

Interpreting the ECHR in its Normative Environment: Interaction between the ECHR, the UN Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention on the Rights of the Child

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Abstract:

The article draws attention to how integrative interpretation – a methodology where the European Court of Human Rights integrates its normative environment into the interpretation of the European Convention of Human Rights – may offer an important path to bridging many of the challenges caused by fragmentation in the field of human rights. More specifically, the article offers insight into a selection of ECHR cases that are characterized by the existence of normative overlap between the ECHR, the CEDAW and the CRC; and by the fact that interaction between these legal sources actually takes place in the interpretation carried out by the Court. Interaction is discussed through two topics: the issue of state obligations in relation to domestic violence, and the issue of state obligations in relation to expulsion of immigrants with children. The article demonstrates that systemic integration may result in a strengthening of the protection of human rights under ECHR through what is termed ‘interpretive widening and thickening’.

Keywords:

treaty interpretation; fragmentation; domestic violence; discrimination against women; the principle of the best interests of the child; immigration

Introduction

During the last decades, the number of international legal instruments and judicial and quasi-judicial bodies set up to enforce them have expanded rapidly. This has resulted in international law being described as ‘wider’ and ‘thicker’ than before, a characteristic that applies also to the human rights branch of international law.¹ When looking at the field of human rights through an institutional lens, the widening takes place through the adoption of new human rights treaties both on regional and international levels², whereas the thickening refers to a situation where a legal question may involve state obligations under more than one human rights instrument due to normative overlap between them.³ While there is normative overlap in the content, the supervision of the human rights instruments is structured in a one-dimensional way: Courts and other supervisory bodies (such as UN treaty bodies) are set up with the expressed aim to enforce the treaty under which they have been established, and only in relation to States that have become Parties to that treaty. It is for instance stated in Article 19 of the European Convention of Human Rights (ECHR) that the task of the European Court of Human Rights (ECtHR) is to ‘ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’, not to ensure that States Parties uphold their human rights obligations established under other human rights instruments.

Institutional fragmentation poses challenges on many levels. One challenge is connected to the risk of supervisory bodies and courts imposing conflicting or inconsistent legal obligations on States. Such legal insecurity can become a barrier to human rights implementation on domestic level, and it may lead to ‘forum shopping’. Institutional fragmentation also implies that both States Parties and international supervisory bodies have to act in conformity with the many supervisory procedures that have been established, which is resource intensive. The ongoing process of strengthening the ten UN treaty bodies through, inter alia, harmonizing their working methods, is a response to the growth in the number of UN treaty bodies and their workload.⁴ Another institutional response to the challenges caused by fragmentation is the proposal to establish a UN World Court of Human Rights with competence to judge in cases that involve all the UN core human rights treaties.⁵

Currently there is increased attention on how *interpretation* may function as a tool that can counter problems caused by fragmentation. The principle of ‘systemic integration’ points to an interpretative approach where a convention is interpreted in light of its broader ‘normative environment’.⁶ This interpretative approach is anchored in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties (VCLT)⁷ that provides that: ‘[t]here shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties’.⁸

The ECtHR has on several occasions stated that:

The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (...), of ‘any

relevant rules of international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights ...⁹

Thereby the Court has formulated a formal platform for systemic integration of other international human rights law – the normative environment – when interpreting the ECHR.

Other researchers have used case law from the ECtHR for the purposes of critically discussing systemic integration as an interpretive method¹⁰; to explicate and detect the normative basis for the Court's interaction with other international law¹¹; and for comparing practice from the ECtHR with practice carried out by other supervisory bodies in order to detect whether the supervision of similar questions result in fragmented human rights protection in practice¹². This article offers insight into the issues of systemic integration from a substantive rights-oriented perspective. The aim is to display, analyse and assess how systemic integration may lead to a strengthening of the protection of human rights under ECHR. Two human rights issues have been selected: the issue of state obligations in relation to domestic violence, and the issue of state obligations in relation to expulsion of immigrants with children. In order to display, analyse and assess in a substantive manner how systemic integration may strengthen the protection of human rights, a small number of ECHR-cases have been selected. These are cases where interaction between ECHR, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child (CRC) takes place through the Court's reasoning. This approach also necessitates elaboration on the content of CEDAW and CRC in relation to the two selected issues, in order to shed light on the normative environment of the ECHR.

The article demonstrates that systemic integration may result in a strengthening of the protection of human rights under ECHR through what can be called 'interpretive widening and thickening'. 'Interpretive widening' takes place through the integration by the Court of new dimensions and factors into its reasoning when assessing whether one or more Convention Articles have been violated. It also takes place through the inclusion by the Court of new Convention Articles when dealing with issues that were earlier dealt with through other Articles in the ECHR. 'Interpretive thickening' occurs due to the fact that the reasoning and conclusions reached by the Court in concrete cases, become new layers that are added to the already existing human rights protection that is embedded in other human rights instruments, such as in CEDAW and CRC, instruments that have interacted with the ECHR in the Court's reasoning.

This article proceeds in three parts. Firstly, attention is put on interaction between ECHR and CEDAW through the issue of state obligations in relation to domestic violence. Secondly, interaction between ECHR and CRC is approached through the issue of state obligations in relation to expulsion of immigrants with children, an issue that necessitates the integration of the principle of the best interest of the child. Some concluding comments are presented in the last part.

Interaction between ECHR and CEDAW in Relation to Domestic Violence and Gender Discrimination

Cases regarding domestic violence centre on the positive duty on the part of States to secure rights between private individuals. It was not until 2007 that the ECtHR addressed issues of domestic violence in a substantive manner.¹³ Since then, cases regarding domestic violence have regularly been assessed by the Court under ECHR Article 2 on the right to life, ECHR Article 3 prohibiting torture, inhuman or degrading treatment and ECHR Article 8 on the right to private and family life. This case law has undoubtedly been significant in clarifying the content of positive state duties.¹⁴ However, cases regarding domestic violence were for a long time not approached by the ECtHR as cases involving *discrimination against women*. The absence of the discrimination component has been criticized as being conspicuous.¹⁵ It is widely acknowledged that domestic violence affects women and girls disproportionately.¹⁶ Surveys in Europe suggest that:

across countries, one-fifth to one-quarter of all women have experienced physical violence at least once during their adult lives and more than one-tenth have suffered sexual violence involving the use of force. Figures for all forms of violence, including stalking, are as high as 45%. The majority of such violent acts are carried out by men in their immediate social environment, most often by partners and ex-partners.¹⁷

The Court's lack of bringing inequality and gender discrimination into its reasoning in cases regarding domestic violence, was in contrast to how similar topics had been approached under other human instruments, in particular the CEDAW.

The CEDAW does not contain a provision that explicitly mentions violence against women. When the CEDAW was drafted during the 1970s, violence against women in the family and society was not an issue that loomed large on the international agenda.¹⁸ However, in the following decades, increased awareness was put on the widespread nature of domestic violence and its serious consequences. In 1992, the CEDAW-Committee adopted a general recommendation on violence (General Recommendation No. 19, hereafter referred to as 'GR No. 19').¹⁹ Here, it is explicitly stated that the definition of discrimination in CEDAW Article 1:

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.²⁰

Violence against women is today, in all its forms, considered to be covered by the Convention. GR No. 19 also identifies the obligations of States with regard to violence. The CEDAW-Committee recommends the States to 'take all legal and other measures that are necessary to provide effective protection of women against gender-based violence'²¹, 'including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence'²². Further, the obligation on States includes an obligation to act with due diligence in order to prevent violence against women, including violence by private actors.²³

GR No. 19 has been the most frequently invoked of the Committee's recommendations, at both international and national levels.²⁴ This general recommendation is also a key legal source when the CEDAW-Committee itself assesses individual complaints relating to state obligations and domestic violence.²⁵ In 2008, almost ten years after the entry into force of the individual complaints procedure under the CEDAW, the major substantive contribution of the CEDAW-Committee was considered to be 'with regard to the due diligence standard in relation to violence, particular in the family context.'²⁶

All this formed part of the 'normative environment' surrounding the ECHR when the ECtHR in 2009 was to judge in the case *Opus v. Turkey*.²⁷ The case involved a man, H.O., that had subjected his wife and his mother-in-law to serious forms of violence on a number of occasions, including injuring them with a knife, running a car into them, and issuing death threats.²⁸ The victims had filed complaints at the public prosecutor's office many times, but every time they ended up withdrawing them. In line with Turkish legislation, these withdrawals resulted in the discontinuation of court proceedings. In the area of Turkey where the victims lived, it was found to be systematic problems connected to how police officers behaved when victims reported domestic violence. Instead of investigating their complaints, they sought to assume the role as mediator by trying to convince the victims to return home and drop their complaint.²⁹ The violence culminated with H.O. shooting and killing the mother-in-law. The wife, who was the applicant in the case, alleged that the State authorities had failed to take the necessary steps to protect her and her mother from domestic violence.

The ECtHR concluded that both Article 2 and Article 3 of the ECHR were violated.³⁰ The death of the mother amounted to a violation of Article 2 in that Turkey had failed to display due diligence.³¹ The Turkish legislative framework then in force was considered to fall 'short of the requirement inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims.'³² The Court stressed that the authorities should have continued investigating the complaints of violence even though the victims withdrew them.³³ Further, the failure of the State authorities to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband, amounted to a violation of Article 3.³⁴

The Court then went one step further and assessed whether the applicant and her mother had been subject to gender discrimination violating ECHR Article 14 in conjunction with Articles 2 and 3, as alleged by the applicant. This part of the judgement builds extensively on other international law, and CEDAW in particular. The Court formulated a point of departure for its interpretation when stating the following:

The Court notes at the outset that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional

means of interpretation have not enabled it to establish with a sufficient degree of certainty...³⁵

Even though it was not mentioned explicitly, this statement is very much in line with the interpretive principle in the VCLT Article 31 (3) (c). However, the last part of the phrase indicates that the weight offered to other international law will possibly be stronger where there is uncertainty relating to the content of the ECHR itself, which was the situation in this case. The Court further stated that:

when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law ..., the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.³⁶

This interpretive point of departure was followed by active integration of the text of the CEDAW and of treaty body practice from the CEDAW-Committee, in particular of GR No. 19 and the Committee's Concluding Comments to Turkey. In these sources, the Committee had explicitly stated that violence against women, including domestic violence, is a form of discrimination.³⁷ In addition, there was in the 'Relevant international and comparative-law material'-section of the judgment, a thorough elaboration of individual complaints that the CEDAW-Committee had assessed in the field of domestic violence.³⁸ Other international and regional legal material from the UN, the Council of Europe and the Inter-American human rights system, was also integrated, as well as reports produced by NGO's documenting the extent of domestic violence in Turkey.³⁹

By integrating CEDAW and practice from the CEDAW-Committee, other relevant human rights sources, as well as reports and statistics showing that women were the main victims of violence in Turkey, the Court was able to conclude on the issue of discrimination in the following way:

Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey ... mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence (see, in particular ...the CEDAW Committee's General Recommendation No. 19...)⁴⁰

The Court found that Turkey had violated Article 14, read in conjunction with Articles 2 and 3. This finding of a violation of the prohibition against discrimination is considered a milestone in the Court's jurisprudence on domestic violence as it brought the ECHR in line with other international law.⁴¹ The reasoning and conclusions in the case is an example of systemic integration resulting in 'interpretive widening' as the Court included Article 14 into

a case on domestic violence and – thereby – expanded the legal issues considered to be relevant in such cases.

In addition, the reasoning and conclusions reached in the *Opuz-case* has also had the effect of contributing to an ‘interpretive thickening’ when it comes to state obligations in relation to domestic violence. The thickening is a result of interaction between the *Opuz-case* and other human rights law and developments on regional and international levels. Altogether, this gradual ‘thickening’ has resulted in a more robust human rights protection in relation to domestic violence and gender discrimination, which has functioned as a platform for new developments. In 2011, the Council of Europe adopted the *Istanbul Convention on preventing and combating violence against women and domestic violence* (hereafter referred to as the ‘Istanbul Convention’). The Istanbul Convention, which is open for ratification and accession also to Non-Member States of the Council of Europe, ‘significantly reinforces action to prevent and combat violence against women and domestic violence at world level.’⁴² In the preamble to the Convention, it is explicitly stated that the States Parties take ‘account of the growing body of case law of the European Court of Human Rights which sets important standards in the field of violence against women’, and they also have regard to CEDAW and practice from the CEDAW-Committee, as well as to other international law.⁴³

In the 2017-case *Talpis v. Italy*, the ECtHR actively referred to the Istanbul Convention when determining the content of positive State obligations with regard to domestic violence.⁴⁴ Through integrating the Istanbul Convention into its interpretation, ‘a stricter due diligence standard’ was according to De Vido imposed on States.⁴⁵ De Vido further argues that ‘the Court has started to use the Istanbul Convention as a key instrument to interpret positive legal obligations...’ and that the Istanbul Convention constitutes ‘relevant rules of international law’ under VCLT Article 31 (3) (c).⁴⁶ The Istanbul Convention is also among the many legal sources that underlie the 2017 General Recommendation No. 35 from the CEDAW-Committee on gender-based violence against women, which ‘complements and updates’ its previous GR No. 19 ‘and should be read in conjunction with it.’⁴⁷ GR No. 35 builds on and explicitly refers to the wide range of earlier developments in this field, aiming at accelerating the elimination of gender-based violence against women.⁴⁸

In relation to the issue of domestic violence, we witness that the ‘thickening’ of the substantive human rights protection formed a platform for the adoption of new human rights obligations to take place, namely the adoption of the Istanbul Convention (which led to a widening of the statutory field of human rights). Subsequently, the Istanbul Convention has become a new interpretive factor that the ECtHR (and other supervisory organs such as the CEDAW-Committee) interacts with in its reasoning. In the *Talpis-case*, this resulted in a stricter due diligence standard to be imposed on States, which can be seen as a new ‘interpretive widening’ of the ECHR.

Interaction between ECHR and CRC in Relation to Expulsion of Parents – the Role of the Principle of the Best Interests of the Child

In Article 3 No. 1 CRC it is stated that:

In all actions concerning children ..., the best interests of the child shall be a primary consideration.

The ECHR does not contain a provision on the best interests of the child. Nevertheless, this is a principle that is explicitly referred to and integrated into a number of ECHR-cases. Article 8 on the right to respect for private and family life is particularly relevant in this regard, as this is a provision relevant to issues such as adoption, parental rights, surrogacy and immigration.⁴⁹ While the applicants in these cases are regularly the *parents*, the principle of the best interests of the child serves as a mechanism to integrate the interests of the *children* into the legal framing.⁵⁰

In practice, the Court integrates the principle as part of its attempt to strike a ‘fair balance ... between the competing interests of the individual and of the community as a whole’ under Article 8 No. 1 or No. 2.⁵¹ Thus, the principle of the best interests of the child is applied as a factor relevant to the act of balancing. What the principle requires in the ECHR-setting, has been subject to interpretive developments, developments that should not be analysed in isolation from the CRC. In the following, a presentation of the two cases *Nunez v. Norway* and *Jeunesse v. the Netherlands*⁵² will be carried out, as this forms the basis for a closer assessment of how systemic integration of the CRC has led to a more complex approach towards the principle of the best interests of the child from the ECtHR, and therefore to a strengthening of the human rights protection offered by ECHR.

The CRC-Committee has since the adoption of the CRC developed the content of the principle of the best interests of the child through several General Comments. The best interests of the child is by the Committee defined as one of the four ‘general principles’ of the Convention, which means that CRC Article 3 No. 1 is not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.⁵³ What the principle entails has been articulated by the Committee in relation to the different topics addressed in its General Comments, such as in relation to children’s rights in early childhood.⁵⁴ However, in 2013, General Comment No. 14 dealing solely with the principle of the best interests of the child, was adopted (hereafter referred to as ‘GC No.14’).⁵⁵ The objective was for the Committee to define ‘the requirements for due consideration’ of the best interest of the child:

especially in judicial and administrative decisions as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines – that is, all implementation measures – concerning children in general or as a specific group.⁵⁶

The CRC-Committee acknowledged that the principle of the best interests of the child covers a wide range of situations, and that there is ‘need for a degree of flexibility in its application’.⁵⁷ The principle was, however, considered to include several dimensions. It does not only relate to the outcome of cases.⁵⁸ In GC No. 14 it is clearly stated that the best interests of the child is a threefold concept: a substantive right, an interpretive legal principle and a rule of procedure.⁵⁹ Even though the principle does not include an obligation on States

to let what is considered in the child's best interest to prevail when balanced against other considerations, the expression 'primary' in CRC Article 3 No. 1 means that 'the child's best interest may not be considered on the same level as all other considerations.'⁶⁰ Particular weight and consideration should be accorded to the best interests of the child. States Parties are further required to identify and assess what is in the child's best interest⁶¹, and to demonstrate that the principle has been taken duly into consideration in the legal reasoning. The CRC-Committee has emphasized that:

In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained.⁶²

Thus, when dealing with issues that involve children, the States must show that the best interests of the child 'has been explicitly taken into account' and they must explain how 'the child's interests have been weighed against other considerations...'.⁶³ What the principle of the best interests of the child requires from States Parties to the CRC, has thus been concretised by the CRC-Committee through requirements pertaining to procedure, justification and the principle's weight in relation to other interests. These requirements are of particular concern when turning to the case law of the ECtHR.

Both *Nunez* and *Jeunesse* involved a parent that was going to be expelled from a Member State due to lack of lawful residence permit. Both had resided in the Member State for a long time (15 years and 17 years respectively). Both cases concerned the right to private and family life under ECHR Article 8, as the expulsion would result in the separation of the parent from its children, who were to remain in the Member State. In both cases, the interests of the children pulled in the opposite direction of the immigration related interests that were put forward to justify the expulsions.

In cases of immigration, the ECtHR has held that 'Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion on its territory.'⁶⁴ It is also well-established in the Court's practice that the removal of a non-national family member will only violate Article 8 in 'exceptional circumstances', in cases where the:

family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious.⁶⁵

In both *Nunez* and *Jeunesse*, family life was created even though the applicants – mothers of two and three children respectively⁶⁶ – did not have lawful residence permits. Therefore, in both cases the threshold 'exceptional circumstances' had to be met before the Court could conclude that Article 8 had been violated. A violation was found in both cases. The way in which the Court integrated the interests of the applicants' children, played a crucial part when the Court concluded that 'exceptional circumstances' existed.

The judgment in *Nunez* was delivered in 2011, *before* the CRC-Committee had adopted GC No. 14. The judgment in *Jeunesse* was delivered *after*, in 2014. In both cases the Court acknowledged that a State's obligations in cases involving family life as well as immigration 'will vary according to the particular circumstances of the persons involved and the general interest'.⁶⁷ The Court put forward a list of principles relevant to the Article 8-assessment, a list that has been stated in a number of previous cases:

Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.⁶⁸

Here, the interests of the applicant's children are not explicitly mentioned. In *Nunez*, this did not prevent the Court from integrating the interests of the applicant's children in the concrete balancing act that was carried out. The Court was 'not convinced ... that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention.'⁶⁹ In this connection it referred explicitly to CRC Article 3, before concluding that the State had failed to 'strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.'⁷⁰ Article 8 was therefore violated.

A new approach to the formal space offered to the principle of the best interest of the child within Article 8-assessments, was introduced in *Jeunesse*, in that the Court added a new section to its old list of principles:

Where children are involved, their best interests must be taken into account ... On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.⁷¹

The section presents the interests of children as a principle that includes both substantive and procedural obligations on States, and it has been included in succeeding cases.⁷²

In *Jeunesse*, the Court cited and referred to several Articles in the CRC, including Article 3, and GC No. 7 on children's rights in early childhood, in its elaboration on 'Relevant European and International Law'.⁷³ No explicit reference was made to GC No. 14. However, when looking at content, the requirements articulated in GC No. 14 on the best interests of the child, to a large extent resemble the requirements expressed by the Court. Therefore, it is plausible

to say that the way in which the Court integrated the principle of the best interests of the child into its articulation of ‘Relevant principles’ rests on an approach where the Court interprets the ECHR in light of its ‘normative environment’, more concretely CRC Article 3 and GC No. 14 from the CRC-Committee.⁷⁴ The Court stated that it was ‘not convinced’ that actual evidence on matters regarding the children ‘was considered and assessed by the domestic authorities.’⁷⁵ In light of this weakness, the Court was of the opinion that ‘insufficient weight was given to the best interests of the applicant’s children in the decision of the domestic authorities to refuse the applicant’s request for a residence permit’⁷⁶. It concluded that Article 8 had been violated.

Even though both *Nunez* and *Jeunesse* are examples of cases where integration of the children’s interests play a crucial role in the Court’s reasoning, *Jeunesse* demonstrates the way in which the best interests of the child entered the Court’s *a priori* list of ‘Relevant principles’ to be taken into consideration when interpreting Article 8. Through the Court’s elaboration of what the best interests of the children-assessment requires, it was made clear that the ECHR – similar to CRC Article 3 – contains requirements pertaining to procedure, justification and the principle’s weight in relation to other interests.⁷⁷ In this authors view the reasoning carried out in *Jeunesse* is an example of ‘interpretive widening’ when compared to *Nunez*, as new factors and dimensions stemming from CRC Article 3 and interpretive practice from the CRC-Committee, played into the Court’s interpretation of ECHR Article 8. The view articulated by the Court in the ‘Relevant principles’-section of the judgment, and the concrete assessment carried out in the case, further has become a separate layer – and therefore ‘thickened’ – the general understanding under human rights law of the obligations States have in order to implement the principle of the best interests of the child sufficiently.

Concluding Comments

The two issues that were selected in this article – state obligations in relation to domestic violence and expulsion of immigrants with children – are characterized by three factors. Firstly, they are issues where normative overlap exists between ECHR, CEDAW and CRC. Secondly, both issues involve questions where other human rights bodies – more specifically the CEDAW-Committee and the CRC-Committee – have issued interpretive practice that display that ECtHR-practice is not fully in line with other human rights law. Thirdly, both examples involve questions where the content of the ECHR was considered by the Court itself to be somewhat unclear. There was therefore a space available for interaction with other international law to take place. This third factor is important, as it in this author’s opinion may explain (to a certain degree) why the ECtHR does not always integrate other human rights law into its interpretation, even though both normative overlap and a ‘protection-gap’ exists. In fields where the Court has a well-established body of case law, such as when it comes to the regulation of religion by States Parties, the Court seems to be less willing to apply systemic integration in its interpretation.⁷⁸ What motivates the Court to apply systemic integration in its interpretation, and what hinders such an approach, are questions that merit further research.

This article has provided examples where interaction between ECHR, CEDAW and CRC have taken place. Integration of the CEDAW and the CRC into its reasoning has clearly

influenced the Court's assessments in a direction that has strengthened the protection of human rights both through 'interpretive widening and thickening'. The analyses carried out has also displayed that systemic integration is an approach that allows ECHR to evolve over time, in light of other international law. Thus, it is an approach that carries with it a dynamic element.⁷⁹

Interpretation of ECHR in its normative environment has undoubtedly enabled the Court to reach conclusions that promote coherency under human rights law, instead of inconsistency. Through this, the interpretive approach can be said to further the universal set of values that are expressed in the Universal Declaration of Human Rights of 1948 that all regional and international conventions in the field of human rights build on.⁸⁰ Such systemic integration of the normative environment has been considered to 'operate like a "master key" to the house of international law.'⁸¹ It allows for the different fragments – 'rooms' – of human rights law to exist, at the same time as it nurtures the house of human rights law as such. In this author's opinion, systemic integration is an important path to bridging many of the challenges caused by fragmentation.

¹ Ragnar Nordeide, *The Interaction between the European Convention on Human Rights (ECHR) and Other International Law. What Role for a Purposive Conception of the ECHR?* (Series of dissertations submitted to the Faculty of Law, University of Oslo No. 90, 2015) 16.

² Some examples are the *UN Convention for the Protection of All Persons from Enforced Disappearance*, adopted on 20 December 2006 (entry into force 23 December 2010), the *UN Convention on the Rights of Persons with Disabilities*, adopted on 13 December 2006 (entry into force 3 May 2008), the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (the Istanbul convention), adopted on 7 April 2011 (entry into force 1 August 2014), the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (the Lanzarote Convention), adopted on 25 October 2007 (entry into force 1 July 2010).

³ Such thickening is also referred to as institutional fragmentation, cf. Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws', *Nordic Journal of Human Rights* 32, no. 2 (2014): 87–98 at 88, <https://doi.org/10.1080/18918131.2014.897795>.

⁴ For instance, the growth of the UN Treaty Body System has resulted in a growing backlog of State reports, individual communications, and urgent actions; in insufficient compliance by States parties with their reporting obligations; and in diverging working methods among the treaty bodies, cf. 'Treaty Body Strengthening', The Office of the High Commissioner for Human Rights, accessed October 10, 2018, <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>.

⁵ Cf. Julia Kozma, Manfred Nowak and, Martin Scheinin, consolidated draft statute for the establishing of a World Court of Human Rights, included in the report *Protecting Dignity: An Agenda for Human Rights* (Swiss Federal Department of Foreign Affairs and the Geneva Academy of international humanitarian law, 2011). See also Manfred Nowak, 'The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights', *Nordic Journal of Human Rights* 32, no. 1 (2014): 3–17 at 10, <https://doi.org/10.1080/18918131.2013.877552>. For a critique of the proposal, cf. Philip Alston, 'Against a World Court of Human Rights', NYU School of Law, Public Law Research Paper No. 13-71, available at SSRN: <https://ssrn.com/abstract=2344333>.

⁶ The use in this article of the two concepts 'systemic integration' and 'normative environment' draws on the presentation and elaboration of the concepts in Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (April 13 2006), UN Doc A/CN.4/L.682, 211 (para. 419) and 243–244 (paras. 479-480).

⁷ *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969 (entry into force 27 January 1980).

⁸ For a critical analyses of the relationship between VCLT Article 31 (3) (c) and the principle of systemic integration, cf. Adamantia Rachovitsa, 'The Principle Of Systemic Integration In Human Rights Law', *International & Comparative Law Quarterly* 66, no. 3 (2017): 557–588, <https://doi.org/10.1017/S0020589317000185>.

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- ⁹ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131, ECHR 2010. Similar formulations are found in, inter alia, *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 35, ECHR 2001-XI (extracts); *McElhinney v. Ireland* [GC], no. 31253/96, § 36, ECHR 2001-XI (extracts); *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 65—68, ECHR 2008. Cf. Ragnar Nordeide, ‘The ECHR in its Normative Environment: Difficulties arising from a Regional Human Rights Courts’s Approach to Systemic Integration’ in *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, ed. Ole Kristian Fauchald and André Nollkaemper (Oxford and Portland: Hart Publishing, 2012) 121 ff.
- ¹⁰ Rachovitsa, ‘The Principle Of Systemic Integration’.
- ¹¹ Nordeide, ‘The Interaction between’.
- ¹² Ajevski, ‘Fragmentation in International Human Rights’, 90—91, and the other articles included in Marjan Ajevski, ed. ‘Fragmentation in International Human rights Law – Beyond Conflict of Laws’. Special issue, *Nordic Journal of Human Rights* 32, no. 2 (2014).
- ¹³ Ronagh J. A. McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (London: Routledge, 2017), 60.
- ¹⁴ Patricia Londono, ‘Developing Human Rights Principles in Cases of Gender-based Violence: *Opuz v Turkey* in the European Court of Human Rights’, *Human Rights Law Review* 9, no. 4 (2009): 657—667 at 657, <https://doi.org/10.1093/hrlr/ngp022>.
- ¹⁵ *Ibid.*, 658.
- ¹⁶ See for instance the preamble to the Council of Europe Istanbul Convention.
- ¹⁷ *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Explanatory Report to the Istanbul Convention), Council of Europe Treaty Series No. 210 (2011), para. 2.
- ¹⁸ Andrew Byrnes and Eleanor Bath, ‘Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women - Recent Developments’, *Human Rights Law Review* 8, no. 3 (2008): 517—533 at 518, <https://doi.org/10.1093/hrlr/ngn022>.
- ¹⁹ It had already adopted a brief general recommendation on the subject, cf. CEDAW-Committee, General recommendation No. 12 *Violence against women* (1989).
- ²⁰ CEDAW-Committee, General recommendation No. 19 *Violence against women* (1992), para. 6.
- ²¹ *Ibid.*, para. 24 (t).
- ²² *Ibid.*
- ²³ *Ibid.*, para. 9.
- ²⁴ Byrnes and Bath, ‘Violence against Women’, 519.
- ²⁵ Competence to assess individual complaints is established through the Optional Protocol to the Convention, adopted on 15 October 1999 (entry into force 22 December 2000).
- ²⁶ Byrnes and Bath, ‘Violence against Women’, 533.
- ²⁷ *Opuz v. Turkey*, no. 33401/02, ECHR 2009.
- ²⁸ *Ibid.*, § 23.
- ²⁹ *Ibid.*, § 195.
- ³⁰ In its interpretation of the content of positive state obligations and the principle of due diligence, it looked for ‘any consensus and common values emerging from the practices of European States and specialised international instruments, such as CEDAW’, cf. *Ibid.*, § 164.
- ³¹ *Ibid.*, §§ 149, 153.
- ³² *Ibid.*, § 145.
- ³³ *Ibid.*
- ³⁴ *Ibid.*, § 176.
- ³⁵ *Ibid.*, § 184.
- ³⁶ *Ibid.*, § 185.
- ³⁷ *Ibid.*, §§ 186—187, that refers back to § 74.
- ³⁸ *Ibid.*, § 72 ff.
- ³⁹ *Ibid.*, § 187 ff.
- ⁴⁰ *Ibid.*, § 200.
- ⁴¹ McQuigg, ‘The Istanbul Convention’, 65.
- ⁴² Explanatory Report to the Istanbul Convention, para. 6.
- ⁴³ Further, in the Explanatory Report to the Istanbul Convention it is acknowledged that the ECtHR in its case law has set down ‘important standards in the field of violence against women, and which provided guidance to the drafters for the elaboration of numerous positive obligations and measures needed to prevent such violence.’, cf. , cf. *Ibid.*, para. 29. The *Opuz*-case is explicitly mentioned several times, see for instance *Ibid.*, para. 49.
- ⁴⁴ *Talpis v. Italy*, no. 41237/14, 2 March 2017.

⁴⁵ Sara De Vido, 'States' positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights', *ESIL Reflections* 6, no. 6 (2017): 1—11 at 2, <http://www.esil-sedi.eu/node/1815>.

⁴⁶ *Ibid.*, 1.

⁴⁷ CEDAW-Committee, General recommendation No. 35 *on gender-based violence against women, updating general recommendation No. 19* (2017), CEDAW/C/GC/35, para. 8.

⁴⁸ *Opuz v. Turkey* is explicitly referred to in *Ibid.*, footnote no. 2.

⁴⁹ Anette Faye Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure', *International Journal of children's rights* 24, no. 3 (2016) 548-574, at 553, <https://doi.org/10.1163/15718182-02403003>.

⁵⁰ See the concurring opinion of judge Jebens in the case *Nunez v. Norway*, no. 55597/09, 28 June 2011 where he states that 'an applicant's children are indirectly protected under the Convention, even if they are not applicants in an expulsion case which concerns a parent. The protection of the children in such situations has become clearer in recent years, and may even have increased, as a result of the Court's reliance on other international legal instruments, in particular the UN Convention on the Rights of the Child, notably its Article 3...'.⁵¹

⁵¹ *Nunez v. Norway*, § 68.

⁵² *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014.

⁵³ CRC-Committee, General Comment no. 5 *General measures of implementation of the Convention on the Rights of the Child* (2003), para. 12. CRC-Committee, General Comment no. 12 *The right of the child to be heard* (2009), para. 2.

⁵⁴ CRC-Committee, General Comment No. 7 *Implementing child rights in early childhood* (2005).

⁵⁵ CRC-Committee, General Comment No. 14 *on the right of the child to have his or her best interests taken as a primary consideration* (2013).

⁵⁶ *Ibid.*, para. 2.

⁵⁷ *Ibid.*, para. 39.

⁵⁸ For a broad account of the different State obligations embedded in CRC Article 3 No. 1, see Kirsten Sandberg, 'Barnets beste som rettighet', in *Rettigheter i velferdsstaten. Begreper, trender, teorier*, eds. Ingunn Ikdahl and Vibeke Blaker Strand (Oslo: Gyldendal, 2016), 57—83.

⁵⁹ CRC-Committee, GC no. 14, para. 6

⁶⁰ *Ibid.*, para. 37.

⁶¹ *Ibid.*, para. 32.

⁶² *Ibid.*, para. 97.

⁶³ *Ibid.*, para 6 c)

⁶⁴ *Nunez v. Norway*, para. 70. *Jeunesse v. the Netherlands*, para. 107.

⁶⁵ *Nunez v. Norway*, para. 70. *Jeunesse v. the Netherlands*, para. 108.

⁶⁶ The applicant in *Nunez* had two children; the applicant in *Jeunesse* had three children.

⁶⁷ *Nunez v. Norway*, para. 70. *Jeunesse v. the Netherlands*, para. 107.

⁶⁸ *Ibid.*

⁶⁹ *Nunez v. Norway*, para. 80.

⁷⁰ *Ibid.*, para. 84.

⁷¹ *Jeunesse v. the Netherlands*, para 109.

⁷² See for instance *Krasniqi v. Austria*, no. 41697/12, 25 April 2017.

⁷³ *Jeunesse v. the Netherlands*, paras. 73—74.

⁷⁴ *Ibid.*, para. 106 ff.

⁷⁵ *Ibid.*, para. 120.

⁷⁶ *Ibid.*

⁷⁷ In similar direction, cf. Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?', *European Journal of Migration and Law* 17 (2015): 70—103 at 97, <https://doi.org/10.1163/15718166-12342072>; Lourdes Perioni, 'Jeunesse v. the Netherlands: Quiet Shifts in Migration and Family Life Jurisprudence?', blog published 30.10.2014 by Strasbourg Observers, available at:

<https://strasbourgobservers.com/2014/10/30/jeunesse-v-the-netherlands-quiet-shifts-in-migration-and-family-life-jurisprudence/>; Council of Europe, Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, issue paper 2017, available at: <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0>.

⁷⁸ The ECtHR has so far granted the Contracting States a large margin of appreciation in cases that involve religion, which does not par with the approach taken by UN treaty bodies. This practice indicates that the ECHR

does not contain the strongest human rights in relation to issues that involve prohibitions against the use of religious clothing and symbols in public institutions, cf. Vibeke Blaker Strand, 'Prohibitions against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations', *Religion & Human Rights. An International Journal* 10, no. 2 (2015): 160—190 at 186, <https://doi.org/10.1163/18710328-12341285>.

⁷⁹ However, the relationship between systemic integration and dynamic interpretation is not touched upon in this article.

⁸⁰ See preambles to i.e. the ECHR, the CRDAW and the CRC.

⁸¹ International Law Commission, finalized by Koskenniemi, *Fragmentation of International Law*, 211 (para. 420).