

Article

# Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR

Sylvie Da Lomba

Law School, University of Strathclyde, Lord Hope Building, Level 3, 141 St James Road, Glasgow G4 0LT, Scotland, UK; sylvie.da-lomba@strath.ac.uk; Tel.: +44-(0)141-548-3331

Received: 30 October 2017; Accepted: 13 December 2017; Published: 16 December 2017

**Abstract:** This paper focuses on settled migrants and calls for the construction of the right to respect for private life as an autonomous source of protection against expulsion under Article 8 ECHR. I contend that, as a core part of human existence, private life warrants meaningful protection. I posit that the fact that all settled migrants have established private life in the host State brings it to the fore of Article 8 expulsion cases. This argument finds strong support in the concept of belonging and transnational migration theory; both tell us that settled migrants' host State has become their 'own country'. Drawing on earlier work, I reclaim vulnerability as a foundation and tool of International Human Rights Law with a view to recognising migrants within the jurisdiction of ECHR States as fully-fledged ECHR subjects and making the European Court of Human Rights responsive to their vulnerability. I make the case for absolute protection against expulsion for second (and subsequent)-generation migrants and settled migrants who have spent most of their adult life in the host State. In respect of other settled migrants, I argue that the minimum protection standard should be that expulsion is only justifiable in exceptional circumstances.

**Keywords:** ECHR; European Court of Human Rights; expulsion; international human rights adjudication; migrants; right to respect for private life; second-generation migrants; settled migrants; vulnerability; vulnerability analysis

---

## 1. Introduction

In this article, I challenge the State's power to expel non-nationals on account of its dehumanising effect and posit that the human experience calls for the construction of the right to respect for private life as an autonomous source of protection against expulsion under Article 8 of the European Convention on Human Rights (ECHR).<sup>1</sup> I reclaim vulnerability as a foundation and tool of International Human Rights Law (IHRL) and, on this basis, advocate the deployment of a private life approach in Article 8 expulsion cases.

Private life is a core aspect of any human being's existence and the right to respect for private life is recognised as a basic human right in an array of international human rights instruments.<sup>2</sup> Private life is critical to one's sense of belonging and well-being. It is undeniable that expulsion severely disrupts

---

<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

<sup>2</sup> E.g., Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Article 12; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 17; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), Article 14; and American Convention on Human Rights, opened for signature 22 November 1969 (entered into force 18 July 1978), Article 11.

settled migrants' private life and as such interferes with their right to respect for private life. Yet the European Court of Human Rights (ECtHR) neglects private life when assessing whether expulsion engages migrants' Article 8 rights.<sup>3</sup> Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

I contend that the ECtHR's affirmation of the State's right to control immigration causes the Court to develop a contradictory approach that pays lip service to the right to respect for private life. The focus of this paper is on 'settled migrants', the term used by the Court to refer to regular long-term resident migrants. In using the term 'settled migrants' for clarity's sake, I accept that the Court's construction of the term is problematic as it is exclusionary; for example, it does not apply to *irregular* long-term resident migrants. Similarly, I concede that the use of the terms 'host State' and 'country of origin' is not entirely satisfactory;<sup>4</sup> they can be seen as artificial in that they do not capture the realities of migrants' ties to these States. Alternate terminology could thus be considered; for example, the host State could be more accurately referred to as settled migrants' 'home State' or 'own country'. The reasons for the focus on settled migrants are threefold. First, the fact that *all* will have established private life in the host State is undisputed, bringing private life to the fore of expulsion cases. Secondly, these migrants are seen as having the most 'secure' type of immigration status; yet the ECtHR fails to protect their private life against the exercise of the State's power to expel non-nationals. Lastly, this focus sheds light on the predicament of second (and subsequent)-generation migrants. The term second-generation migrants applies to persons who were born in the host State or migrated with their parents at a very young age (Schneider 2016, p. 3). The term, however, excludes those who are national citizens either by reason of their being born in the host State or through naturalisation as they are not migrants for the purpose of national immigration laws.

Building on the work of especially Fineman (2008, 2010–2011, 2012), I advocate the deployment of a vulnerability analysis in the ECtHR's case law with a view to making ECHR law more responsive to universal human vulnerability, including migrants' vulnerability. I show how the proposed approach brings private life to the core of Article 8 expulsion cases, thereby recognising its centrality to human existence (Larson et al. 1986) and ensuing critical role in building human resilience to vulnerability.

I start with a critique of the ECtHR's failure to deploy a private life approach in Article 8 expulsion cases in relation to settled migrants. I then set out the theoretical framework and reconceptualise vulnerability as both a foundation and tool of IHRL. I posit that the development of a vulnerability analysis in IHRL adjudication—understood to cover regional systems—enables the recognition of migrants as fully-fledged IHRL subjects and thus makes IHRL more responsive to their vulnerability. Finally, I demonstrate that the deployment of a vulnerability analysis in the ECtHR's Article 8 expulsion cases fundamentally alters the nature of the ECHR subject and the Court's role. This progressive shift in turn supports the construction of the right to respect for private life as an autonomous source of protection against expulsion and therefore significantly increases protection standards for settled migrants.

<sup>3</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC]; ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012; and ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012.

<sup>4</sup> For example, in *Nasri v. France*, Judge Morenilla intimates that the term 'own country' is best suited to encapsulate the nature of long-term migrants' ties to their State of residence, the so-called host State (ECtHR, *Nasri v. France* v. App. No. 19465/92, Judgment of 14 July 1995, Partly Dissenting Opinion of Judge Morenilla, para. 4).

## 2. Private Life in Expulsion Cases: A Contradictory Approach

The ECtHR's treatment of private life in Article 8 expulsion cases is deeply contradictory. The Court recognises the existence and significance of settled migrants' private life in the host State', yet it fails to protect it. I first consider how the ECtHR establishes private life within the meaning of Article 8(1) ECHR and then unravel the paradox at the heart of Article 8(2) ECHR assessments in expulsion cases.

### 2.1. Establishing Private Life under Article 8(1) ECHR in Expulsion Cases

The right to respect for private life has given rise to an abundant case law that looks at issues as varied as freedom from interference with physical and psychological integrity and freedom from serious pollution (Moreham 2008). The ECtHR has emphasised that private life is 'a broad term not susceptible to exhaustive definition.'<sup>5</sup> In the context of Article 8 expulsion cases, the concept of private life encompasses a wide range of relationships developed outside the family inner circle. In this respect, the Court has repeatedly held that

[A]s Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity<sup>[6]</sup> it must be accepted that the totality of social ties between settled migrants ( . . . ) and the community in which they are living constitutes part of the concept of private life within the meaning of Article 8.<sup>[7]</sup>

In *Slivenko v. Latvia*, the ECtHR stressed that private life covered 'the network of personal, social and economic relations' developed 'since birth'.<sup>8</sup> Accordingly, in *Miah v. the United Kingdom*, the Court emphasised that the applicant's expulsion would undoubtedly have 'an impact on his ability to develop the family relationships, friendships and other social ties he had in the United Kingdom'.<sup>9</sup> Similarly, in *C v. Belgium*, the Court held that private life within the meaning of Article 8(1) entailed 'the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'.<sup>10</sup> This breadth sets private life apart from family life; the latter is indeed construed narrowly and is 'normally limited to the core family'.<sup>11</sup> Typically, relationships between parents and adult children will not fall within the concept of family life unless an element of dependence that goes beyond normal emotional ties can be established.<sup>12</sup>

The ECtHR readily accepts that *all* long-term migrants will have developed private life in the host State<sup>13</sup> and this is irrespective of applicants' specific circumstances and immigration status. Accordingly, the Court has upheld the existence of long-term migrants' private life in the host State whether expulsion is the consequence of criminal convictions<sup>14</sup> or/and breaches of national

<sup>5</sup> ECtHR, *Peck v. the United Kingdom*, App. No. 44647/98, Judgment of 28 January 2003, para. 57.

<sup>6</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 59, referred to in ECtHR, *Mikulić v. Croatia*, App. No. 53176/99, Judgment of 7 February 2002, para. 53. In *Mikulić v. Croatia*, the Court held that 'everyone should be able to establish details of their identity as individual human beings (ECtHR, *Mikulić v. Croatia*, App. No. 53176/99, Judgment of 7 February 2002, para. 54).

<sup>7</sup> ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81. See also ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 59 and ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 63.

<sup>8</sup> ECtHR, *Slivenko v. Latvia*, App. No. 48321/99, Judgment of 9 October 2003, para. 96.

<sup>9</sup> ECtHR, *Miah v. the United Kingdom*, App. No. 53080/07, Decision of 27 April 2010, para. 17.

<sup>10</sup> ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, para. 25.

<sup>11</sup> ECtHR, *Nacic and Others v. Sweden*, App. No. 16567/10, Judgment of 15 May 2012, para. 73.

<sup>12</sup> ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, para. 43; and ECtHR *Slivenko v. Latvia*, App. No. 48321/99, Judgment of 9 October 2003 [GC], para. 97.

<sup>13</sup> E.g., ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81; and ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 63.

<sup>14</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC]; and ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC].

immigration law requirements. Critically, private life is found to exist whether stay in the host State is lawful<sup>15</sup> or unlawful.<sup>16</sup> Thus, unlawful long-term residence does not operate as a bar to the establishment of private life under Article 8(1) ECHR. However, long-term migrants' immigration status does weigh on their recognition as settled migrants by the Court as the term only applies to regular migrants. For example, in *Butt v. Norway*, the ECtHR accepted that the applicants had established both private and family life in the host State notwithstanding their irregular immigration status,<sup>17</sup> but concurred with the respondent State that their irregular stay prevented them from being regarded as settled migrants.<sup>18</sup> The (unverified) assumption that underlies the Court's reasoning is that a precarious immigration status makes for tenuous ties to the host State. Elsewhere, I show how the importance that the Court attaches to the immigration status of so-called irregular migrants frustrates their recognition as fully-fledged ECHR subjects (Da Lomba 2014). Below, I show that the ECtHR's exclusionary construction of the term settled migrants shapes the Court's approach to Article 8(2) assessments and contributes to eroding protection standards. Cases where expulsion is as a result of criminal convictions provide further evidence of the ECtHR's readiness to recognise settled migrants' private life. Indeed, periods of incarceration do not frustrate the recognition of private life in the host State and this is irrespective of the length of prison sentences and thus the nature and seriousness of the offences. For instance, in *Miah v. the United Kingdom*, the Court rejected the United Kingdom Asylum and Immigration Tribunal's finding that eleven years spent in prison or using drugs had dissolved the applicant's private life ties.<sup>19</sup> Importantly, the ECtHR's rebuttal of the national tribunal's finding shows that assessing the existence of private life is grounded in the realities of migrants' life and that it does not entail a 'moral judgment' on their circumstances nor a punitive aspect—in *Miah v. the United Kingdom*, the Court does not 'chastise' the applicant for his drug use and criminal record.<sup>20</sup> It follows from the above that the ECtHR's approach to assessing the existence of settled migrants' private life under Article 8(1) provides a solid basis for upholding the centrality of private life to migrants' existence in Article 8(2) assessments and thus constructing the right to respect for private life as a potent tool of protection against expulsion. Yet, in the next section, I show that, rather than fully engage with private life in line with its characterisation as a core element of migrants' existence, the Court fails to bring private life to the fore in Article 8(2) assessments.

## 2.2. Private Life in Article 8(2) ECHR Assessments

The ECtHR draws several protective principles from its unequivocal recognition of settled migrants' private life in the host State which in turn point to the deployment of a private life approach in Article 8(2) assessments. Yet, rather than follow through with the development of a protective approach, the Court takes a 'wrong turn' when assessing whether interferences with the right to respect for private life can be justified under Article 8(2).

### 2.2.1. Towards a Private Life Approach to Article 8(2) ECHR assessments . . .

Having unequivocally admitted that all settled migrants will have developed private life in the host State, the ECtHR sets out several principles that are congruent with the existence and significance of private life. First, and with the same readiness that characterises its recognition of settled migrants' private life in the host State, the Court stresses that expulsion will unavoidably interfere with their right to respect for private life.<sup>21</sup> Secondly, and in line with the recognition of private life as a core element

<sup>15</sup> *Id* at, para. 63; and ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, para. 25.

<sup>16</sup> ECtHR, *Butt v. Norway*, App. No. 16567/10, Judgment of 15 May 2012, para. 76.

<sup>17</sup> *Id.* 6.

<sup>18</sup> *Id* at para. 78.

<sup>19</sup> ECtHR, *Miah v. the United Kingdom*, App. No. 53080/07, Decision of 27 April 2010, paras. 16 and 17.

<sup>20</sup> *Id.*

<sup>21</sup> E.g., ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81.

of migrants' existence and the construction of expulsion as a major interference with settled migrants' right to respect for private life, the ECtHR emphasises that 'regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there'.<sup>22</sup> Accordingly, the Court has consistently held that 'serious reasons are required to justify expulsion' in the case of second-generation migrants.<sup>23</sup> These principles clearly acknowledge the importance of relationships outside the family nucleus and the intensity of settled migrants' private life in the host State. In doing so, they firmly locate private life at the core of Article 8(2) assessments and make the case for increased protection against expulsion for settled migrants, especially second (and subsequent)-generation migrants. Yet, rather than shape the ECtHR's Article 8(2) assessments, these principles are in effect eclipsed by the Court's affirmation of the State's right to control immigration.

### 2.2.2. And Then a 'Wrong Turn'

Having laid the foundations of a private life approach to Article 8(2) assessments, I posit that the ECtHR's reversal ([Dembour 2015](#)) and its ensuing affirmation of the State's power to expel non-nationals cause the Court to take a 'three-prong wrong turn'. First, it makes migrants' offending the decisive factor in Article 8(2) assessments. Secondly, private life is relegated to the background. Finally, the intensity of settled migrants' ties to the host State and the country of origin is appraised through the sole prism of their immigration status.

#### (i) Criminal Offences: the Decisive Factor in Article 8(2) ECHR Assessments

In the case of settled migrants, States will commonly seek to exercise their power to expel non-nationals following convictions for criminal offences. In this respect, the ECtHR has constantly held that 'in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences'.<sup>24</sup> Importantly, the Court has repeatedly held that the State's power to expel non-nationals can be exercised 'regardless of whether an alien entered the host country as an adult or at a very young age, or was even born there'.<sup>25</sup> Unsurprisingly, some of the criteria set out by the Court to assess whether interferences with Article 8(1) rights can be justified under Article 8(2)—the so-called *Boultif/Üner* criteria<sup>26</sup>—are concerned with migrants' offending; the other criteria focus on migrants' ties to the host State and the country of origin. Accordingly, the Court looks at 'the seriousness of the offence committed', 'the time elapsed since the offence was committed and the applicant's conduct during that period'.<sup>27</sup> Here I contend that the problem does not so much lie with criminal offences being considered when weighing whether a 'fair balance'<sup>28</sup> has been struck between the applicant and the respondent State's interests. Rather I argue that the problem lies with migrants' offending being the decisive factor in Article 8(2) assessments. The Court's approach shows that having a criminal record will normally tip the balance towards a non-violation finding, and this is irrespective of the intensity of migrants' ties to the host State. Critically, the significance given to criminal offences in Article 8(2) assessments is bolstered by the wide margin of appreciation granted to States in matters of immigration, especially when assessing whether expulsion is justifiable.<sup>29</sup>

<sup>22</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC] para.58; and ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 74.

<sup>23</sup> *Id* para.75; and ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, paras 46 and 50.

<sup>24</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 54.

<sup>25</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 55.

<sup>26</sup> ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, para. 48; and ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 57.

<sup>27</sup> ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, para. 48.

<sup>28</sup> E.g. *id* at para.47.

<sup>29</sup> E.g. ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 76.

Consequently, both private and family life struggle to prevail in Article 8(2) assessments.<sup>30</sup> For example, in *Balogun v. the United Kingdom*, the ECtHR found that the applicant's repeated offending outweighed the intensity of his private life in the respondent State—the applicant had not established family life within the meaning of Article 8(1).<sup>31</sup> Yet the Court had recognised that expulsion would 'have a very serious impact on [the applicant's] private life, given his length of residence in the [host State] and his limited ties to his country of origin.'<sup>32</sup> The Court further accepted that 'his social and cultural ties to the United Kingdom were undoubtedly stronger than those to Nigeria [his country of origin]'.<sup>33</sup> Similarly, in *Üner v. the Netherlands*, the Court stressed that it did 'not doubt that the applicant had strong ties with the [host State]',<sup>34</sup> but found that the respondent State had struck a fair balance in light of the applicant's offending. However, whilst both private and family life suffer from the construction of criminal offences as the decisive criterion, their degree of resilience in Article 8(2) assessments differs. To date, relationships formed outside the family nucleus, no matter how intense, have never outweighed considerations pertaining to applicants' offending and the prevention of crime and disorder. It follows from the ECtHR's approach that private life alone cannot offer protection against expulsion in this type of cases. The powerlessness of private life is apparent in the Court's reasoning in *Balogun v. the United Kingdom*: the applicant's strong and uncontested private life in the host State failed to counteract the importance accorded to his criminal record.<sup>35</sup> The ECtHR did note that the applicant had had a particularly difficult upbringing: he had been left with an aunt at the age of three; he had been ill-treated by her; and had been thrown out by her at the age of fifteen and placed in foster care.<sup>36</sup> However, while the Court said it was sympathetic to the applicant's circumstances in his formative years, it opined that he was nonetheless 'responsible for his own actions.'<sup>37</sup> Dissenting judges pointed out that 'all offences were committed when the applicant was still a very young man and three of them when he was still a minor.'<sup>38</sup> This judgment points to another contradiction in the ECtHR's approach. Whilst the Court does not pass 'moral judgments' on applicants when assessing the existence of private life, it does not show the same restraint in Article 8(2) assessments. By contrast with private life, the existence of strong family ties in the host State can stand in the way of expulsion, albeit in limited circumstances. For example, family life shows some resilience where offences were non-violent and perpetrated as a juvenile. In *Maslov v. Austria*, the Court pointed out that 'the decisive feature of the present case [was] the young age at which the applicant committed the offences and, with one exception, their non-violent nature'<sup>39</sup> and concluded that expulsion would breach Article 8.<sup>40</sup> Similarly, family life will come first where the applicant's circumstances are deemed exceptional; this is, for instance, the case where the applicant's severe disabilities make him dependent on his family.<sup>41</sup>

The characterisation of criminal offences as the decisive factor in Article 8(2) assessments plays a pivotal role in causing the ECtHR to deviate from its promising protective principles and is thus instrumental in preventing the right to respect for private life from developing as an autonomous

<sup>30</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], paras 63–64; ECtHR, *Samsomnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, paras. 90 and 92; and ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, paras. 35–36.

<sup>31</sup> ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, para. 53.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at para. 51.

<sup>34</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 62.

<sup>35</sup> ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, paras 52 and 53.

<sup>36</sup> *Id.* at para. 52.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Joint Dissenting Opinion of Judges Garlicki and David Thór Björgvinsson.

<sup>39</sup> E.g., ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 81.

<sup>40</sup> *Id.* at para. 101.

<sup>41</sup> ECtHR, *Nasri v. France*, App. No. 19465/92, Judgment of 13 July 1995, para. 46. See also ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, paras 53 and 55. In the latter case, the Court found that it was 'practically impossible for [the applicant] to have a family life outside Switzerland' (ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, para. 55).

source of protection against expulsion. I further posit that, in addition to frustrating the deployment of a private life approach, the centrality of criminal offences in Article 8(2) assessments raise three additional issues. First, the ECtHR's failure to build on its protective principles causes the Court to blur the distinction between the treatment of settled migrants and irregular migrants as regards protection against expulsion. Above I stress that the Court has consistently held that expulsion unavoidably interferes with settled migrants' right to respect for private life<sup>42</sup> and emphasised that 'serious reasons are required to justify expulsion' in the case of second-generation migrants.<sup>43</sup> The reverse presumption applies in respect to irregular migrants; in their case, expulsion 'will only violate Article 8 in exceptional circumstances.'<sup>44</sup> Yet, with offending normally prevailing over all other considerations in Article 8(2) assessments, protection standards for settled migrants become akin to those applicable to irregular migrants. It is not my contention that an irregular immigration status justifies lower protection standards. Elsewhere I challenge the ECtHR's reversal on the ground that it confines irregular migrants to the margins of the ECHR system (*Da Lomba 2014*). Rather I show that the erosion of protection standards caused by the Court's approach extends to settled migrants, including second-generation migrants. Secondly, the disproportionate weight afforded to migrants' offending raises the problem of double punishment. Dissenting judges have disputed the majority's view that expulsion in addition to a prison sentence is a preventive measure.<sup>45</sup> They convincingly argue that expulsion constitutes an additional punitive measure which can actually prove more severe on account of its interference with private and family life.<sup>46</sup> They also persuasively characterise this form of double punishment as 'discriminatory' as it is not imposed on nationals who have committed similar offences.<sup>47</sup> In Section 4.2.2., I posit that the case can certainly be made for a violation of Article 8 in conjunction with Article 14 (prohibition of discrimination), notably in respect of second-generation migrants (*Dembour 2015*, pp. 161, 506). As the host State becomes their 'own country', these migrants have become members in the national community which calls for their treatment to be brought in line with that of nationals. Such a dynamic reading of the ECHR is consistent with its characterisation as a 'living instrument'<sup>48</sup> and developments in IHRL. This inclusive interpretation of the ECHR, which has received some support—albeit very limited—in the ECtHR,<sup>49</sup> can be said to be congruent with the Court's consistently held view that differential treatment exclusively based on nationality requires 'very weighty reasons'.<sup>50</sup> This argument has not been tested in the ECtHR, but its case law strongly suggests that the argument would be rejected on the ground that such 'very weighty reasons' do exist, namely the prevention of disorder or crime. Finally, the significance ascribed to criminal offences begs the question of the host State's (lack of) responsibility for settled migrants, especially second-generation migrants. Judge Morenilla pertinently remarks that, whilst the expulsion of 'dangerous "non-nationals"' may be an expedient way for a State to rid itself of "undesirable" persons, it is inconsistent with its duty to (re-)integrate settled migrants.<sup>51</sup> He convincingly argues that the host has in effect become 'responsible' for these migrants and their children.<sup>52</sup> I develop this point in Section 4.2.2.

<sup>42</sup> E.g., ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81.

<sup>43</sup> ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para.75; and ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, paras 46 and 50.

<sup>44</sup> ECtHR, *Butt v. Norway*, App. No. 47017/09, Judgment of 4 December 2012, para. 78.

<sup>45</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para.56.

<sup>46</sup> *Id.*, Joint Dissenting Opinion of Judges Costa, Zupančič and Türmen, at para. 17.

<sup>47</sup> *Id.*

<sup>48</sup> E.g., ECtHR, *Tyrer v. the United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, para. 31.

<sup>49</sup> ECtHR, *Nasri v. France v. App.* No. 19465/92, Judgment of 14 July 1995, Partly Dissenting Opinion of Judge Morenilla, para. 3.

<sup>50</sup> E.g., ECtHR, *Gaygusuz v Austria*, Application No 17371/90, Judgment of 16 September 1996, para. 42.

<sup>51</sup> ECtHR, *Nasri v. France v. App.* No. 19465/92, Judgment of 14 July 1995, Partly Dissenting Opinion of Judge Morenilla, para. 3.

<sup>52</sup> *Id.*

The ECtHR is not totally averse to the notion that the host State has a ‘duty to facilitate ( . . . ) reintegration into society’.<sup>53</sup> This duty, however, is only acknowledged in respect of second-generation migrants who have committed non-violent offences as juveniles.<sup>54</sup> This type of argument, however, is not decisive and is essentially used to buttress Article 8 violation findings.<sup>55</sup> It is therefore ineffectual in offsetting the affirmation of the State’s power to expel non-nationals.

#### (ii) Private Life: an Inconsequential Issue in Article 8(2) ECHR Assessments

In Sections 2.1 and 2.2.1, I Show How the Ecthr Unequivocally Recognises The Existence And Significance of Settled Migrants’ Private Life In The Host State And Sets Out Principles That Have The Potential to Yield a Private Life Approach In Expulsion Cases. However, The Court’s Affirmation Of The State’s right To Expel Non-Nationals Takes It In The opposite Direction. I Have Already Demonstrated That The Disproportionate Weight Given To Settled Migrants’ Offending In Article 8(2) Assessments Significantly Erodes Protection Standards In Respect Of Both Private And Family, Although The Latter Fares Better. This, However, Does Not Tell The Whole Story About The Status Of Private Life In Article 8(2) Assessments. Here I Demonstrate How The Ecthr Turns Private Life into an Inconsequential Issue; I Attribute The Relegation Of Private Life To The Background To Two Factors. First, The Court Does Not as A Matter Of Course Examine Whether Expulsion Disproportionately Interferes with Applicants’ Right To Respect for Private Life. Secondly, The Court Has Failed To Develop Assessment Criteria That Capture The Extent Of The Impact Of Expulsion on Private Life.

The ECtHR has consistently held that ‘[i]t will depend on the circumstances of the particular case whether it is appropriate ( . . . ) to focus on the “family life” rather than the “private life” aspect’ in Article 8(2) assessments.<sup>56</sup> I take issue with the Court’s approach on account of its failure to put private life on a par with family life. At this juncture, it is important to stress that I do not put private and family life at odds. I do not contend that private life warrants more protection than family life; both are indeed integral parts of human existence. Furthermore, I agree that the ECtHR’s approach to the protection of settled migrants’ right to respect for family life is not entirely satisfactory (Dembour 2015, pp. 96–129). Thus, what I take issue with is not the importance afforded to family life, but the Court’s failure to recognise that private life is just as valuable.

One problem that could have arisen out of the ECtHR’s case-by-case approach has so far been averted: the risk of legal uncertainty has indeed not materialised. However, rather than point to a positive development, this observation highlights a significant flaw in the ECtHR’s approach. I posit that ‘legal certainty’ arises from the fact that the Court does not engage with private life in Article 8(2) assessments. Perhaps unsurprisingly, the Court does not consider private life where expulsion is found to breach the right to respect for family life; such an assessment could be said to be superfluous as protection against expulsion is granted. However, and troublingly, a non-violation finding of the right to respect for family life does not prompt the ECtHR to investigate whether a fair balance has been reached between settled migrants’ right to respect for private life and the State’s interests,<sup>57</sup> save in an uncommon set of circumstances. In *Slivenko v. Latvia*, the Court examined whether expulsion engaged the applicants’ right to respect for private life notwithstanding the absence of family life in the host State and found that their removal to Russia violated Article 8.<sup>58</sup> The circumstances, however, were unusual; the applicants had been expelled pursuant to the 1994

<sup>53</sup> ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 100.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC] para. 59; ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81; and ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 63.

<sup>57</sup> E.g., ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC]; and ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996.

<sup>58</sup> ECtHR, *Slivenko v. Latvia*, App. No. 48321/99, Judgment of 9 October 2003, paras 113–29.



Treaty on the Withdrawal of the Russian Troops concluded between Latvia and Russia upon the former becoming independent. While this judgment could have paved the way to the deployment of a private life approach in expulsion cases, especially where expulsion was not as a result of criminal convictions, the distinctiveness of the circumstances provided the Court with a basis for setting *Slivenko v. Latvia* apart from other expulsion cases. A subsequent judgment of the Grand Chamber involving similar circumstances confirmed that the Court was anxious to circumscribe the reach of the ‘*Slivenko* approach’. In *Sisojeva and Others v. Latvia*, the Grand Chamber departed from the chamber’s violation finding<sup>59</sup> and struck the application out on the ground that the Article 8 complaint had been resolved.<sup>60</sup> The Grand Chamber opined that the applicants’ stay in Latvia could be regularised and pointed out that they would be able to apply for permanent residence in the future.<sup>61</sup> It also noted that the applicants had failed to fully engage with regularisation procedures, a fact that they disputed.<sup>62</sup> Conversely, the chamber had found that ‘the prolonged refusal of the Latvian authorities to grant the applicants the right to reside in Latvia on a permanent basis constitute[d] an interference with the exercise of their right to respect for their private life’<sup>63</sup> that could not be justified under Article 8(2).<sup>64</sup> Thym convincingly opined that the Grand Chamber sought to avoid a ‘substantive overstretch of Article 8 which the earlier chamber judgment . . . might have entailed’ (Thym 2008, p. 98).

The treatment of private life as an inconsequential issue in Article 8(2) assessments is also apparent in the lack of criteria that are specifically concerned with private life. Rather than evaluate the necessity and proportionality of expulsion in the light of guiding principles tailored to the protection of private life, the ECtHR uses the criteria developed in relation to family life, the *Boultif-Üner* criteria.<sup>65</sup> It is true that two of these criteria may be linked to private life: the length of the applicant’s stay in the host State<sup>66</sup> and the solidity of her social and cultural ties to the host State and the country of destination.<sup>67</sup> I accept that these criteria can provide an adequate basis for assessing the justifiability of expulsion in private life cases. The first criterion—the length of stay—resonates with the well-established fact that settled migrants will have established private life in the host State and as such can operate as a marker of its intensity. Similarly, the second criterion—the solidity of the applicant’s social and cultural ties to the host State—can be interpreted in the light of the ECtHR’s broad understanding of private life, thereby compelling the Court to account for the breadth of relationships formed in the host State outside the family core. The ECtHR’s contradictory approach, however, means that the potential of these two criteria remains untapped. The Court’s readiness to recognise settled migrants’ private life in the host State is indeed met with a reluctance to bring its protection to the fore of Article 8(2) assessments. Rather than being a focal point, private life becomes a secondary issue that has little or no bearing on the Court’s assessments.

The ECtHR does not explain why it relegates private life to the background in Article 8(2) assessments and refuses to put it on a par with family life. One could tentatively argue that the Court’s stance reflects the widely held view that the family constitutes the backbone of human societies and social structures which makes family relationships more precious and as such worthier of protection than other types of relationships.<sup>68</sup> Thus, the prominence of family life in Article 8(2) assessments could be said to be in keeping with societal values across the Council of Europe (CoE). I do not dispute

<sup>59</sup> ECtHR, *Sisojeva and Others v. Latvia*, App. No. 60654/00, Judgment of 16 June 2005.

<sup>60</sup> ECtHR, *Sisojeva and Others v. Latvia*, App. No. 60654/00, Judgment of 15 January 2007 [GC].

<sup>61</sup> *Id* paras 99 and 100.

<sup>62</sup> *Id* para. 101.

<sup>63</sup> ECtHR, *Sisojeva and Others v. Latvia*, App. No. 60654/00, Judgment of 16 June 2005, para. 105.

<sup>64</sup> *Id* paras 107–111.

<sup>65</sup> ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, para. 48; and ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 57.

<sup>66</sup> ECtHR, *Boultif v. Switzerland*, App. No. 54273/00, Judgment of 2 August 2001, para. 48.

<sup>67</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 57.

<sup>68</sup> The construction of the family as the backbone of society relies on a particular conception of the family as an economic unit rather than as a mutually supportive social network (Vaughan 1983).

the centrality of family life and I agree that it warrants greater protection in the ECtHR's case law. What I take issue with is the lack of significance given to private life. I concur with Judge Wildhaber that the majority's approach is

[S]omewhat artificial, because the element of the respect of his [or her] private life is missing. In such cases, it would be more realistic to look at the whole social fabric which is important to the applicant, and the family is only part of the entire context, albeit an essential one.<sup>69</sup>

In Section 3.3.1, I stress that relationships outside the family nucleus such as friendships are key to building one's sense of belonging. Moreover, the family can be a site of stress and, in extreme cases, danger for individuals who may be reliant on wider social networks for support, stability and security (Levendosky et al. 2004). There may be some truth in the notion that the ECtHR's approach seeks to reflect the family's societal standing. However, I contend that a more compelling explanation for the ECtHR's lack of interest in private life and ensuing focus on family life is rooted in the Court's reversal (Dembour 2015) which makes the State's right to control immigration the starting point of its reasoning in migrant cases. Critically, with all settled migrants having established private life in the host State—a fact that the Court fully accepts—, the deployment of a private life approach would significantly increase protection against expulsion. Such an approach could indeed counter the State's right to control immigration and offset the constraints on protection arising from the ECtHR's narrow understanding of family life, thereby providing settled migrants with a potent autonomous source of protection against expulsion.

### (iii) Immigration Status as the Determinant of the Intensity of Settled Migrants' Ties to the Host State and the Country of Origin in Article 8(2) ECHR Assessments

Here I show how the State's right to control immigration influences the application of the *Boultif-Üner* criteria designed to assess the strengths and weaknesses of applicants' ties to the host State and the country of origin. I posit that the intensity of these ties is essentially appraised in the light of their immigration status; this makes for inaccurate narratives that contribute to unsatisfactory assessments, thereby stifling protection against expulsion.

I have demonstrated that the ECtHR's Article 8(2) assessments are problematic in that they overlook private life. Another significant problem lies with the Court's (re-)construction of settled migrants' relationships through the sole prism of their immigration status. The significance attached to migrants' legal status is first apparent in the ECtHR's view that 'offending' settled migrants are ultimately the 'responsibility' of the country of origin and this is irrespective of the strength of their ties to this country and to the host State. This line of reasoning is rooted in the notion that nationality creates a strong and distinctive bond between the individual and the nation State (Da Lomba 2010, pp. 8–9). This understanding of nationality further prompts the Court to regard settled migrants' decisions not to apply for naturalisation as a marker of their persisting strong bond with their country of origin.<sup>70</sup> In doing so, the Court echoes the position of respondent States, and in particular the view that belonging is closely linked to national citizenship. For example, in *Samsonnikov v. Estonia*, the Government infers from the applicant's decision not to apply for Estonian nationality that 'he must have felt a particular connection with [his country of origin, Russia].'<sup>71</sup> In *Boughanemi v. France*, the European Commission on Human Rights disagreed with the ECtHR that the applicant's decision

<sup>69</sup> ECtHR, *Nasri v. France*, App. No. 19465/92, Judgment of 13 July 1995, Concurring Opinion of Judge Wildhaber.

<sup>70</sup> E.g., ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, para. 33; ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, para. 51; ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, para.44; and ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para.50.

<sup>71</sup> ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 77.

not to seek the nationality of the host State implied that he had probably retained links with his country of origin.<sup>72</sup>

The significance accorded to immigration status means that, rather than investigate migrants' ties to the host State and the country of origin with a view to determining their respective strengths and weaknesses and gaining an understanding of migrants' specific relationships, the ECtHR makes assumptions based on their immigration status. Although the Court may use the term 'proven' in respect of migrants' ties<sup>73</sup>—thereby suggesting reliance on an investigative process—, its language is often tentative<sup>74</sup> and its inferences 'highly speculative and artificial'.<sup>75</sup> For example, in *Samsonnikov v. Estonia*, stronger ties with the State of nationality—in this instance Russia—were in part inferred from the fact that the applicant had been 'educated in a Russian language school and spoke Russian as his mother tongue'.<sup>76</sup> Similarly, in *Üner v. the Netherlands*, the Court held that

while it is true that the applicant came to the Netherlands at a relatively young age [12-year-old], the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he longer had any social or cultural (including linguistic) ties with Turkish society.<sup>77</sup>

The highly speculative nature of the ECtHR's inferences was challenged by dissenting judges who disputed the majority's postulation in *Balogun v. the United Kingdom* that the 26-year-old applicant, who had had no contact with his mother since the age of three, could rekindle his relationship with her upon returning to his country of origin.<sup>78</sup>

The characterisation of immigration status as the primary determinant of the intensity of settled migrants' ties to the host State and the country of origin is highly problematic. It makes for assessments that are based on assumptions inferred by their immigration status rather than investigations into their relationships. It follows that links with the country of origin are commonly overestimated and those with the host State underestimated. This is especially the case where settled migrants have not applied for naturalisation. The pivotal role afforded to immigration status also means that the Court's assessments rest on narratives that are detached from the realities of migrants' private and family life. Critically, the ECtHR's reliance on immigration status-based assumptions rather than investigations yields narratives that are at odds with migrants' sense of belonging. For example, in *Üner v. the Netherlands*, the applicant stressed that 'he had integrated to such an extent [into Dutch society] that he did not think of himself as a foreigner. By contrast, in Turkey he felt like a stranger'.<sup>79</sup> Similarly, in *Samsonnikov v. Estonia*, the applicant, a Russian national, pointed out that 'Estonia was the only country in which he had developed, since his birth, a network of personal, social and economic relations'.<sup>80</sup> The ECtHR's approach is also unsatisfactory in that it suggests that the assessment of the intensity of migrants' ties is a 'zero-sum game' where ties to the country of origin can cancel out or, at the very least, minimise ties to the host State.

<sup>72</sup> European Commission of Human Rights, *Boughanemi v. France*, App. No. 22070/93, Report of 10 January 1995, para. 40. Available online (in French): <file:///C:/Users/sd118/Downloads/BOUGHANEMI%20contre%20la%20FRANCE.pdf> (accessed on 13 October 2017); and ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, para. 44.

<sup>73</sup> E.g., ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 97.

<sup>74</sup> E.g., ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, para. 34; and ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, para. 44.

<sup>75</sup> ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, Joint Dissenting Opinion of Judges Garlicki and David Thór Björgvinsson.

<sup>76</sup> ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 88.

<sup>77</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 62.

<sup>78</sup> ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, Joint Dissenting Opinion of Judges Garlicki and David Thór Björgvinsson.

<sup>79</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 46.

<sup>80</sup> ECtHR, *Samsonnikov v. Estonia*, App. No. 52178/10, Judgment of 3 July 2012, para. 81. See also ECtHR, *Maslov v. Austria*, App. No. 1638/03, Judgment of 23 June 2008 [GC], para. 70.

In this Section, I have shown that the ECtHR's reversal and ensuing affirmation of the State's right to expel non-nationals cause the Court to depart from its 'private life-friendly principles'. The result is a deeply contradictory approach that frustrates the development of the right to respect for private life as an autonomous source of protection against expulsion. Critically, this approach leaves settled migrants who have not developed family life in the host State particularly vulnerable to expulsion, especially where they have criminal convictions. Below, I use transnational migration theory to challenge the ECtHR's approach.

### 3. Migrants and the Reconceptualisation of Vulnerability as a Foundation and Tool of IHRL

In the previous Section, I demonstrated that the ECtHR's reversal yields a contradictory approach that causes the construction of the right to respect for private life as a source of protection against expulsion to be set against the State's right to control immigration. Whilst the Court readily recognises private life as a core aspect of settled migrants' life in the host State, it fails to protect it in the face of expulsion. To remedy this troubling paradox, I draw on earlier work (Da Lomba 2014) that takes Fineman's vulnerability analysis as its starting point (Fineman 2008, 2010–2011, 2012) and put forward a novel theoretical framework for IHRL adjudication that reclaims the concept of vulnerability as both a foundation and tool of IHRL.

The proposed vulnerability analysis brings about two fundamental changes: first, the theorisation of vulnerability as a foundation of IHRL replaces the nationalistic invulnerable liberal IHRL subject with the universal vulnerable IHLR subject; secondly, its reconceptualisation as a tool of IHRL law makes resilience-building the aim of IHRL and the primary task of international human rights adjudicating bodies. Critically, I show how this transformation of the subject and aim of IHRL enables the recognition of migrants as fully-fledged IHRL subjects, which in turn renders IHRL responsive to their vulnerability as human beings. In Section 4, I demonstrate how the deployment of a vulnerability analysis in the ECtHR's case law deflects its reversal and thus supports the development of a private life approach. In the present Section, I first outline the key points in Fineman's analysis and then theorise vulnerability as a foundation and tool of IHRL with special reference to migrants.

#### 3.1. Fineman's Vulnerability Analysis

Fineman's vulnerability analysis compellingly rebuts liberal theory understandings of the human condition (Fineman 2008, pp. 10–12). Her argument is premised on the notion that vulnerability—understood as both universal and particular—forms an integral part of the human experience: all of us are vulnerable and we all rely on others and on institutions, albeit to varying degrees (Fineman 2008, p. 1). Having debunked a fundamental flaw in the construction of the invulnerable (autonomous) liberal subject, Fineman convincingly argues that this 'mythical' subject must be supplanted by the vulnerable subject (Fineman 2008, pp. 10–12).

Fineman's analysis is concerned with making the vulnerable subject more resilient. Importantly, she does not envisage invulnerability as the counterpoint to vulnerability; rather her analysis aims to build the vulnerable subject's resilience and equip her with some means to face and address life's challenges (Fineman 2010–2011, p. 269). Significantly, Fineman identifies institutions as the primary source of resilience-building assets (Fineman 2012, p. 98) which makes access to institutional resources a focal point of her theory. In this respect, she persuasively argues that the vulnerable subject's reliance on institutional assets calls for a redefinition of her relationship with the State and its institutions, which in turn places a duty on the State to respond to her vulnerability (Fineman 2010–2011). Because vulnerability is both universal and particular, 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' (Fineman 2012, p. 99). Importantly, universal reliance on the responsive State does not obviate the vulnerable subject's own resilience and agency. While Fineman accepts that there is a negative dimension to vulnerability—it can for example result in 'weakness, or physical or emotional decline' (Fineman 2012, p. 96)—, she recognises

‘the generative dimension of human vulnerability and the vulnerable subject’s innate resilience’ (Da Lomba 2014, p. 350). The vulnerable subject is thus not reduced to a ‘helpless victim’ of her vulnerability (ibid.).

Although Fineman has described vulnerability as a ‘stealthily disguised human rights discourse’, she does not go as far as theorising it as a human rights concept (Fineman 2008, p. 9), something that others have done (Mullally and Murphy 2015; Ippolito and Iglesias Sánchez 2015). However, I go further and contend that vulnerability not only has its place in IHRL, but that it can be reclaimed as a foundation and tool of IHRL.

### 3.2. *Vulnerability as a Foundation of IHRL and the Recognition of Migrants as Fully-Fledged IHRL Subjects*

IHRL has long sought to protect the ‘vulnerable’. IHRL, however, does not support the notion of universal vulnerability. Rather IHRL constructs vulnerability as an ‘affliction’ that affects certain groups who are then afforded special protection under IHRL.<sup>81</sup> Elsewhere, however, I show that this vulnerable group approach is a manifestation of IHRL’s failure to extend protections to those in need rather than evidence of its ability to respond to human vulnerability (Da Lomba 2014, pp. 342–45). Critically, the vulnerable group approach does not eschew the liberal invulnerable subject and therefore looks at the vulnerable subject as an atypical subject, which conflicts with the realities of the human experience.

#### 3.2.1. Vulnerability as a Foundation of IHRL

The reconceptualisation of vulnerability as a foundation of IHRL is subject to two conditions: first, vulnerability must have meaning for the whole ‘human family’;<sup>82</sup> secondly, it must be relevant to all human rights. I posit that the potency of vulnerability as a foundation of IHRL first lies with its universality. In this respect, 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’ (Turner 2006, p. 28). Some, however, contend that vulnerability—notwithstanding its universality—cannot be theorised as a foundation of IHRL because it is essentially relevant to social and economic human rights (Turner 2006, p. 36). This viewpoint, however, can be challenged on two grounds. First, it only focuses on the socio-economic dimension of vulnerability and as such fails to recognise vulnerability for what it is, namely a multifaceted human phenomenon that has multiple and diverse causes. For example, my critique of the ECtHR’s approach in Article 8 expulsion cases shows how interferences with civil and political rights is a major vulnerability factor. Secondly, the exclusionary nexus that is established between vulnerability and social and economic rights ignores both the indivisible, interdependent and interrelated nature of human rights<sup>83</sup> and the role of civil and political rights in the enjoyment of social and economic rights.<sup>84</sup> It follows that the universality and relevance of vulnerability to all human rights make it a particularly well-fitting foundation of IHRL.<sup>85</sup>

#### 3.2.2. The Recognition of Migrants as Fully-Fledged IHRL Subjects

At the core of the reconceptualisation of vulnerability as a foundation of IHRL is the affirmation of the IHRL vulnerable subject. Her advent deeply transforms the aim of IHRL in that responding to human vulnerability becomes its chief purpose. Whether IHRL can be instrumental in building

<sup>81</sup> E.g., Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); and Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>82</sup> United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble.

<sup>83</sup> United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para. 5.

<sup>84</sup> ECtHR, *Airey v Ireland*, App. No. 6289/73, Judgment of 9 October 1979, para. 26.

<sup>85</sup> This view is shared by Grear (Grear 2010, p. 135).

migrants' resilience, however, is contingent on their being recognised as fully-fledged IHRL subjects. Thus, in addition to obviating the liberal invulnerable subject, the theorisation of vulnerability as a foundation of IHRL must also do away with the liberal nationalistic subject, something that Fineman's vulnerability theory does not do. To be more specific, Fineman does not engage with the question of membership and inclusion in the distribution of institutional resources. She suggests that the responsive State's duty is owed to 'citizens and others to whom [the State] owes some obligation' (Fineman 2010–2011, p. 256) and intimates 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' (ibid.). With membership of the national community becoming more inclusive in the social and economic sphere in respect of settled migrants (Da Lomba 2010, pp. 11–12), these migrants' partaking in the distribution of resilience-building assets can be seen as a likely prospect. However, migrants' access to institutional resources remains contingent on national understandings of membership and is therefore vulnerable to the vagaries of immigration laws and policies. Moreover, membership divides persist in the civil and political domain as the affirmation of the State's power to expel non-nationals evinces. Thus, whilst central to the reconceptualisation of vulnerability as a foundation of IHRL, Fineman's analysis of itself cannot guarantee the recognition of migrants as fully-fledged IHRL subjects.

Critically, rather than bridge membership divides in line with its universal premise, IHRL replicates these divides. Indeed, the nationalistic dimension of the IHRL subject means that recognition as a fully-fledged IHRL subject is dependent on legal status and ensuing membership in the nation State. To be more precise, it is conditional on access to full membership in the nation State. Critically, the latter is construed as an exclusive attribute of national citizenship owing to the privileged ties and commitment to the nation State that this status is purported to encapsulate (Schauer 1986, p. 1516). Conversely, immigration statuses systematically assume more remote ties to the host State, irrespective of their actual intensity (Da Lomba 2010, pp. 10–11). The IHRL subject is thus exclusionary vis-à-vis migrants—albeit to varying degrees—, which explains IHRL's struggles to extend protections to them. Accordingly, while settled migrants' immigration status means they fare better than migrants with precarious statuses, they cannot totally escape the vulnerabilities associated with the status of migrant as the ECtHR's failure to uphold their right to respect for private life in expulsion cases shows.

In response to the exclusionary nature of the nationalistic IHRL subject, I posit that the theorisation of vulnerability as a foundation of IHRL must be underpinned by an universal understanding of membership. The aim here is to ensure that *all* migrants are seen first and foremost as members of the human family rather than members of *another* nation State. Here I point to and seek to address two interrelated problems with IHRL decision-making, namely the primacy of membership of the country of origin over membership of the host State and the failure to recognise dual or multiple membership. Below, I explore these issues in the light of the concept of belonging and transnational migration theory. The affirmation of the *universal* vulnerable subject brings about two key progressive developments. First, it enables the recognition of migrants as fully-fledged IHRL subjects by disentangling the construction of the IHRL subject from her legal status in the nation State. Secondly and consequently, it remedies the fundamental paradox at the core of IHRL and reconciles the nature of its subject with its universal premise, thereby bringing coherence to the international human rights regime.

I do not contend that the reconceptualisation of vulnerability as a foundation of IHRL based on universal membership can totally obviate the influence of the State's right to control immigration on IHRL. This is because it cannot preclude States from continuing to play a key role in the creation, implementation and enforcement of IHRL (Da Lomba 2011, p. 370). What the proposed theoretical framework does, however, is to firmly locate migrants within the international human rights regime, irrespective of their immigration status. Indeed, the recognition of migrants as fully-fledged IHRL subjects compels States to meet certain minimum conditions in respect of *all* migrants. Whilst I accept that this cannot guarantee equal protection for nationals and non-nationals in all circumstances,

variations in the degree of protection offered to IHRL subjects on account of their legal status cannot confine migrants to the margins of international human rights systems (Turner 2006, p. 110). It follows that the affirmation of the universal vulnerable subject demands that international human rights adjudicating bodies reassess the significance afforded to the State's right to control immigration.

### 3.3. Migrants and the Reconceptualisation of Vulnerability as a Tool of IHRL

The deployment of a vulnerability analysis in IHRL not only fundamentally alters the nature of the IHRL subject, it also transforms international human rights adjudication. Making IHRL central to building resilience to human vulnerability entrusts adjudicating bodies with two critical tasks: recognising lived vulnerability with a view to providing IHRL subjects with resilience-building assets. These functions are explored with respect to migrants.

#### 3.3.1. Recognising Migrants' Lived Vulnerability

Making IHRL responsive to human vulnerability prompts an investigation into IHRL subjects' societal and institutional relationships, which will serve as the basis for ascertaining States' IHRL obligations. In this respect, I posit that recognising lived vulnerability requires the adoption of a substantive standard of review of State's policy and decision-making. In the case of migrants, this triggers an in-depth enquiry into the exercise of the State's right to control immigration. I further contend that reliance on the concept of belonging and transnational migration theory is instrumental in advancing understandings of migrants' ties to the host State and the country of origin in IHRL adjudication.

##### (i) Dispelling the Objections to the Adoption of a Substantive Standard of Review

The deployment of a vulnerability analysis requires full scrutiny of States' policy decisions. A substantive standard of review is indeed critical to elucidating the role of the State in the construction of disadvantage. Importantly for migrants, scrutinising how the State exercises its right to control immigration is key to comprehending how its laws and policies participate in their vulnerability. While objections to the adoption of a substantive standard of review are particularly strong in relation to State's resource allocation decisions and social policy choices,<sup>86</sup> these extend to other domains including immigration policy. Two types of objection may be identified: the legitimacy and expertise objections. The gist of the legitimacy argument lies in the notion that the adoption of a substantive standard of review of States' decisions and policy choices amounts to an encroachment on the powers of the legislature and executive. In-depth scrutiny is thus equated with policy and decision-making. The legitimacy objection is further grounded in the principle of subsidiarity and margin of appreciation doctrine. The latter has been developed to protect States' sovereignty in line with the principle of subsidiarity which makes the role of international human adjudicating bodies secondary to that of the State. The margin of appreciation granted to States varies with the issues under consideration. This margin can be very wide where States are deemed best placed to assess situations and make decisions—this is for example the case in the socio-economic sphere<sup>87</sup> and where the matter is seen as an unassailable State prerogative<sup>88</sup> as is the case with the State's right to control immigration. I contend that the legitimacy objection rests on a misrepresentation of the intended purpose of a substantive standard of review. The latter does not seek to reformulate State policy and supplant national decision-making by supranational decision-making. Rather its purpose is to ensure that the State exercises its powers in a manner that is consistent with the IHRL obligations it has willingly

<sup>86</sup> E.g., ECtHR, *Pentiacova and Others v. Moldova*, App. no. 14462/03, Decision on admissibility of 4 January 2005.

<sup>87</sup> E.g., ECtHR, *Dahabi v Italy*, App. No. 17120/09, Judgment of 8 April 2014, para. 46.

<sup>88</sup> For example, the ECtHR 'has recognised a particularly wide margin of discretion for states in respect of Article 5 (1) f' (Lambert 2007, p. 32).

subscribed to. Thus, rather than undermine legitimacy, a substantive standard of review strengthens legitimacy as well as State accountability (Mureinik 1994, pp. 31–32). Moreover, although the margin of appreciation doctrine is commonly presented as an integral part of IHRL adjudication, it is not universally used by international human rights bodies.<sup>89</sup>

The thrust of the expertise objection is that international human rights adjudicating bodies lack the necessary knowledge and understanding to contend with matters relating to policy and decision-making (Wesson 2007, p. 761). However, as is the case with the legitimacy objection, the expertise objection wrongly assumes that in-depth scrutiny amounts to policy and decision-making. Moreover, this argument overlooks the fact that assistance is available.<sup>90</sup> Accordingly, the development of a vulnerability analysis in migrant cases does not presuppose that human rights adjudicating bodies must become experts in all matters pertaining to international migration. There will be gaps in their knowledge and understanding of what is a highly complex phenomenon; these gaps, however, can be filled by utilising a range of methods and sources. I contend that decision-makers can be trained, that migrants' voices should be given greater weight in the adjudication process and that expert advice and *amicus curiae* briefs can be resorted to. I further argue that respondent States should be required to substantiate their assertions.

#### (ii) Belonging, Transnational Migration Theory and Understandings of Migrants' Relationships

I contend that understanding migrants' relationships is critical to recognising their vulnerability. In this respect, I posit that the concept of belonging and transnational migration theory offer potent tools to elucidate their ties to the host State and the country of origin. The aim here is to yield judicial narratives that accurately encapsulate migrants' experiences; the approach I advocate is thus in stark contrast with the ECtHR's nationalistic perspective on membership and belonging. The Court construes the latter by reference to national membership, which makes it conditional on legal status in the nation State. Above, I have shown how the Court's approach creates artificial narratives that conflict with migrants' sense of belonging.<sup>91</sup> This is a predictable outcome as 'there is no exact correspondence between belonging and formal membership' (Gustafson 2005, p. 5). Yet 'getting belonging right' is critical to building migrants and other IHRL subjects' resilience to vulnerability. Belonging is indeed a central feature of human life (Hubbard 2004, p. 218). It is well-established that a sense of belonging is essential to 'human well-being, if not outright survival' (ibid., p. 219). Hubbard observes that there are two interrelated aspects to belonging. 'The first is social connection of affiliation, including bonds of love, friendship and shared purpose, as well as the basic ability to communicate and relate to others' (ibid., p. 218). Here I contend that the recognition of migrants as fully-fledged IHRL subjects that comes with a vulnerability analysis has a significant role to play in affirming migrants' humanity and is thus instrumental in facilitating social acceptance.

Unsurprisingly, the nationalistic perspective that shapes the ECtHR's construction of membership and belonging also informs its understanding of international migration. The latter mirrors the nation State's understanding of international migration as a 'temporary deviation' from the norm, namely the construction of the nation State as a bounded entity (Gustafson 2005, p. 7). For this deviation to be remedied, migrants must 'transfer their sense of belonging and allegiance' from the country of origin to the host State (Castles 2002, pp. 1154–55). Maintaining or developing ties to the country of origin is thus problematised and construed as a lack of commitment to the host State. By the same token, a 'failure' to strengthen one's legal status in the nation State is seen as evidence of closer ties to the country of origin. For example, above I show how the ECtHR sees

<sup>89</sup> For example, the margin of appreciation doctrine has not been adopted by the Human Rights Committee under the International Covenant on Civil and Political Rights (HRC (View) 26 October 1994, *Lämsman et al v. Finland*, Cmm No. 511/1992, para. 9.4) and the Inter-American Court of Human Rights (Candia 2014, p. 21).

<sup>90</sup> Mantouvalou makes this point in relation to the adjudication of social rights (Mantouvalou 2011, p. 118).

<sup>91</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], para. 46.



in a migrant's decision not to apply for naturalisation evidence of her lack of strong bonds with the host State and enduring commitment to the country of origin.<sup>92</sup> Migrants' relationships with the host State and the country of origin are thus envisaged as a 'zero-sum game'. Troublingly, this nationalistic perspective on international migration struggles with the notion that individuals can have meaningful ties to more than one State. Yet transnational migration theory, and in particular the notion of simultaneity (Levitt and Glick Schiller 2004; Vertovec 2003), tells us that migrants commonly develop strong bonds with more than one country and that this phenomenon has become much more frequent with increasing global mobility (Gustafson 2005, p. 7). Transnational migration theory tells us that it is perfectly possible to love more than one country at the same time (Glick Schiller et al. 1995; Levitt et al. 2003). It follows that, transnational migration theory offers an insightful lens through which to explore migrants' ties to the host State and the country of origin in a manner that is respectful of migrants' sense of belonging.

### 3.3.2. Responding to Migrants' Lived Vulnerability

Having identified lived vulnerability, international human rights adjudicating bodies have a duty to provide IHRL subjects with means to build their resilience. The deployment of a vulnerability analysis thus requires that these bodies redefine themselves as asset-conferring institutions, which in turn calls for a dynamic approach to the articulation of IHRL obligations. Indeed, the proposed vulnerability analysis transforms IHRL obligations into resilience-building resources. I contend that this analysis demands that human rights bodies implement their obligations to the maximum of their resources, thereby making what is traditionally seen as a concept essentially relevant to socio-economic rights pertinent to all human rights.

In the case of migrants, a dynamic approach to the articulation of IHRL obligations demands that these be defined in the light of migrants' recognition as fully-fledged IHRL subjects. Therefore, the articulation of IHRL obligations can no longer be subject to and consequently (unduly) constrained by the State's right to control immigration. This is not say that immigration policy considerations are now proscribed from human rights bodies' reasoning; rather it means that, while such considerations may be factored into IHRL breach assessments, they cannot become the decisive factor and frustrate migrants' affirmation as IHRL subjects.

In the next Section, I show that the deployment of a vulnerability analysis has a transformative effect on the ECHR subject and the ECtHR's decision-making that compels the Court to develop a private life approach in expulsion cases.

## 4. Vulnerability and the Construction of the Right to Private Life as an Autonomous Source of Protection against Expulsion

The deployment of a vulnerability analysis fundamentally transforms the ECtHR's approach in Article 8 expulsion cases. Critically, it 'reverses the Court's reversal', thereby enabling the development of a *pro homine* approach that puts human protection before the State's right to control immigration. In this Section, I show how the affirmation of the universal vulnerable ECHR subject and the ECtHR's metamorphosis into an asset-conferring institution support the construction of the right to respect for private life as an autonomous source of protection against expulsion for settled migrants.

---

<sup>92</sup> See ECtHR, *C v. Belgium*, App. No. 21794/93, Judgment of 7 August 1996, para. 33; ECtHR, *Balogun v. the United Kingdom*, App. No. 60286/09, Judgment of 10 April 2012, para. 51; and ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, para. 44.

#### 4.1. *The Affirmation of the Universal Vulnerable ECHR Subject and the Recognition of Settled Migrants as Fully-Fledged ECHR Subjects*

The development of a vulnerability analysis premised on universal membership in the ECtHR's case law profoundly alters the nature of the ECHR subject: it disentangles its construction from the State's right to control immigration and eschews the liberal invulnerable ECHR subject.

The affirmation of the universal ECHR subject means that non-nationals who find themselves within the jurisdiction of ECHR States are recognised as fully-fledged ECHR subjects and can thus avail themselves of the rights and freedoms enshrined in the Convention, and this is irrespective of their immigration status. This 'denationalisation' of the ECHR subject cements the development of a *pro homine* approach in several ways. First, it brings the construction of the ECHR subject in line both with the universal premise of IHRL and Article 1 ECHR. The latter obliges ECHR to uphold the Convention rights of *all* within their territory. Although both the ECtHR and States have resisted the notion that protections should be fully extended to non-nationals, this reading of Article 1 finds strong support in its wording and the characterisation of the ECHR as a 'living instrument'. Secondly, the 'denationalisation' of the ECHR subject begets a redefinition of the relationship between migrants, the ECtHR and the host (ECHR) State with a view to building migrants' resilience. It compels the Court to reconsider its nationalistic perspective on membership and belonging in the light of the universal dimension of the ECHR subject with a view to closing rather than entrench legal status-based divides. Thirdly, the demise of the nationalistic ECHR subject enables the ECtHR to deploy a private life approach congruent with its protective premises in expulsion cases, thereby bringing coherence to its case law. Lastly, the universal nature of the ECHR subject facilitates the recognition of migrants as vulnerable subjects. Elsewhere I show how the nationalistic dimension of the present ECHR subject causes the deployment of the ECtHR's vulnerable *group* approach in respect of migrants to be contingent on their immigration status (Da Lomba 2014, pp. 352–58). Significantly, the universal ECHR subject compels the ECtHR and the ECHR States to treat migrants first and foremost as human beings. Thus, rather than envisage their immigration status as a potential barrier to protection and 'feed' their vulnerability as migrants, the Court is required to respond to their vulnerability, including disadvantages arising from their immigration status. Below, I demonstrate how the affirmation of the universal vulnerable ECHR subject and ensuing recognition of settled migrants as fully-fledged ECHR subjects protect settled migrants' right to respect for private life in expulsion cases.

#### 4.2. *Making the ECtHR Responsive to Settled Migrants' Vulnerability: Developing a Private Life Approach in Expulsion Cases*

With the deployment of a vulnerability analysis, the ECtHR becomes concerned with responding to the ECHR subject's vulnerability, which transforms the Court into an asset-conferring institution. I show how this redefinition of the Court's role fundamentally alters its approach in Article 8 expulsion cases and compels it to uphold settled migrants' right to respect for private life.

##### 4.2.1. Recognising Settled Migrants' Vulnerability

In order to make settled migrants more resilient as per its new role, the ECtHR must first recognise their vulnerability. This endeavour demands that the Court gain an understanding of migrants' experiences. It follows that artificial narratives based on (unverified) immigration status-based assumptions must give way to investigations into settled migrants' societal and institutional relationships.

The 'denationalisation' of the ECtHR's perspective on membership and belonging enables the development of informed narratives that are grounded in the realities of migrants' lives. Transnational migration theory is also instrumental in this endeavour in that it requires that the Court cease to envisage migrants' ties to the host State and the country of origin as a 'zero-sum game'.

Considering that all settled migrants will have established private life in the host State, that private life is an integral part of any human being's life, that it participates in one's sense of belonging and thus well-being and that expulsion inevitably interferes with the right to respect for private life,

it is imperative that the ECtHR delve into migrants' private life in the host State and reassess the prominence of family life in its Article 8(2) assessments. As stressed in Section 2.2.2., the aim here is not to devalue family life; rather the aim is to recognise private life as a core aspect of human life alongside family life.

Importantly, a denationalised and transnational migration perspective on membership and belonging puts expulsion in a new light; it is seen for what it is—a State-constructed disadvantage that exacerbates migrants' vulnerability. Below I show how the deployment of a vulnerability analysis compels the ECtHR to make migrants more resilient in the face of the risk of expulsion, which in turn supports the construction of the right to respect for private life as an autonomous source of protection against expulsion.

#### 4.2.2. Responding to Settled Migrants' Vulnerability

Having recognised settled migrants' vulnerability, the ECtHR is entrusted with the task of making them more resilient. This places a duty on the Court to protect them against expulsion as fully-fledged ECHR subjects. The significance of private life for human life makes it a potent source of resilience against vulnerability; conversely, any interference with private life exacerbates human vulnerability. I thus posit that protection against expulsion must be congruent with the characterisation of private life as a resilience-building asset and the recognition of settled migrants as universal vulnerable ECHR subjects. This in turn calls for the deployment of a private life approach. Importantly, and by contrast with the ECtHR's reversal, the *pro homine* approach that comes with a vulnerability analysis subjects the exercise of the State's right to control immigration to its ECHR obligations. Consequently, the State's power to expel non-nationals can no longer be the starting point of the Court's reasoning.

Voices from within the ECtHR have called for the deployment of a private life approach and increased protection against expulsion for so-called 'integrated migrants', namely second-generation migrants and migrants who have become 'fully integrated' by virtue of their long residence in the host State.<sup>93</sup> While this is to be welcome, I take issue with two of the assumptions that underpin these dissenting voices' reasoning. First, they suggest that integration into the host State requires that migrants 'become completely segregated from their country of origin.'<sup>94</sup> This postulation endorses the ECtHR's 'zero-sum game' approach to migrants' ties to the host State and the country of origin and is therefore inconsistent with the realities of transnational migration. Significantly, such an approach can constrain protection against expulsion for those settled migrants who have retained or developed ties to their country of origin. Significantly, while these dissenting voices argue that '[l]egal resident migrants should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals',<sup>95</sup> they strongly reject the idea of absolute protection against expulsion on the ground that this would amount to equating settled migrants' legal status with that of nationals.<sup>96</sup> Thus, whilst they advocate greater protection against expulsion, their thinking remains entrenched in nationalistic understandings of membership, which jar with the affirmation of the universal vulnerable ECHR subject. Below, I point out that the notion of absolute protection is not farfetched.

Expulsion further elicits the question of its discriminatory nature. In Section 2.2.2., I note that settled migrants' expulsion is normally considered following criminal convictions. The ECtHR endorses States' understanding of expulsion as a measure designed to prevent disorder or crime.

<sup>93</sup> ECtHR, *Beldjoudi v. France*, App. No. 12083/86, Judgment of 26 March 1992, Separate Concurring Opinion of Judge Martens, para. 2; and ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], Joint Dissenting Opinion of Judges Costa, Zupančič and Türmen.

<sup>94</sup> ECtHR, *Beldjoudi v. France*, App. No. 12083/86, Judgment of 26 March 1992, Separate Concurring Opinion of Judge Martens, para. 2.

<sup>95</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], Joint Dissenting Opinion of Judges Costa, Zupančič and Türmen, para. 5.

<sup>96</sup> *Id* at para. 9; and ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, Dissenting Opinion of Judge Martens.

Yet its construction as a preventive nature is misleading; I concur with dissenting judges' view that expulsion 'constitutes as severe a penalty as a term of imprisonment, if not more severe', which makes it a punitive measure.<sup>97</sup> This characterisation points to another problem with expulsion, that of 'double punishment'. Expulsion is indeed an additional punishment that is exclusively imposed on migrants, which makes this type of measure potentially discriminatory; this is considered below.

The ECtHR's transformation into an asset-conferring institution first compels it to fully integrate private life in Article 8(2) assessments and relinquish its 'zero-sum game' approach to assessing the strength of migrants' ties to the host State and the country of origin. It follows that private life becomes a decisive criterion in Article 8(2) assessments. In line with the 'reversal of the reversal' (Dembour 2015, p. 411), the State's right to control immigration—and more precisely the State's power to expel non-nationals—becomes a secondary issue.

A vulnerability analysis unequivocally recognises the right to respect for private life as an autonomous source of protection against expulsion, thereby significantly increasing protection standards for settled migrants. The rule becomes that expulsion violates their right to respect for private life. This begs the following key question: should the rule be absolute and, in the affirmative, in respect of whom? Or should it be subject to exceptions and, if so, to what extent? Here I posit that the recognition of settled migrants as fully-fledged ECHR subjects and the redefined role of the ECtHR make the latter option the minimum standard of protection. However, for this model to be viable, settled migrants' expulsion should only be justifiable in exceptional circumstances. This standard of protection has been advocated by dissenting judges;<sup>98</sup> for example, Judge Martens opines that exceptions to the rule should only cover 'very serious crimes, such as serious crimes against the State, terrorism, holding a leading position in a drug trafficking organisation.'<sup>99</sup> While this approach clearly marks a progressive shift in that it subjects the State's right to control immigration to its ECHR obligations, it cannot fully address all the issues associated with the expulsion of settled migrants. I accept that the proposed rule can prompt a much more rigorous approach to protection against discrimination under Articles 14 and 8 ECHR in that it requires that the 'very weighty reasons' needed to justify discrimination on the sole basis of nationality be interpreted in the light of the very limited exceptions to the rule. However, it remains the case that 'double punishment' remains permissible albeit in a few cases, which is not fully consistent with migrants' recognition as fully-fledged ECHR subjects.

For this reason, I posit that absolute protection against expulsion under Article 8 ECHR should be considered in respect of settled migrants. Although this remains a contentious issue, there is support in favour of absolute protection. CoE States have at times accepted 'the principle that "integrated aliens" should be no more liable to expulsion than nationals'.<sup>100</sup> In the same vein, the CoE Parliamentary Assembly supports the idea that 'migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances.'<sup>101</sup> Judge Morenilla, a lone voice in the ECtHR, pertinently points out that 'legal considerations or reliance on the *traditional notion of the State sovereignty* cannot today serve as the basis for [the] treatment of [integrated migrants in relation to expulsion].'<sup>102</sup>

Extending absolute protection to all settled migrants is likely to face opposition from States; they are likely to perceive such a development as a quasi-obliteration of their right to control immigration or, at the very least, of their power to expel non-nationals. Thus, some might argue

<sup>97</sup> ECtHR, *Üner v. the Netherlands*, App. No. 46410/99, Judgment of 18 October 2006 [GC], Joint Dissenting Opinion of Judges Costa, Zupančič and Türmen, para. 17.

<sup>98</sup> ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, Dissenting Opinion of Judge Martens, para. 8; and ECtHR, *Nasri v. France*, App. No. 19465/92, Judgment of 14 July 1995, Concurring Opinion of Judge Wildhaber.

<sup>99</sup> ECtHR, *Boughanemi v. France*, App. No. 22070/93, Judgment of 24 April 1996, Dissenting Opinion of Judge Martens, para. 9.

<sup>100</sup> ECtHR, *Beldjoudi v. France*, App. No. 12083/86, Judgment of 26 March 1992, Separate Concurring Opinion of Judge Martens, para. 2.

<sup>101</sup> Council of Europe, Parliamentary Assembly, Non-Expulsion of Long-Term Immigrants Recommendation 1504 (2001).

<sup>102</sup> ECtHR, *Nasri v. France*, App. No. 19465/92, Judgment of 14 July 1995, Partly Dissenting Opinion of Judge Morenilla, para. 4, emphasis added.

that such a move is likely to galvanise hostility towards the Court and weaken it irremediably. Whilst I accept that the adoption of this optimum standard of protection would undoubtedly attract strong criticism, I dispute the notion that ‘the Court’s vulnerability is unavoidably set against the vulnerability of those who [risk finding] themselves at the outer margins of human rights protection’ (Da Lomba 2014, p. 363). I contend that ‘lowering protection standards ( . . . ) poses a greater risk for the ECtHR and the whole ECHR system’ (Da Lomba 2014, p. 363). With this in mind, I contend that there is a strong case for absolute protection in respect of second (and subsequent)-generation migrants as well as settled migrants who have spent most of their adult life in the host State. Citing Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR)<sup>103</sup> and drawing on the broad interpretation of the concept of ‘own country’,<sup>104</sup> Judge Morenilla convincingly posits that the host State has in effect become ‘integrated migrants’ ‘own country’.<sup>105</sup> I concur with him that expulsion unduly shifts responsibility for settled migrants, and especially second-generation migrants, from the host State—their ‘own country’—to the country of origin.<sup>106</sup> Judge Morenilla persuasively contends that ‘[a] State, which for reasons of convenience, accepts immigrant workers and authorise their residence becomes responsible for the education and social integration of the children of such immigrants as it is of the children of its “citizens”’.<sup>107</sup> Critically,

Where such integration fails, and the result is antisocial or criminal behaviour, the State is also under the duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent.<sup>108</sup>

The existence of *meaningful* ties to the country of origin should not negate these migrants’ belonging to the host State. It is certainly the case that mere ‘foreign’ nationality should not be allowed to undo the strong bonds that they have developed with the host State. I thus posit that expelling migrants from their ‘own country’ should be deemed to engage article 14 ECHR in conjunction with Article 8 ECHR. I further contend that, in addition to being consistent with the universal premise of IHRL and the affirmation of the ECHR universal vulnerable subject, such a dynamic and bold interpretation of the ECHR is congruent with the ECtHR’s characterisation of the Convention as a ‘living instrument’.

## 5. Conclusions

The development of a private life approach in expulsion cases prompted by the deployment of a vulnerability analysis seeks to affirm migrants’ humanity and make the ECtHR and the ECHR States responsive to the realities of global human mobility and human existence. This novel approach to human rights adjudication compels host States to recognise settled migrants for who they are—persons who have made these States their ‘own country’. The ensuing construction of the right to respect for private life as an autonomous source of protection against expulsion demands that States recognise private life for what it is—a core dimension of human existence that participates in one’s sense of belonging and well-being.

---

<sup>103</sup> Article 12(4) ICCPR reads that ‘[n]o one shall be arbitrarily deprived of the right to enter his own country’ (International Covenant on Civil and Political Rights, opened for signature 19 December 1966, UNTS 999 (entered into force 23 March 1976)).

<sup>104</sup> The concept of ‘own country’ in Article 12(4) ICCPR is not confined to the country of nationality and might be used in respect of migrants who can no longer be regarded as ‘mere aliens’ owing to their strong ties with the host State (United Nations Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, available online: <http://www.refworld.org/docid/45139c394.html> (accessed on 13 October 2017)).

<sup>105</sup> ECtHR, *Nasri v. France v. App. No. 19465/92*, Judgment of 14 July 1995, Partly Dissenting Opinion of Judge Morenilla, para. 4.

<sup>106</sup> *Id.* at para. 3.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Importantly, the proposed theoretical framework and approach have value beyond the focus of this article: it paves the way to increased protection against expulsion for other migrants and bolsters private life protection for all ECHR subjects. Ultimately, it makes the ECtHR more responsive to the vulnerabilities of *all* within the jurisdiction of ECHR States.

I accept that the deployment of a vulnerability analysis in the ECtHR and the development of private life approach in expulsion cases are challenging—some might say unrealistic—endeavours. ECHR States are likely to construe enhanced protection against expulsion as an assault on their right to control immigration in that it forces them to treat settled migrants as ‘quasi-nationals’ (Dembour 2003). Some may also argue—and this appears to be the majority’s position in the ECtHR—that the Court’s reversal is actually consistent with the principle of subsidiarity. Others will point out that the ‘very protection of especially vulnerable and unwanted people renders the Court vulnerable and unwanted itself’ (Timmer 2013, p. 168).

Timidity in the light of difficult challenges, however, amounts to accepting ECHR law and more broadly IHRL’s failings to extend protections to migrants and others confined to the margins of human rights regimes. I contend that, rather than strengthen the ECtHR and other international adjudicating bodies, reticence to transform international human rights adjudication shackles these bodies to the State’s power, including its immigration power. Ultimately, such a defeatist attitude reduces the universal premise of IHRL to a mere rhetorical tool rather than uphold it as its fundamental aim.

**Acknowledgments:** The author wishes to thank Nicole Busby for her advice and comments and the reviewers for their comments.

**Conflicts of Interest:** The author declares no conflict of interest.

## Abbreviations

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IHRL	international human rights law

## References

- Candia, Gonzalo. 2014. Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Courts of Human Rights. Available online: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2406705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406705) (accessed on 13 October 2017).
- Castles, Stephen. 2002. Migration and Community Formation under Conditions of Globalization. *International Migration Review* 36: 1143–68. [CrossRef]
- Da Lomba, Sylvie. 2010. Immigration Status and Basic Social Human Rights: A Comparative Study of Irregular Migrants’ Right to Health Care in France, the UK and Canada. *Netherlands Quarterly of Human Rights* 28: 6–40. [CrossRef]
- Da Lomba, Sylvie. 2011. Irregular Migrants and the Human Right to Health Care: A Case-Study of Health-Care Provision for Irregular Migrants in France and the UK. *International Journal of Law in Context* 7: 357–74. [CrossRef]
- Da Lomba, Sylvie. 2014. Vulnerability, Irregular Migrants’ Health-Related Rights and the European Court of Human Rights. *European Journal of Health Law* 21: 339–64. [CrossRef] [PubMed]
- Dembour, Marie-Bénédicte. 2003. Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg. *Netherlands Quarterly of Human Rights* 21: 63–98. [CrossRef]
- Dembour, Marie-Bénédicte. 2015. *When Humans Become Migrants, Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press.
- Fineman, Martha A. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law & Feminism* 20: 1–23.
- Fineman, Martha A. 2010–2011. The Vulnerable Subject and the Responsive State. *Emory Law Journal* 60: 251–75.

- Fineman, Martha A. 2012. "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility. *The Elder Law Journal* 20: 71–111. [CrossRef]
- Glick Schiller, Nina, Linda Bosch, and Cristina Szanton Blanc. 1995. From Immigrant to Transmigrant: Theorizing Transnational Migration. *Anthropological Quarterly* 68: 48–63. [CrossRef]
- Grear, Anna. 2010. *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*. Basingstoke: Palgrave MacMillan.
- Gustafson, Per. 2005. International Migration and National Belonging in the Swedish Debate on Dual Nationality. *Acta Sociologica* 48: 5–19. [CrossRef]
- Hubbard, Ann. 2004. The Major Life Activity of Belonging. *Wake Forest Law Review* 39: 217–67.
- Francesca Ippolito, and Sara Iglesias Sánchez, eds. 2015. *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford and Portland: Hart Publishing.
- Lambert, H el ene. 2007. *The Position of Aliens in Relation to the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, Available online: [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) (accessed on 13 October 2017).
- Larson, Reed, Roger Mannell, and Jiri Zuzanek. 1986. Daily Well-Being of Older Adults with Friends and Family. *Psychology and Aging* 1: 117–26. [CrossRef] [PubMed]
- Levendosky, Alytia A., Anne G. Bogat, Sally A. Theran, Jennifer S. Trotter, Alexander von Eye, and William S. Davidson. 2004. The Social Networks of Women Experiencing Domestic Violence. *American Journal of Community Psychology* 34: 95–109. [CrossRef] [PubMed]
- Levitt, Peggy, Josh De Wind, and Steven Vertovec. 2003. International Perspectives on Transnational Migration: An Introduction. *Transnational Migration: International Perspectives* 37: 565–75. [CrossRef]
- Levitt, Peggy, and Nina Glick Schiller. 2004. Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society. *The International Migration Review* 38: 1002–39. [CrossRef]
- Mantouvalou, Virginia. 2011. In Support of Legalisation. In *Debating Social Rights*. Edited by Virginia Mantouvalou and Conor Gearty. Oxford: Hart Publishing, pp. 85–169.
- Moreham, Nicole A. 2008. The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination. *European Human Rights Law Review* 1: 44–79.
- Mullally, Siobh an, and Cl odhna Murphy. 2015. Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions and Rights. In *Care, Migration and Human Rights*. Edited by Siobh an Mullally. London and New York: Routledge, pp. 59–89.
- Mureinik, Etienne. 1994. A Bridge to Where? Introducing the Interim Bill of Rights. *South African Journal of Human Rights* 10: 31–48. [CrossRef]
- Schauer, Frederick. 1986. Community, Citizenship and the Search for National Identity. *Michigan Law Review* 84: 1504–17. [CrossRef]
- Schneider, Jens. 2016. First/Second Generation Immigrants. NESET II Ad Hoc Question No. 4/2016. Available online: [http://nesetweb.eu/wp-content/uploads/2016/02/NESET2\\_AHQ4.pdf](http://nesetweb.eu/wp-content/uploads/2016/02/NESET2_AHQ4.pdf) (accessed on 26 November 2017).
- Thym, Daniel. 2008. Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay? *International & Comparative Law Quarterly* 57: 87–112.
- Timmer, Alexandra. 2013. A Quiet Revolution: Vulnerability in the European Court of Human Rights. In *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics*. Edited by Martha A. Fineman and Anna Grear. Farnham and Burlington: Ashgate, pp. 147–70.
- Turner, Bryan S. 2006. *Vulnerability and Human Rights*. University Park: The Pennsylvania State University Presses.
- Vaughan, Megan. 1983. Which Family? Problems in the Reconstruction of the History of the Family as an Economic and Cultural Unit. *The Journal of African History* 24: 275–83. [CrossRef]
- Vertovec, Steven. 2003. Migration and other Modes of Transnationalism: Towards Conceptual Cross-Fertilization. *Transnational Migration: International Perspectives* 37: 641–65. [CrossRef]
- Wesson, Murray. 2007. Equality and Social Rights: An Exploration in Light of the South African Constitution. *Public Law* winter: 748–69.

