly wide margin of discretion for states in respect of Article 5 (1) F” (H. Lambert, *The Position of Aliens in relation to the European Convention on Human Rights* (Strasbourg, Council of Europe Publishing, 2007), p. 32, <[www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08(2007).pdf)>).

to policy and decision-making,¹⁴³ especially in relation to polycentric issues.¹⁴⁴ However, both the legitimacy and expertise objections lack teeth and do not sit well with states' acceptance of IHRL obligations and their submission to the jurisdiction of human rights bodies.¹⁴⁵ Significantly, the legitimacy objection is premised on the ill-conceived notion that substantive review of states' policy choices amounts to policy and decision-making. Yet the aim of in-depth scrutiny is not to reformulate state policies; rather it is to ascertain whether states' policy decisions are consistent with their IHRL obligations.¹⁴⁶ Thus, rather than undermine legitimacy, substantive review helps promote 'a culture of justification' in policy-making, thereby fostering government legitimacy and accountability. The same argument can be made in support of a narrow margin of appreciation. Importantly, not all international human rights bodies embrace this doctrine. For example, the Human Rights Committee under the International Covenant on Civil and Political rights has rejected this doctrine.¹⁴⁷ By contrast with its European counterpart, the IACtHR has proved sceptical towards the margin of appreciation doctrine. Candia attributes the Court's cautious approach to the historical and political context in which it has developed and to the Court's aspiration to become a quasi-constitutional court entrusted with standardising national legislation.¹⁴⁸ Substantive review,

¹⁴³ See e.g.: M. Wesson, "Equality and Social Rights: An Exploration in Light of the South African Constitution" Winter *Public Law* (2007), p. 761.

¹⁴⁴ See L. Fuller, "The Forms and Limits of Adjudication", 92 *Harvard Law Review* (1978-1979), p. 353, discussed in J. King, "The Pervasiveness of Polycentricity", Spring *Public Law* (2008), p. 101.

¹⁴⁵ Langford, *supra* n. 138, p. 34.

¹⁴⁶ For example, the ECSR has emphasised "that it is not the task of the Committee to substitute itself in determining the policy best adapted to the situation" (ECSR (Decision on the Merits) 18 October 2006, *European Roma Centre v. Bulgaria*, Collective Complaint No 31/2005, para. 37). The ECSR's role is confined to assessing whether states' social policy decisions are congruent with their European Social Charter obligations (see e.g.: ECSR (Decision on Merits) 29 September 2003, *Autism-Europe v. France*, Collective Complaint No. 13/2002, para. 53). In *Autism-Europe v. France*, the ECSR 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 (*ibid.*, para. 54).

¹⁴⁷ See e.g.: HRC (View) 26 October 1994, *Länsmän et al v Finland*, Cmm No 511/1992, para. 9.4.

¹⁴⁸ G. Candia, "Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Courts of Human Rights", 9 March 2014, p. 21, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2406705>. Candia notes that, in contrast with the IACtHR, the ECtHR sees itself as a "supranational [court] with subsidiary jurisdiction" (*ibid.*). For example, the ECtHR emphasises the subsidiary nature of the Strasbourg complaint machinery in *Paposhvili v. Belgium* (*supra* n. 82, para. 184). Candia describes the IACtHR's approach as "more intrusive" and recommends that the Court makes

however, does not seek to standardise national legislation; its aim is to ensure that states fully comply with their IHRL obligations. Moreover, while in-depth scrutiny seeks to uphold fundamental human rights standards, it does not preclude international human rights adjudicating bodies from accounting for states' specific contexts in their human rights breach assessments. As is the case with the legitimacy objection, concerns over human rights bodies' lack of expertise rests on the flawed assumption that in-depth scrutiny equates with policy and decision-making.¹⁴⁹ Furthermore, this objection overlooks the fact that these bodies can receive training and resort to experts' opinions when they lack the necessary technical knowledge.¹⁵⁰

The deployment of a vulnerability analysis entrusts regional human rights adjudicating bodies with the task of recognising but also responding to lived vulnerability, which can only be positive if the promise of human rights is to be realised. Critically, IHRL obligations become resources to help build the IHRL subject's resilience. It follows that these bodies must redefine themselves as asset-conferring institutions. This, in turn, compels them to revisit their approach to human rights adjudication. Notably, making IHRL responsive to vulnerability requires an activist approach to the articulation of positive obligations. For example, the deployment of a vulnerability analysis would require that the ECtHR more readily identifies positive obligations in the socio-economic domain.¹⁵¹ The transformation of IHRL obligations into resilience-building assets further demands that states mobilise the resources necessary to the implementation of their obligations. Here, a vulnerability analysis can borrow from the ECSR's approach; the Committee has held that compliance with the European Social Charter requires that Contracting Parties meet their obligations "within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources."¹⁵²

greater use of the margin of appreciation doctrine to comply with the principle of subsidiarity and avoid encroaching on State sovereignty (*supra* n. 148).

¹⁴⁹ Langford, *supra* n. 138, p. 35.

¹⁵⁰ V. Mantouvalou, "In Support of Legalisation", in: C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford, Hart Publishing, 2011), p. 85, 118.

¹⁵¹ Da Lomba, *supra* n. 81, p. 39.

¹⁵² See e.g.: *Autism-Europe v France*, *supra* n. 146, para. 53. The ECSR's approach is reminiscent of the approach enshrined in the International Covenant on Economic, Social and Cultural Rights; Article 2 of the Covenant requires that States realise the rights guaranteed in the Covenant to the maximum of their available resources (International Covenant on Economic, Social and Cultural Rights General Assembly resolution 2200A (XXI) of 16 December 1966).

[W]here 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.^[153]

A vulnerability analysis requires that the concept of “maximum available resources” be given a broad understanding so that it encompasses all state resources.¹⁵⁴ For example, assessing whether a state has fully discharged its IHRL obligations must account for its (lack of) investment in basic infrastructure.¹⁵⁵ Importantly, arguments based on resource shortages cannot be allowed to erode states’ obligations. In this respect, it is well-established that resort to the concept of maximum available resources does not prevent the identification of both immediate and core IHRL obligations.¹⁵⁶ Furthermore, while the use of the concept of maximum available resources is commonly associated with the implementation of social and economic rights, a vulnerability analysis makes it relevant to all human rights.

4.2. VULNERABILITY AND THE TRANSFORMATION OF REGIONAL HUMAN RIGHTS ADJUDICATING BODIES INTO GIMG ACTORS

Here I show how the deployment of a vulnerability analysis in international human rights adjudication empowers regional human rights adjudicating bodies to make a meaningful contribution to good GIMG by providing a strong human rights underpinning and supporting a novel approach to human rights adjudication.

4.2.1. An Entrenched Human Rights Underpinning

Human rights are central to good GIMG. Thus, the transformation of regional human rights adjudicating bodies into key governance actors is first and foremost contingent on adjudication having a strong human rights underpinning. While this could be regarded as a given, reversals reveal that human rights can come second to the state’s right to control immigration.

¹⁵³ *Defence for Children International (DCI) v. Belgium*, *supra* n. 90, para. 71.

¹⁵⁴ See ComESCR, UN Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1, 2007; and D. Elson, R. Balakrishnan and J. Heintz, “Public Finance, Maximum Available Resources and Human Rights”, in A. Nolan, R. O’Connell and C. Harvey (eds.), *Human Rights and Public Finance, Budgets & the Promotion of Economic and Social Rights* (Oxford, Hart Publishing, 2013), p. 13.

¹⁵⁵ *Ibid.*, p. 22.

¹⁵⁶ See e.g.: CESCR (General Comment No. 14 on *the right to the highest attainable standard of health*) 11 August 2000, UN Doc. E/C.12/2000/4.

The affirmation of the vulnerable subject supports the recognition of migrants as fully-fledged IHRL subjects irrespective of their immigration status. This ‘legal status-neutral’ subject compels regional human rights adjudicating bodies to firmly put human rights before the government immigration power. Above, I stress that the IACtHR’s *pro homine* approach satisfies this requirement, thereby begging the question of the differences between a ‘traditional’ *pro homine* approach and a vulnerability analysis and their respective merits. Both approaches put human rights first and as such share a strong human rights underpinning. The IACtHR’s approach yields judicial pronouncements that are premised on the notion that “attributes of the human personality” calls for international protection.¹⁵⁷ One such attribute is vulnerability; however, this concept is employed in the context of a vulnerable group approach. For example, the IACtHR has emphasised undocumented adult migrants’ vulnerability¹⁵⁸ and undocumented migrant children’s special vulnerability.¹⁵⁹ Vulnerability is not construed as the basis of human rights; it is human dignity that is the foundation of human rights in the IACtHR’s case law.¹⁶⁰ There is no space to discuss the concept of human dignity in IHRL¹⁶¹ and my contribution is confined to comparing the merits of human dignity and vulnerability in ensuring that human rights are entrenched in international human rights adjudication. In this respect, the ECtHR and ECSR’s reversals demonstrate that the conceptualisation of human dignity as the basis of IHRL does not necessarily guarantee a *pro homine* approach; the state’s right to control immigration remains these bodies’ starting point in migrant cases. This is not to say that dignity has no place in IHRL; both dignity and vulnerability are attributes of the human and as such are interrelated. Rather, I posit that making IHRL responsive to universal vulnerability protects and promotes human dignity. In other words, the concept of vulnerability becomes instrumental in guaranteeing respect for human dignity. A vulnerability analysis is also distinctive in that it triggers an investigation into migrants’ societal and institutional interactions as well as in-depth scrutiny of the exercise of the government immigration power.

¹⁵⁷ ACHR, Preamble, *supra* n. 61.

¹⁵⁸ Advisory Opinion OC-18/03, *supra* n.61, para. 71; *Nadege Dorzema et Al v Dominican Republic*, *supra* n. 61, para. 152; and *The Pacheco Tineo Family v Plurinational State of Bolivia*, *supra* n. 61, para. 128.

¹⁵⁹ Advisory Opinion OC-18/03, *supra* n. 61, para. 66.

¹⁶⁰ See e.g.: *The Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* n. 61, para. 129; and IACtHR (Judgment) 26 June 2012, *Díaz Peña v. Venezuela*, para. 135.

¹⁶¹ C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, 19(4) *European Journal of International Law* (2008), p. 655.

These features have the merit to flesh out the concept of vulnerability, thereby making it a more tangible concept than human dignity.

I accept that the reconceptualisation of vulnerability as a foundation of IHRL cannot totally disable the government immigration power. However, what it can do is contain its influence. This can be shown in respect of the two main aspects of this power's influence on IHRL. First, a vulnerability analysis cannot prevent the government immigration power from affecting the creation of IHRL, especially the personal scope of international human rights instruments and the range of rights they guarantee. However, because it provides human rights adjudicating bodies with a potent interpretative tool, a vulnerability analysis can bring migrants from the margins to the core of the international human rights regime. Arguably, vulnerability-sensitive interpretations of IHRL could be seen to flout the state's consent. However, as noted above, these legitimacy-related concerns are overstated. Besides, they unduly stifle human rights instruments' adaptability to societal changes and evolving protection needs.¹⁶² Above, I further stress that timid interpretations imperil human rights systems. The second aspect of the government immigration power's resilience lies in the inability of a vulnerability basis to fully guarantee equality between migrants and (national) citizens. A vulnerability analysis does not obviate the state's right to regulate migrants' entry, residence and exit, with the consequence that differential treatment on account of one's immigration status may persist. What a vulnerability analysis does, however, is subject the state's right to control immigration to IHRL. Consequently, differential treatment cannot result in an erosion of human rights standards for migrants as this would frustrate their recognition as fully-fledged IHRL subjects. This does not constitute a novel understanding of the principle of equality. The ACtHR has affirmed the *jus cogens* nature of the principle of equality before the law¹⁶³ and held that "the migratory status of a person [could] not constitute a justification to deprive him of the enjoyment and exercise of human rights."¹⁶⁴ However, not all regional human rights adjudicating bodies construct equality in a manner that is consistent with the recognition of migrants as fully-fledged IHRL subjects. While the ECtHR has repeatedly held that differential treatment exclusively based on nationality requires "very weighty reasons",¹⁶⁵ it does not apply

¹⁶² The ECtHR has repeatedly described the ECHR as a "living instrument" (see e.g.: ECtHR (Judgment) 25 April 1978, *Tyler v. United Kingdom*, App. No. 5856/72, para. 31).

¹⁶³ Advisory Opinion OC-18/03, *supra* n.61, Part IV (especially para. 88).

¹⁶⁴ *Ibid.*, paras. 169, 8.

¹⁶⁵ ECtHR (Judgment) 16 September 1996, *Gaygusuz v. Austria*, App. No. 17371/90, para. 42. Differential treatment must also be objectively and reasonably justifiable (*ibid.*).

this high threshold to differential treatment on account of one's immigration status where there is an element of choice in the immigration status.¹⁶⁶ The ECtHR's reasoning is problematic on two accounts: first, immigration status becomes a primary determinant of the extent of human rights protection; secondly, it rests on a simplistic - or at the very least under-researched - understanding of the concept of choice in the context of migratory decisions. This concept tends to be closely associated with the notion of voluntary migration; whether migration is perceived as voluntary or involuntary has significant implications for migrants' rights and duties in receiving states. Ottonelli and Torresi observe that "[t]hose who want to downplay the duties toward migrants tend to picture voluntary migration as a matter of mere preference."¹⁶⁷ The ECtHR's approach in migrant cases shows how the concept of voluntariness can play an important role in human rights breach assessments. For example, the Court's reversal supports the idea that irregular migration and the breaches of immigration laws that it entails constitute voluntary acts for which (adult) migrants should be held 'responsible'.¹⁶⁸ Consequently, irregular migrants' 'choice' to migrate *illegally* weighs unfavourably on the Court's assessments.¹⁶⁹ Yet the concept of voluntariness requires a nuanced and sophisticated conceptualisation. In this regard, Ottonelli and Torresi propose a conceptualisation of voluntary migration that has the merit of recognising migrants' agency while avoiding to reduce migratory decisions to mere choices.¹⁷⁰

¹⁶⁶ ECtHR (Judgment) 27 September 2011, *Bah v. United Kingdom*, App. No. 56328/07, para. 47.

¹⁶⁷ V. Ottonelli and T. Torresi, "When is Migration Voluntary?", 47(4) *International Migration Review* (2013), p. 784. These authors also point out that 'those who want to press the case for migrants' rights tend to classify all current migration as forced or non-voluntary' (*ibid.*).

¹⁶⁸ Irregular migrant children tend not to be considered responsible for their irregular immigration status. For example, in *Ponomaryovi v. Bulgaria*, the ECtHR observed that "[i]t was not [the children's] choice to [irregularly] settle in Bulgaria" (*Ponomaryovi v. Bulgaria*, *supra* n.101, para. 61).

¹⁶⁹ For example, in *Osungu and Lokongo v. France*, the ECtHR opined that the French authorities' decision to refuse the applicants' family benefits was the consequence of voluntary behaviour on their part that was contrary to the law (ECtHR (Decision) 8 September 2015, *Jean-Michel Okitaloshima Okonda Osungu and Anita Okitaloshima Okonda Osungu v. France* and *Elisabeth Selpa Lokongo v. France*, Apps.Nos 76860/11 and 51354/13, para. 45).

¹⁷⁰ Voluntary migration must be non-coerced; migrants must come from a position of sufficiency; they must have exit options; and they must have knowledge of the migratory path that they are choosing (Ottonelli and Torresi, *supra* n. 167, p. 168).

The strong human rights underpinning that comes with the reconceptualisation of vulnerability as a foundation of IHRL enables human rights adjudicating bodies to partake in the development of good GIMG. The affirmation of the vulnerable subject and the ensuing recognition of migrants as fully-fledged IHRL subjects bolster a principled approach to migration governance. Moreover, the construction of the IHRL subject in keeping with the universal premise of IHRL brings coherence to both IHRL and GIMG. Besides, because it is grounded in the realities and complexities of international migration - thereby avoiding the pitfalls associated with policy-driven and legalistic categorisations of migrants and migration -, the affirmation of the vulnerable subject supports coherent, viable and sustainable governance.

4.2.2. A Novel Approach to International Human Rights Adjudication in Migrant Cases

Here, I examine how the theorisation of vulnerability as a tool of IHRL transforms international human rights adjudication in migrant cases and equips regional human rights adjudicating bodies with the means to participate in the development of good GIMG. The deployment of a vulnerability analysis brings about two fundamental changes to human rights adjudication: it prompts an investigation into migrants' societal and institutional relationships; and it adopts a substantive standard of review of states' migration policy choices. Both changes enable human rights bodies to identify and respond to migrants' vulnerabilities and, in so doing, support their role as GIMG actors.

4.2.2.1. Identifying Migrants' Vulnerability

Regional human rights adjudicating bodies' investigation into migrants' societal and institutional relationships is concerned with identifying lived vulnerability with a view to providing migrants with the resilience-building assets they need. Thus, this investigation provides the basis for determining states' IHRL obligations towards migrants. The IACtHR with its *pro homine* approach has come the closest to undertaking an investigation into migrants' interactions.¹⁷¹ Conversely, reversals rely on states' accounts of migrants' relationships. Troublingly, these accounts are informed by the assumptions that underpin immigration laws, policies and discourse.¹⁷² Of particular significance in the construction of

¹⁷¹ In Advisory Opinion OC-18/03, states' practices in respect of irregular migration and irregular migrants bear on the IACtHR's assessments (Advisory Opinion OC-18/03, *supra* n. 61, paras. 169-170).

¹⁷² Common assumptions include the idea that welfare provision for migrants acts as a pull factor; that irregular migration is a simple matter of preference; that migrants with a precarious immigration status are a burden on national resources; and that irregular migrants do not contribute to the national community.

these narratives are the assumptions that come with one's immigration status. Immigration statuses assume varying degrees of remoteness from the state that, in turn, create assumptions regarding migrants' relationships. Accordingly, migrants with a precarious status are in the main located outside the national community, with the consequence that their interests are commonly set against those of the receiving state. Critically, these assumptions provide an unreliable picture of migrants' societal and institutional interactions that weigh on human rights breach assessments. Conversely, a vulnerability analysis is concerned with understanding the nature of migrants' interactions with the state, its community and its institutions. Consequently, a vulnerability analysis makes for narratives and IHRL breach assessments that have a solid knowledgebase. Importantly, the light that international human rights adjudication then sheds on migrants' experiences and the dynamics of international migration advances the development of the comprehensive knowledgebase integral to good GIMG.

Whether regional human rights adjudicating bodies can contribute to building the knowledgebase necessary to both good international human rights adjudication and good GIMG is contingent on their being capable of undertaking the requisite investigation into migrants' interactions. Human rights bodies cannot be expected to have specialist knowledge in all matters of international migration. The absence of in-built expertise, however, does not constitute an unsurmountable obstacle; their lack of knowledge can be filled using a range of methods and sources. First, judges and other members of human rights bodies can be trained.¹⁷³ Secondly, greater weight should be given to migrants' voices in the adjudication process. The information provided by applicants and the questions put to them should help gain a thorough understanding of their experiences as migrants and should not therefore be confined to those issues directly arising from the alleged human rights violations. Thirdly, respondent states have an important role to play in building a picture of migrants' relationships. As shown below, states become accountable for the exercise of the government immigration power and are thus required to substantiate their assertions. For example, where a state claims that short-term migrants place an undue burden on national resources, supportive evidence should be provided. Finally, regional human rights adjudicating bodies can use expert opinions;¹⁷⁴ this can be at the

¹⁷³ Mantouvalou, *supra* n. 150, p. 118.

¹⁷⁴ The ECtHR has made relatively wide use of expert evidence (see e.g.: G. Cumming, *Expert Evidence Deficiencies in the Judgments of the Courts of the European Union and the European Court of Human Rights* (The Netherlands, Kluwer Law International, 2014).

request of the parties or of their own motion.¹⁷⁵ Expert opinions are there to assist human rights bodies with establishing and assessing evidence. *Amicus curiae* briefs – notably briefs filed by NGOs - offer a means to bring expert knowledge to the attention of adjudicating bodies.¹⁷⁶ A vulnerability analysis supports an extensive use of *amicus curiae* briefs akin to the practice developed by the IACtHR; for example, the Court has, in some instances, used its discretion and asked for interested groups' views.¹⁷⁷

Importantly, regional human rights adjudicating bodies' in-depth scrutiny of the exercise of the government immigration power complements their investigation into migrants' societal and institutional relationships in the construction of informed narratives and human rights violation assessments. In-depth scrutiny does so by helping elucidate how migration laws and policies shape migrants' experiences and migratory patterns. In particular, the degree of scrutiny that a vulnerability analysis demands helps explicate the correlation between state action in the field of migration and migrants' vulnerability. How the adoption of a substantive standard of review affects human rights adjudication is discussed above in the context of the theorisation of vulnerability as an IHRL tool and below in relation to the articulation of responses to migrants' vulnerability by regional human rights adjudicating bodies.

4.2.2.2. Responding to Migrants' Vulnerability

A vulnerability analysis calls for a dynamic approach to the articulation of IHRL obligations congruent with their characterisation as resilience-building assets and the recognition of migrants as fully-fledged IHRL subjects. Factors that inhibit the response of international human rights adjudication to migrants' vulnerabilities must therefore be removed, which alters approaches to human rights adjudication in migrant cases.

A vulnerability analysis first compels regional human rights adjudicating bodies to put human rights protection before the state's right to control immigration, thereby doing away with reversals. This 'supremacy' of human rights constitutes the underpinning principle for the assessment of human rights violations. Having identified migrants' vulnerabilities, human rights bodies are then required to act as asset-conferring institutions. Importantly, migrants' claims to protection and the articulation of IHRL obligations are no longer set against the

¹⁷⁵ See e.g.: European Court of Human Rights, Rules of Court, 19 September 2016, Annex to the Rules, Rule A1 (1) Investigative measures.

¹⁷⁶ A. A. Mohamed, "Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' rights: Lessons from the European and Inter-American Courts of Human Rights", 8 *MSU-DCL Journal of International Law* (1999), p. 377.

¹⁷⁷ *Ibid.*, p. 391.

exercise of the government immigration power. In particular, a vulnerability analysis facilitates the distribution of resilience-building assets to migrants in keeping with their recognition as fully-fledged IHRL subjects. Because a vulnerability analysis subjects states' policy choices to in-depth scrutiny, unsubstantiated policy considerations can no longer constrain protection for migrants. Furthermore, while substantiated considerations can have some bearing on the range of IHRL obligations placed on states, these cannot result in migrants being pushed to the edges of human rights systems. Importantly, the adoption of a substantive standard of review of the exercise of the government immigration power and, more broadly, states' policy decisions significantly reduces the margin of appreciation conferred on states, especially in matters of immigration policy and resource allocation. The requirement that states must implement their IHRL obligations to the maximum of their resources further expand their obligations vis-à-vis migrants.

5. CONCLUSION

A human rights-based approach to GIMG accounts for the three fundamental traits of international migration. It acknowledges that migration is a fundamentally human phenomenon. This approach also accepts that humans are mobile and that international migration is a permanent world feature. Finally, it recognises that isolated state action cannot offer fitting responses to the global phenomenon that is international migration. Because it rests on a sound understanding of the nature of international migration, a human rights-based approach provides the necessary framework for good GIMG.

The recognition of international migration as a fundamentally human phenomenon makes human rights central to good GIMG. This very strong linkage between human rights and good migration governance, in turn, makes international human rights adjudication a key migration governance activity and human rights adjudicating bodies key GIMG actors. In this paper, I have focused on regional bodies because of the greater momentum of GIMG at the trans-regional level. However, this is not to say that multilateral activity should not be developed; on the contrary, the global nature of international migration makes multilateralism a significant facet of GIMG and trans-regional activity can provide incentives for multilateral developments. It follows that my argument in support of the transformation of regional human rights adjudicating bodies into GIMG actors extends to international bodies such as the Human Rights Committee or the Committee on the Rights of the Child.

I accept that the transformation of human rights bodies into GIMG actors is hampered by the influence that the government immigration power exerts on IHRL. I have shown how the affirmation of the state's right to control immigration and the reversals it causes undermine

protection for migrants, which frustrates the development of fair GIMG. Reversals are indeed incompatible with the conceptualisation of human rights as the core of GIMG. Reversals also thwart efficient governance. Because they significantly constrain states' IHRL obligations towards migrants, reversals facilitate the inequitable distribution of the costs and benefits of international migration; benefits are disproportionately apportioned to (wealthy) receiving states while costs are in the main borne by (poorer) states of origin. Critically, the significance afforded to the government immigration power yields narratives that are detached from the realities and complexities of international migration. Thus, rather than further efficient GIMG, international human rights adjudication contributes to the lack of coherence, viability, sustainability and knowledgebase that presently beset most attempts at GIMG.

To enable the transformation of regional human rights adjudicating bodies into good GIMG actors, I advocate the deployment of a vulnerability analysis in international human rights adjudication. This analysis is premised on the conceptualisation of universal vulnerability as a foundation and tool of IHRL. A vulnerability analysis has a profound transformative effect on international human rights adjudication. First, it fundamentally alters the nature of the IHRL subject: the liberal invulnerable and nationalistic subject is replaced by the universal vulnerable subject. Secondly, with the development of a vulnerability analysis, IHRL becomes concerned with building the vulnerable subject's resilience. Thirdly, the redefined function of IHRL morphs human rights bodies into asset-conferring institutions. Fourthly, a vulnerability analysis subjects the state's right to control immigration to the state's IHRL obligations. Finally, because it prompts an investigation into migrants' societal and institutional relationships as well as in-depth scrutiny of the exercise of the government immigration power, a vulnerability analysis produces narratives and human rights breach assessments that are grounded in the facts of international migration. Importantly, the merits of a vulnerability analysis are not confined to migrant cases; this approach is instrumental in making IHRL responsive to the vulnerabilities of *all* IHRL subjects.

Critically, the advancement of migrants' human rights protection that a vulnerability analysis yields supports good GIMG. It recognises and strengthens the fundamental linkage between human rights and international migration. A vulnerability analysis further helps elucidate the dynamics of international migration. Importantly, a vulnerability analysis has the merit to produce migrant and migration narratives that are evidence-based rather than policy driven. In particular, investigations into migrants' societal and institutional relationships combined with in-depth scrutiny of the exercise of the government immigration power

illuminate the state's role in the construction of the disadvantages associated with alienage.¹⁷⁸ Because it recognises the intrinsic human nature of international migration and seeks to understand this global phenomenon, a vulnerability analysis brings coherence to GIGM as well as supports sustainable and viable governance activity while promoting fairness.

I accept that the deployment of a vulnerability analysis in international human rights adjudication presents significant challenges. I recognise that it places great demands on regional human rights bodies and states. A vulnerability analysis could be said to 'take on' the state's right to control immigration, thereby exposing human rights bodies to 'accusations' of illegitimate activism and, in so doing, rendering human rights systems vulnerable.¹⁷⁹ However, these claims are misplaced. A vulnerability analysis does not disable the government immigration power; rather it subjects its exercise to IHRL obligations to which states have subscribed. Thus, a vulnerability analysis can be said to foster legitimacy and accountability in the exercise of the government immigration power. Furthermore, as Judge Cançado Trindade and Dembour rightly point out, human rights adjudication approaches that submit to the state's will undermine protection standards and as such pose greater threats to human rights systems.¹⁸⁰ Critically, the transformation of human rights bodies into asset-conferring institutions and the ensuing characterisation of IHRL obligations as resilience-building resources do not alter the nature of states' 'pre-vulnerability' duty to respect, protect and fulfil human rights. Rather than 'impose' a human rights adjudication 'revolution' on states, a vulnerability analysis gives greater substance to states' IHRL obligations in keeping with the universal and humanistic premise of IHRL.

¹⁷⁸ The term alienage is borrowed from Bosniak (L. Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton, Princeton University Press, 2006).

¹⁷⁹ For example, Timmer opines that the concept of vulnerability is not without risks for the ECtHR; she observes that "the Court's very protection of especially vulnerable and *unwanted* people renders the Court vulnerable and unwanted itself" (A. Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. A. Fineman and A. Gear (eds.), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham, Ashgate, 2013), p. 147,168).

¹⁸⁰ IACtHR (Concurring Opinion of Judge A. A. Cançado Trindade), Advisory Opinion OC-18/03, *supra* n. 61, para. 87; and Dembour, *supra* n. 60, p. 312, 351.