

Abstract

The subsidiarity principle has been referred to by human rights scholars and practitioners as one of the main tools to guide underlying theoretical perceptions and to address and remedy some of the current problems prevailing in this field. Nonetheless, the principle's exact scope and utility in human rights law have remained unclear. This contribution focuses on two major challenges: subsidiarity's varying theoretical rationale and the practical demands of international human rights review.

I. Introduction

In present day human rights law the principle of subsidiarity is on almost every agenda. Scholarly literature, in particular, seems to have developed a certain fascination both with the principle's most general form, which builds upon the recognition of smaller entities in relation to greater ones,² and with its legal adaptation, which is the exercise of deference or deferral, i.e. the preference to the exercise of authority by the smaller or lower entity, as opposed to the larger, or hierarchically higher authority.³ Several recent publications have tackled subsidiarity, or variations of it, and explored its usefulness for international human rights

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² *Infra*, section II.

³ Compare: ANDREAS FØLLESDAL, *Subsidiarity*, 6 *Journal of Political Philosophy* (1998), at 190; JOSEF ISENSEE, *Subsidiarität, das Prinzip und seine Prämissen*, in *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche Staat und Gesellschaft, Rechtstheorie, Beiheft 20* (Peter Blickle, et al. eds., 2001), at 145 *et seq.*

law.⁴ As many of those publications emphasized subsidiarity's nature as a structural or ordering principle for international human rights law,⁵ it now seems to have grown into a panacea for many theoretical as well as practical problems which have evolved in this field. Nonetheless, despite increased scholarly interest, the exact content, contours and uses of both the more general, as well as the legal conceptions of subsidiarity, in the various stages of

⁴ PAOLO G. CAROZZA, *Subsidiarity as a structural principle of international human rights law*, 97 American Journal of International Law (2003); LAURENCE HELFER, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law (2008); DINAH SHELTON, *Subsidiarity and human rights law*, 27 Human rights law journal (2006); WILLIAM M. CARTER, *Rethinking Subsidiarity in International Human Rights Adjudication*, 30 Hamline Journal of Public Law and Policy (2008-2009); JONAS CHRISTOFFERSEN, *Fair balance : proportionality, subsidiarity and primarity in the European Convention on Human Rights* (Martinus Nijhoff. 2009) at 227-357; HELEN KELLER, et al., *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 European journal of international law (2010) For a general overview: ISABEL FEICHTNER, *Subsidiarity* (Rüdiger Wolfrum ed., Max Planck Institute for Comparative Public Law and International Law and Oxford University Press)

⁵ ULRICH FASTENRATH, *Subsidiarität im Völkerrecht, in Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft* (Peter Blickle, et al. eds., 2002), at 475 *et seq*; P Carozza, *supra* note 4, D Shelton *supra* note 4, at 4 *et seq*; L Helfer *supra* note 4, at 125-159.

international human rights review, still remain rather unclear.⁶ Several aspects need to be differentiated: First and foremost, subsidiarity has been and is used in numerous legal and non-legal contexts. On a more general level, it may be invoked merely as an ethical appeal, or underlying moral value. In legal contexts, it can have a substantive, as well as a procedural nature and compliance with it may even be subject to judicial review. Procedural subsidiarity will guide certain procedures concerned with the competences and relationships between various entities in an institutional setting, substantive subsidiarity will influence the interpretation and weighing of conflicting substantive rights and obligations against each other.

Despite the foregoing, the practical relevance of subsidiarity in international human rights law appears undisputed. In the wider Europe, the Interlaken Declaration on the Reform of the European Court of Human Rights (ECtHR) emphasized the principle as a crucial element of the further reform of the Court.⁷ There seems no doubt about the necessity and importance of considering subsidiarity, particularly in international human rights law review. The concept seems almost inherent in its very idea.⁸ Subsidiarity mirrors the vertical nature of human

⁶ Criticism has been raised, for example, by Carter, *supra* note 4, at 319 – 334, and GARETH DAVIES, *Subsidiarity as a Method of Policy Centralisation, in* The Shifting Allocation of Authority in International Law (Thomer Broude & Yuval Shany eds., 2008) 79-98.

⁷ EUROPEAN COURT OF HUMAN RIGHTS COUNCIL OF EUROPE, High Level Conference on the Future of the European Court of Human Rights (Council of Europe ed., 2010); compare: *Ibid.*, Conference on the Principle of Subsidiarity: Strengthening Subsidiarity: Integrating the Court's Case Law Into National Law and Judicial Practice. (2010) 1-5; contrast: H Keller, A Fischer and D Kühne, *supra* note 4, at 1031, 1032.

⁸ Compare: P Carozza, *supra* note 4, at 40.

rights obligations: primarily, human rights are not intended to create reciprocal obligations between states, they guarantee the individual freedom from the state, and it is the national state which is the bearer and guarantor of the obligation.⁹ The current nature of the UN human rights supervisory system reflects this fact: most of the procedures, like the reporting procedures, as well as the follow-up mechanisms build on the primary responsibility of the national state.¹⁰ But also the individual complaints and judicial review system focus on the responsibility of the national state: international human rights review as a form of ‘secondary’, ‘constitutional’ or ‘appellate’ review can only continue the national judicial review of the human rights obligation. There are some further expressions of this procedural subsidiarity, for example, in the local remedies rule, or in the procedural obligation that a claim before a human rights treaty body has to be sufficiently substantiated.¹¹ Subsidiarity may also secure a certain review of the exercise of (judicial) competences of the human rights treaty bodies. Substantive subsidiarity takes account of the very character of human rights provisions, which are often of a more open or principled nature than other legal provisions. Where the

⁹ MARKO MILANOVIC, *Norm Conflict in Interantional Law: Wither Human Rights?*, 20 Duke Journal of Comparative and International Law (2009), at 70.

¹⁰ NIGEL S. RODLEY, *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights--Complementarity or Competition?*, 25 Human Rights Quarterly (2003), at 887 *et seq.*

¹¹ HRC, Report of the Human Rights Committee, Volume I, Ninety-Seventh till Ninety-Nineth Session 12.-30 July 2010. (2010) para. 98. Compare: HRC, *Manzano et al. v. Colombia*, Communication No. 1616/2007, CCPR/C/98/D/1616/2007, 10 May 2010, paras. 6.4 and 6.5; *Pestaño v. The Philippines*, Communication No. 1619/2007, CCPR/C/98/D/1616/2007, 11 May 2010, para. 6.4.

substantive content of a right has not been fully defined at the international level, states enjoy a certain discretion with respect to the individual methods with which they intend to fill out the particular right. Here, subsidiarity allows the international judicial body to determine the reasonableness and appropriateness of those methods. Further echoes of this affiliation with the material content of a right may be found in the doctrine that a state's measures may not violate a human right's very 'core'.¹² Finally, subsidiarity can apply at the remedy level. Generally, states must implement the remedies recommended by human rights treaty bodies, and may have greater or lesser leeway with regard to this ultimate instrument to compensate human rights violations. They may be called upon to award a specific sum of money to the victim, change particular legislation, or even be ordered to build a memorial.¹³ The concrete design of the human rights courts' and treaty bodies' procedure will ultimately decide how much discretion will be accorded to the national state.

In this paper, I try to reveal some of the fascinations with the principle of subsidiarity in international human rights law. Essentially, I will point to two major challenges which warrant further scrutiny. The first challenge to subsidiarity is the actual form and character of the principle. As indicated, subsidiarity has been invoked in many legal and non-legal contexts. It assumes both legal and moral functions. And due to diverging underlying theoretical conceptions, the principle may assume so many various shapes and contours that it can end up supporting almost diametrically opposed agendas. It may protect smaller entities from being encroached upon by greater ones, or permit the assumption of authority by a

¹² Compare: ICESCR, *General Comment No. 3, Nature of States Parties' Obligations*, U.N. Doc. E/1991/23, annex III (1990), at 86.

¹³ See *infra*, IV.F.

greater entity if certain requirements are fulfilled.¹⁴ To illustrate this first dilemma of subsidiarity, I will by way of example examine some instances where the principle has come to be used at the international, European and national levels. Many of those examples have also been highlighted by those writers who stressed subsidiarity's importance in international human rights law.¹⁵ Nonetheless, I will only point to some of subsidiarity's multiple forms and usages; a comprehensive comparative assessment of the use of subsidiarity is beyond the scope of this article.¹⁶

The second challenge to subsidiarity is the actual demands of international human rights law. I will concentrate on its application in international human rights review, since many of the suggestions which advocated its invocation focused as well on this area of law.¹⁷ I will particularly address how the principle has been used by those UN treaty bodies which have an individual complaints procedure up and running (i.e., the Human Rights Committee (HRC), The Committee on the Elimination of all Forms of Racial Discrimination (CERD) and the Committee against Torture CAT). I will also refer to the practice of regional human rights courts, like the ECtHR and the Inter American Court of Human Rights (IACtHR), to further exemplify where subsidiarity might be invoked in practice. I will point to some of the issues that have evolved and to the approaches the treaty bodies have taken in those areas. I will

¹⁴ KEN ENDO, *Subsidiarity and Its Enemies: To What Extent Is Sovereignty Contested to the Mixed Commonwealth of Europe*, 24 EUI Working Papers - RSC No. 2001/24 (2001), at 17.

¹⁵ Compare: D Shelton, *supra* note 4, at 4; P Carozza, *supra* note 4, at 38.

¹⁶ See K Endo, *supra* note 14, *ibid.*; A Føllesdal, *supra* note 4, *ibid.*; A FØLLESDAL, *Subsidiarity and Democratic Deliberation, in Democracy in the European Union: Integration though Deliberation?* (Erik Oddvar Eriksen & John Erik Fossum eds., 2000).

¹⁷ L Helfer, *supra* note 4, at 125–159.

conclude with some recommendations that follow for the theoretical concept of subsidiarity and its application in human rights law.

II. The general idea

As mentioned, subsidiarity is a vast concept which spawns over various fields of national, regional and international law. Even though the concept differs according to its field of application, there seems to be one notion which is commonly referred to as comprising the concept's most general idea: it is the recognition and preservation of some form of primacy of geographically smaller entities within an institutional arrangement where larger and smaller entities coexist.¹⁸ In legal contexts, this concept evolves as a principle of deference. Following that understanding, subsidiarity gives preference to the exercise of authority by the smaller or lower entity, as opposed to the larger, or hierarchically higher authority.¹⁹ Often, the actual assessment of the deferral of a decision is connected to further requirements, such as effectiveness, willingness or ability, or necessity, which then gear either the allocation or the exercise of authority through the larger or the smaller entity, or both.²⁰ Within this overall context - to utilize Dworkin's famous distinction between principles and rules - subsidiarity

¹⁸ Pius XI, *Quadregesimo Anno*, AAS 23 (1931), 15 May 1931, para. 79, at:

http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadregesimo-anno_en.html.

¹⁹ Compare: A Føllesdal, *supra* note 4, at 190; Isensee, *Subsidiarität*, *supra* note 4, at 145 *et seq.*

²⁰ *Infra*, section V.B.

must be regarded as an overall principle, not a legal rule.²¹ It is thus often a form of legal reasoning, and not just hard and fast law (subsidiarity as *ratio legis*, no *lex*).²²

III. The first challenge: what is subsidiarity and how do we tell it when we see it?²³

I will now turn to the first challenge. Various theoretical and conceptual functions and elements are ascribed to the principle, each depending on the context of its application. Generally, the perspective on subsidiarity differs depending on the theoretical perspective of the theorist involved and on the area of application. There are substantive and procedural approaches to subsidiarity. The former ascribe certain moral or normative functions to the principle²⁴ and many of those approaches concern the area of substantive human rights law. The latter view subsidiarity from a functionalist or structural perspective. They often concern the area of procedural law and/or address institutional issues. They stress the principle's importance for the overall structure and institutional order of the system of international human rights review or highlight its benefits for certain institutional interactions.²⁵

²¹ See RONALD DWORKIN, *Taking rights seriously* (Duckworth New impression with a reply to critics. ed. 1997), at 24, 26.

²² Isensee, *supra* note 4, at 169.

²³ Credit is owed to ROBERT Y. JENNINGS & J. R. SPENCER, *What is international law and how do we tell it when we see it?* (Kluwer. 1983) for the title of this heading.

²⁴ JAMES A SWEENEY, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 *International and Comparative Law Quarterly* (2005), at 471.

²⁵ MATTHIAS KUMM, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in *Ruling the World? Constitutionalism*,

Functionalist approaches have also developed further criteria to guide the basic decision behind subsidiarity, i.e. deferral to the smaller entity. They held that this decision is dependent on whether the deferral is necessary, whether the decision is effective at that particular level, or whether the entity in question is willing or able to carry out the decision.²⁶ The views vary on which level and entity should ultimately be able to decide on the allocation of authority to the more junior level. Some of those conceptions have evolved into hard and fully justiciable legal concepts.²⁷ But functionally aligned scholars have also emphasized the importance of the principle for the prioritization of decisions and value judgments in general, and particular decision-making processes.²⁸ Thus, often enough, approaches to subsidiarity overlap in their endeavors and address both its structural and normative aspects.

In the following section, I will first address some of the substantive, i.e. more normative or moral benefits of subsidiarity, as well as some of the aspects that belong to the procedural part of the concept, and the different contexts and environments in which they apply. I will identify which entity and level has the final say in decisions about the allocation of authority. Secondly, I will establish the various functions and contexts of application of the principle in human rights law and in other fields of law. I will also turn to the relevant content of the principle in those diverse contexts and fields of application.

International Law and Global Governance (Jeffrey Dunoff & Joel P. Trachtman eds., 2009), at 291; THOMAS SPIJKERBOER, *Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases*, 21 International Journal of Refugee Law (2009), at 73 and 74.

²⁶ *Infra* V. B.

²⁷ *Ibid.*

²⁸ P Carozza, *supra* note 4, at 42.

A. Some normative accounts

Normative accounts of subsidiarity often tackle the area of substantial human rights law. That is, they either advocate the realization of certain values connected to certain human rights provisions, or they are concerned with cases where decisions on substantive human rights should or should not be ceded to the lower, i.e. the national or sub-national, level. Many substantive human rights provisions at the national as well as at the international level already recognize this interpretative primacy of the national state.²⁹ But normative accounts of subsidiarity also attempt to tackle those cases where the provisions are open ended and leave room for either the international or the national level ultimately to determine the substance and content of the underlying obligation.³⁰

1. Thick and thin human rights

A useful distinction for decisions on which entity shall be competent to decide upon and interpret the substantive content and core of human rights law, can be found with Sweeney, who addresses subsidiarity from a moralist perspective and distinguishes between thick and thin moralities and corresponding aspects of the principle.³¹ He advances his theory mostly for the ECtHR, but since some of the Court's problems replicate those at the international

²⁹ *Infra* IV. E.

³⁰ Geir Ulfstein, for example, maintains that subsidiarity in international law entails that there should be good reasons for choosing international, rather than national decision-making. See: GEIR ULFSTEIN, *International Constitutionalization: A Research Agenda*, Guest Editorial - ESIL Newsletter (2010), 2.

³¹ Sweeney, *supra* note 24.

level,³² his approach is highly relevant for international human rights law. Sweeney points to the fact that within the overall regime of the European Convention on Human Rights (ECHR) subsidiarity is viewed as the institutional solution to how to fill out the substantive content of human rights norms.³³ The principle finds reflection in the margin of appreciation and fourth instance doctrine of the ECtHR, and ensures that the convention mechanisms are subsidiary to the actions of member states.³⁴ Sweeney differentiates between the core and the outer layers of human rights norms. Borrowing from Waltzer's terminology of thick and thin legal rules,³⁵ Sweeney argues that the thin moral concept of a right corresponds to the definition of a right's very core, whereas a thick concept concerned the outer layers of the right or its ultimate implementation in practice.³⁶ In essence, his doctrine stipulates that states would not be involved when the determination of the very core of a human rights is at stake (i.e. when the thin moral concept of the right is concerned), whereas they would well advised to become involved when outer layers and further particularities of application are at stake (i.e. the so-called thick moral concept of the right).

³² Among the treaty bodies under scrutiny, the HRC faces similar problems to those of the ECtHR. Like the ECtHR, the Committee has accumulated a significant backlog of cases. As of 1 January 2011, there are about 400 individual complaints pending before it.

³³ Sweeney, *supra* note 24, at 471.

³⁴ *Ibid*, 472; MARK EUGEN VILLIGER, *The principle of subsidiarity in the European Convention on Human Rights in Promoting justice, human rights and conflict resolution through international law* (Marcelo G. Kohen ed. 2007), at 627 and 629 *et seq.*

³⁵ MICHAEL WALZER, *Thick and thin: moral argument at home and abroad* (University of Notre Dame Press. 1994).

³⁶ Sweeney, *supra* note 24, at 470, 471.

Sweeney's core rights account of subsidiarity can serve two main assessments with regard to the interpretation substantive human rights obligations: first, it opens the way for a discussion on the preconditions for the application of the subsidiarity principle in human rights law. It allows for discussions on the proper account of decision-making power to either the lower or the higher level. Second, his approach can provide guidance to subsequent qualitative decision, which concerns the interpretation of substantive human rights by either the international or the national entity. One may well argue that his core rights account has already found entry into "positivist" human rights doctrine: when discussing the nature of state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic and Social and Cultural Rights (CESCR Committee), in its General Comment No. 3 differentiated minimum core rights obligations, which are incumbent upon any state party to the Covenant, and obligations which concern the outer layer of social and economic rights, with regard to which states shall strive to ensure the widest possible enjoyment of social and economic rights.³⁷ Nonetheless, Sweeney's approach does not provide criteria for a decision on which institutional level should be accorded the authority to make those normative decisions.

2. Democratic deliberation

Another normative function which has been ascribed to the application of subsidiarity in international human rights law is the furtherance and structuring of democratic deliberation in national and supranational decision-making processes.³⁸ This has been advanced both for the application of subsidiarity in EU law, and for its application in international human rights

³⁷ CESCR, *The Nature of States Obligations*, General Comment No. 3, 4 December 1990, U.N. Doc. E/1991/23, paras. 10 and 11.

³⁸ A Føllesdal, *supra* note 4, at 211.

law.³⁹ The argument is often linked to the criterion that subsidiarity considerations should allow for discussions about the adequate level of decision-making.⁴⁰ Shelton, for example, emphasizes that subsidiarity can have an influential effect on democratic processes in the area of human rights⁴¹ and on the actual actors involved in the decision-making process. She holds, in particular, that subsidiarity could act as a safeguard for the rights of a minority against the majority,⁴² mostly because the concept ensured both the recognition and the participation of smaller entities in decision-making processes. MacCormick opines that four crucial values which guide the EU, i.e. market subsidiarity, communal subsidiarity, rational legislative subsidiarity and comprehensive subsidiarity ensure freedom of choice, the realization of individual rights, participation in the community, and effective legislation and deliberation in the EU.⁴³ In his view, comprehensive subsidiarity in particular contributes greatly to democratic forms of decision-making, even at the supra-state level.⁴⁴

Even though discussions about the adequate level of decision-making further deliberation as such, it is difficult to view subsidiarity as an idea which supports or enhances democratic decision-making in multi-level environments. It presupposes that democracy must be seen as a value which is mostly concerned with institutional procedures and prerequisites. Understood

³⁹ D Shelton, *supra* note 4, at 7 *et seq*, N MACCORMICK, *Democracy, subsidiarity, and citizenship in the 'European Commonwealth'*, 16 Law and Philosophy (1997). Compare: NEIL MACCORMICK, *Problems of democracy and subsidiarity* /, 6 European public law (2000).

⁴⁰ D Shelton, *supra* note 4, at 6, 7; MacCormick, *supra* note 39, 350 *et seq*.

⁴¹ D Shelton, *ibid.*.

⁴² *Ibid*, at 11.

⁴³ N. MacCormick, *supra* note 39, at 354.

⁴⁴ *Ibid*, at 355.

in such a functional way, however, the deferral of decision-making processes to smaller entities constitutes neither a sufficient, nor a necessary requirement for the implementation of democratic decision-making processes. It may facilitate democratic deliberations,⁴⁵ but it involves but one necessary procedural adjustment to the process as such, because it ensures that deliberation takes place at a lower level or in a smaller entity. It does not ensure that any individual actually becomes involved with the actual decision-making,⁴⁶ neither does it provide a suggestion on how. Further processes and means which ensure that the decision-making process at the lower level actually involves a *demos* as such, or a representative part of it are still necessary.⁴⁷ In addition, if one leaves the procedural perspective and assumes that democracy must be understood as a substantive value which is concerned with attending to questions of both social and material equality and on the ability of citizens to sanction their leaders,⁴⁸ the relationship between subsidiarity and democracy becomes even less clear. Subsidiarity, even in its normative form, which expresses a preference for the lower, i.e. national level, on its own, does not facilitate the effective realization of either human rights, or social and material equality, without further institutional arrangements and guarantees in place.

⁴⁵ FØLLESDAL, at 90.

⁴⁶ Compare: ANDREAS L. PAULUS, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law*, in *The Shifting Allocation of Authority in International Law* (Thomer Broude & Yuval Shany eds., 2008), 204f.

⁴⁷ JA SCHUMPETER, *Capitalism, socialism and democracy* (Allen and Unwin. 1942), 269.

⁴⁸ Compare: MOLLY BEUTZ, *Functional Democracy: Responding to Failures of Accountability*, 44 *Harvard International Law Journal* (2003), at 405, 406.

B. Primarily functionalist and/or constructivist solutions

Functionalist as well as constructivist accounts of subsidiarity focus on the criteria which make or shall make the principle effective and work in practice, mostly at the institutional or procedural level. Many of the conceptions described in the following paragraphs concern procedural subsidiarity and already apply as hard and fast principles at the national, regional and international levels. But they also allow the tackling of substantive subsidiarity, i.e. the interpretation of substantive human rights law. Most functional scholarly accounts of subsidiarity do not exclude certain normative connotations; and also most normative and constructivist visions of the principle overlap. In fact, normative factors, such as efficiency and necessity, are often employed to steer the ultimately normative decision if and when the smaller or lower level should be endowed with some decision-making authority.⁴⁹ And even though all approaches are unanimous, in that the smaller or lower level should be endowed with some decision-making authority, they differ as to whether the ultimate decision on the deferral to the lower level should rest with the higher or greater level. I will now highlight some functional approaches where considerations of subsidiary have become the most prominent.

⁴⁹ A Paulus, *supra* note 46, at 197, who rightly remarked that subsidiarity may also require the shift of authority to the higher level, “if and to the extent that the higher level appears better suited to fulfil the task in question and guarantees the participation subject to the decision.”

3. Unwillingness and inability

One often quoted example of a general account of the principle of subsidiarity is enshrined in pope Pius XI's encyclical of 1931.⁵⁰ Even though his predecessor Leo XIII had relied on the basic concept behind subsidiarity a hundred years before,⁵¹ Pius made the clearest and most explicit reference to its character as an ordering principle for civil societies.⁵² He invoked the principle both in its functional and normative account and held that

“Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.”⁵³

The wording of the encyclical illustrates quite vividly both the value of subsidiarity and the two-fold conception of the concept. First and foremost, it clearly awards the lower level with a preference right to a decision-making power. That is, according to Endo, the negative

⁵⁰ Pius XI, *Quadregesimo Anno*, AAS 23 (1931), 15 May 1931 at:

http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadregesimo-anno_en.html.

⁵¹ Compare: PL XIII, 'Rerum novarum: ENCYCLICAL OF POPE LEO XIII ON CAPITAL AND LABOR ' http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html (Vatican, Rome 1891), para. 32, 33, 35, 36.

⁵² Compare the discussions in: D Shelton, *supra* note 4, at 4, and P Carozza, *ibid.*, at 41.

⁵³ Pius XI, *supra* note 50, at para. 79.

aspect of subsidiarity.⁵⁴ Second, it refers both to the *allocation* and to the *exercise* of competence by the higher entity.⁵⁵ It concentrates on deference, but sets up the criterion of willingness and ability as a precondition for the factual deferral of a decision to the lower level. If the lower level shows itself to be unwilling or unable to decide, the decision will not be deferred and the state has a duty to intervene. This is what Endo has termed the positive aspect of subsidiarity.⁵⁶

In international law, the positive concept of subsidiarity finds a direct reflection in the complementarity principle of the Rome Statute of the International Criminal Court (ICC Statute).⁵⁷ Complementarity states that the Court's jurisdiction shall be subsidiary to that of national courts, unless those national courts are "unwilling or unable to genuinely carry out the investigation or prosecution"⁵⁸ and the case is of sufficient gravity to justify the exercise of the Court's jurisdiction.⁵⁹ In the ICC Statute, the principle serves two purposes: First, to prevent the ICC from being flooded with claims and, second, to respect as much as possible the sovereignty of national states which are parties to the Statute.⁶⁰ The two prerequisites,

⁵⁴ K Endo, *supra* note 14, at 19.

⁵⁵ A Føllesdal, *supra* note 4, at 209.

⁵⁶ K Endo, *supra* note 14, at 19.

⁵⁷ Compare: Arts. 1, 15, 17, 18 and 19 Rome Statute of the International Criminal Court, (ICC Statute).

⁵⁸ Article 17 (1) (a) ICC Statute.

⁵⁹ Article 17 (1) (d) ICC Statute.

⁶⁰ Compare: ANTONIO CASSESE, *International Criminal Law* (Oxford University Press. 2008), at 343; SHARON A. WILLIAMS & WILLIAM A. SCHABAS, *Issues on Admissibility, Art. 17, in*

unwillingness and inability, are spelled out in article 17 (2) and (3) of the ICC Statute, respectively. Unwillingness requires either that national authorities have undertaken proceedings with the purpose of shielding the person concerned from criminal responsibility, that there has been an unjustified delay in the proceedings showing that in fact the parties do not intend to bring the person to justice, or that the proceedings are not carried out impartially or independently or in a manner showing the intention to bring the person to justice.⁶¹ Inability, on the other hand, occurs in the event of the total or partial collapse of a state's judicial system, the state not being in a position to detain the accused or have him surrendered by the authorities or bodies that hold him in custody, or to collect the necessary evidence, or to carry out criminal proceedings.⁶²

Pius XI's as well as complementarity's two-fold version of subsidiarity focus on the respect and right to decision-making of the lower entities involved in the process.⁶³ The concept therefore presents a bottom-up approach to subsidiarity, where the smaller entities are at the centre of decision-making and the greater entities step in only if and when the lower level does not function adequately to solve the problem. Nonetheless, as the implementation of that very concept in the ICC Statute demonstrates, the higher level ultimately remains with the right to determine whether the lower level has proven unwilling or unable to carry out the decision-making (i.e. criminal prosecutions) at the lower level. But the lower level enjoys a

Commentary on the Rome Statute of the International Criminal Court (Otto Triffterer ed. 2008), marginal No. 1.

⁶¹ Article 17 (2) ICC Statute.

⁶² Article 17 (3) ICC Statute.

⁶³ For an assessment of the earlier codification of subsidiarity in the encyclical 'Rerum Novarum' see: K Endo, *supra* note 14, at 17.

certain margin of discretion with regard to the proper exercise of its competences.

Nonetheless, the possibility of the higher level to withdraw jurisdiction from the national level contributes to the ultimate prosecution of the heinous crimes involved, if only at the international level.

4. The federalist basis

Sometimes, the idea of subsidiarity is linked to the concept of federalism.⁶⁴ This is no far fetched idea: the general idea behind subsidiarity – the decentralization of power and taking into account local needs and conditions in decision-making processes – underlies the very concept of federalism.⁶⁵ Several federalist states or federalist arrangements, like Germany or the EU, use subsidiarity as an explicit principle to regulate the decentralization of decision-making from the federal to the state level. The particularities of the application of those concepts of subsidiarity at those levels will be discussed later in this article.⁶⁶ Other federalist

⁶⁴ JOEL TRACHTMAN, *L'Etat C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 Harvard International Law Journal (1992), 468; A Føllesdal, 204; PHILIP PETTIT, *Republicanism: A Theory of Freedom and Government* (Clarendon Press. 1997); QUENTIN SKINNER, *The idea of negative liberty: philosophical and historical perspectives*, in *Philosophy in History* (Richard Rorty, et al. eds., 1984).

⁶⁵ Compare: A. W. HERINGA & PHILIPP KIIVER, *Constitutions compared : an introduction to comparative constitutional law* (Intersentia, Metro 2nd ed. 2009), at 49.

⁶⁶ See *infra* section V.B.6.

states, like the US, do not explicitly rely on the concept of subsidiarity, but use very similar concepts and principles to ensure decentralization or devolution.⁶⁷

For example, US judicial practice has developed the doctrines of federal pre-emption and frustration of congressional purpose, of which the rule of federal pre-emption allows the US Congress to establish preference for or exclude federal over state regulation with regard to a given matter.⁶⁸ Pursuant to this rule, Congress can essentially pre-empt a rule in the states. It therefore has the ultimate authority in decisions about what should be regulated by federal rules and what should be regulated by the states. Despite the foregoing, the factual exercise of this authority is forfeited by the general presumption against pre-emption which has been developed by federal jurisprudence.⁶⁹ Accordingly, as a general rule, states may exercise their legislative powers and Congress needs to disprove the general presumption against pre-emption if it is to exercise federal legislative powers. This concept clearly gives preference to the exercise of judicial authority by the states and thence provides another bottom-up approach to the devolution of legislative powers, even though the legality of the exercise of judicial powers may ultimately be subject to assessment by the US Supreme Court.

⁶⁷ See GEORGE A. BERMAN, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Columbia Law Review (1994), at 406 who held: „subsidiarity is foreign to the law and practice of federal legislation.” Compare: GARY VAUSE, *The Subsidiarity Principle in European Union Law - American Federalism Compared*, 27 Case Western Journal of International Law (1995), at 68.

⁶⁸ Compare: *Wyeth v. Levine* – 555 U.S. Docket No. 06-1249 (2009), 8; further: Berman, *supra* note 67, at 424.

⁶⁹ *Ibid.*; Berman, *ibid.*, at 425.

The doctrines of pre-emption and forfeiture of congressional purpose provide a relatively rigid approach, which is built upon the strict separation of judicial powers between the states and the federation. More recent scholarly conceptions therefore advocate dynamic or polyphonic federalism as an alternative.⁷⁰ Often, those concepts are also used as a means to incorporate international human rights at state level where the federal government has failed to ratify the respective human rights treaties.⁷¹ The dynamic or polyphonic model builds upon the values of plurality, dialogue and redundancy.⁷² Schapiro, for example, explains that the value of plurality focuses on the fact that the decision upon certain rights by various courts at various levels does not lead to a uniform interpretation of those rights, but to multiple meanings.⁷³ The diverging meanings then create a dialogue among judges about the interpretation of the law.⁷⁴ The value of redundancy presupposes a court system where courts

⁷⁰ KIRSTEN H. ENGEL, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 Emory Law Journal (2006); CATHERINE POWELL, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 University of Pennsylvania Law Review (2001); ROBERT A. SCHAPIRO, *Toward a Theory of Interactive Federalism* 91 Iowa Law Review (2005); ROBERT A. SCHAPIRO, *Polyphonic federalism : toward the protection of fundamental rights* (Univ. of Chicago Press. 2009); MARGARET E MCGUINNESS, *Federalism and Horizontality in International Human Rights*, 73 Mo Law Review (2008).

⁷¹ JOHANNA KALB, *Dynamic Federalism in Human Rights Treaty Interpretation*, 84 Tulane Law Review (2010), 1029; Powell, *supra* note 71, at 245f.

⁷² R Schapiro, *Polyphonic Federalism*, *supra* note 70, at 134-138.

⁷³ *Ibid*, 134.

⁷⁴ *Ibid*, 136; Powell *supra* note 70, 288 *et seq.*

are accountable in their respective levels, but where no level has a final decision-making authority. That presupposed, an erratic decision at either level will not affect the other.⁷⁵

Even though the conception of dynamic federalism is more difficult to understand at the national level - it disturbs the national hierarchy of courts and conflicts with the principle of finality, i.e. the ultimate settlement function of judicial review – its application at the international level, in particular with regard to human rights review, does not seem that problematic. There is no clear hierarchy between national courts and supranational human rights review bodies.⁷⁶ Both organs receive their authority from their respective legal systems. Whereas the national level usually produces binding legal decisions, the treaty bodies are commonly held to issue “authoritative statements of the law” both in their Views and in General Comments.⁷⁷ The situation is not much different in dualist national orders, even in cases where the judgments of (regional) human rights courts are formally binding upon those states.⁷⁸ Here, the judgments of regional courts are often neither directly applicable in national law nor integrated into the formal hierarchy of the judiciary.⁷⁹ They require implementation

⁷⁵ R Schapiro, *Polyphonic Federalism*, *supra* note 70, at 137.

⁷⁶ Compare: GEIR ULFSTEIN, *The International Judiciary, in The Constitutionalization of International Law* (Jan Klabbers, et al. eds., 2009), 143.

⁷⁷ HRC, *General Comment N. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (2008), para. 13.

⁷⁸ Compare Art. 46(1) ECHR and Art. 68(1) IACHR, concerning the judgments of the IACtHR.

⁷⁹ Compare for Germany: C TOMUSCHAT, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 *German Law Journal* (2010), 517 and 518.

by the national state. Thus, findings as expressed in the Views of the treaty bodies or even formally binding judgments of regional human rights courts do not override or annul previous findings or even contrary findings at the national level. They simply remain valid at each level and therefore provide different viewpoints, answers or reasoning on one and the same human rights issue, i.e. precisely the situation which Schapiro describes as redundancy.⁸⁰ In addition, there is a strong need for interaction, as international human rights treaties impose binding obligations on states parties and as states are called upon to cooperate with the treaty bodies, either in the state reporting procedure or in the follow-up procedure or in the special procedures before the Human Rights Council.

5. Effectiveness

Subsidiarity is an important principle, if not one of the most important, in the legislative and administrative architecture of the EU. Starting with the treaty of Maastricht, all subsequent EU/EC treaties recognized it as an independent principle.⁸¹ Now, also the new Lisbon Treaty regulates the devolution of decision-making and the exercise of authority in its article 6 via the concepts of subsidiarity, conferral and proportionality. The decision whether a decision was rightly taken either at the EU or at the national level, usually involves a consideration of all three elements. It is generally held that subsidiarity concentrates on the “whether” of the exercise of Union competences, and proportionality the “how”.⁸² Within this assessment, subsidiarity focuses on the *effectiveness* of the supra-majoritarian entity to give

⁸⁰ R Schapiro, 'Towards a Theory of Interactive Federalism', *supra* note 70, at 289, 290.

⁸¹ The principle was already contained in the Single European Act of 1986, but it addressed only environmental legislation (compare ROBERT SCHÜTZE, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism*, 68 Cambridge Law Journal (2009), 526).

⁸² *Ibid*, 532.

decisions and it tackles both the allocation and the exercise of the EU's competences. The current wording of Article 5 (3) of the Lisbon treaty evidences this⁸³:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be *sufficiently* achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”⁸⁴

The principle was last accommodated in the Protocol on the Application of the Principles of Subsidiarity and Proportionality (Lisbon Subsidiarity Protocol) annexed to the Treaty of Lisbon.⁸⁵ Prior to the adoption of the Lisbon Subsidiarity Protocol, the European version of subsidiarity seemed to be guided by a “top-down” approach to the principle.⁸⁶ Even though the codification of subsidiarity in the EU treaties expressed a presumption of preference for the national level, the main determination of what sort of competences may be exercised took place at Union level.⁸⁷ Nonetheless compliance with it by the EU institutions was fully

⁸³ But see: *ibid*, 531.

⁸⁴ Emphasis added.

⁸⁵ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality (Lisbon, 13 December 2007) in: Official Journal of the European Union, No C 83, 30 March 2010, 206-209.

⁸⁶ But see: J Trachtman, *supra* note 64, at 465.

⁸⁷ For the 1997 Protocol in its latest 2006 version see: *Official Journal C 321 E 29/12/2006 pp. 308 – 311*. Vause, *supra* note 67, at 79 warned that this creates a “creeping federalism” in which the subsidiarity principle “may not adequately protect against encroachment upon state powers by the central European government”.

justiciable and the ECJ already discussed the first allegations of its breach.⁸⁸ According to the ECJ's jurisprudence, the three main preconditions for the application of subsidiarity are that, firstly, there is a primary and explicit EU competence pursuant to which the respective organ may have acted in the individual case at hand and, secondly, that there is a need for a regulation at the Community level. Lastly, the exercise of legislative competences at the Community level must have been proportionate.⁸⁹ The most recent decision of the ECJ, which concerns the legality of capping prices on roaming on public mobile telephone networks within the Community pursuant to directive 717/2007, exemplifies this approach.⁹⁰ In that decision, the Court first affirmed that article 95 could serve as a basis for the Community's competences regarding mobile phone roaming. Thereafter, the Court acknowledged that there was a need for a Community regulation to contribute to the smooth functioning of the community market and the regulation in directive 717/2007 did not exceed this intended aim.⁹¹

⁸⁸ Compare: ECJ, *UK v. Council*, Judgment, No. C-84/94, I-5755, 12 November 1996; *Federal Republic of Germany v European Parliament and Council of the European Union*, Judgment, Judgment, No. C-233/94, I-2405, 13 May 1997; *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd und Imperial Tobacco Ltd.*, Judgment, No. C-491/01, 2 July 2002, I-11453 (BAT Tobacco case); *The Queen on the application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (Vodafone pp. case)*, Judgment, No. C-58/08, 8 June 2010.

⁸⁹ Compare the BAT Tobacco case, *supra* note 88, paras. 182, 183.

⁹⁰ ECJ, *Vodafone pp case*, *supra* note 88.

⁹¹ ECJ, *Vodafone pp case*, *supra* note 88, para. 76, 77.

Even though the new Lisbon Protocol did not to change this approach, it nevertheless strengthened the role of national parliaments in the observation of those processes. Thus, it eventually provided for a more bottom-up - and democratic - perspective in the assessment of the observation of the principle by introducing the so-called yellow card mechanisms.

Pursuant to article 6 of the Lisbon Protocol, national parliaments may now within six weeks from the production of a legislative draft produce a reasoned statement why they think the draft does not comply with the principles of subsidiarity. If those reasoned statements amount to one third of the two votes allocated to each national parliament, or to one quarter of those votes in case of a draft legislative act, the EU legislation needs to be “reviewed”.⁹²

Nonetheless, it remains to be seen whether this new yellow card approach will lead to a truly different notion of subsidiarity, which does not concentrate on the EU level as the main point of reference or provides more checks and balances for the national level. Yet, the involvement of national parliaments clearly recognizes and furthers the involvement of democratic elements in decisions about the exercise of the EU’s institutional competences.

6. Necessity

In contrast to the more bottom-up approaches of the ICC Statute and the Lisbon version, the German adaptation of the subsidiarity principle emphasizes a top-down approach. Its adoption in the German constitution is often held to be the result of the German effort to decentralize and order the state’s federal structures after the national socialist experience⁹³ and is one of the first versions of subsidiarity expressed as a legal principle, which greatly

⁹² *Supra*, note 85, Arts. 6, 7 (2). Compare the assessment by Schütze, *supra* note 81, 530 *et seq.*

⁹³ P Carozza, *supra* note 4, at 50.

influenced its adaptation in other areas, such as at the European level.⁹⁴ The principle is commonly perceived as ordering the overall relationship between the national states (*Länder*) and the German federal state.⁹⁵ Nevertheless, there is no provision in the Basic Law which explicitly refers to this function.⁹⁶ The provision which is commonly quoted when considering the relationship of the federation with the *Länder*, i.e. article 72(2) of the Basic Law (BL), addresses subsidiarity only with regard to the exercise of legislative competences.⁹⁷ The article awards legislative competences to the federal government in certain areas of law:

“if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation *necessary* in the national interest.”(emphasis added)⁹⁸

⁹⁴ Schütze, *supra* note 81, at 525, 526; ROBERT SCHÜTZE, *From Dual to Cooperative Federalism* (Oxford University Press. 2009), at 246.

⁹⁵ D Shelton, *supra* note 4, at 4; P Carozza, *ibid.*, at 50 and note 67.

⁹⁶ JOSEF ISENSEE, *Subsidiaritätsprinzip und Verfassungsrecht - Eine Studie über das Regulativ des Verhältnisses von Staat und Gesellschaft*. Nachtrag: Die Zeitperspektive 2001. *Subsidiarität - das Prinzip und seine Prämissen* (Duncker & Humblot. 2001) , in particular 106 *et seq*, 143 *et seq*, 178 *et seq*, 220 *et seq*, 295 *et seq*, 313 *et seq*. The Basic Law explicitly mentions “subsidiarity” only when considering the relationship of the federal state with the European Union (compare articles 23 (1) and (1a) of the Basic Law).

⁹⁷ This provision is quoted by scholars assessing German subsidiarity. Compare: GREG TAYLOR, *Germany: a slow death for subsidiarity?* , 7 *International Journal of Constitutional Law* (2009), at 139.

⁹⁸ Art. 72(2) Basic Law, as translated by C. Tomuschat and D. Kommers, at: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#GGengl_000P72.

Every legislative initiative of the federation in those areas listed in article 72(2) BL must thus comply with the criterion of providing equivalent living standards. Even though article 72(2) BL provides a justiciable codification of subsidiarity, judicial review of the legislative's compliance with article 72(2) BL requirements is limited.⁹⁹ The German Constitutional Court has held that the national legislative has a broad margin of appreciation in determining whether federal legislation is 'necessary' in the terms of article 72(2) BL. Following the established jurisprudence of the Constitutional Court, the determination of what constitutes a necessity also lies within the discretion of the national legislative.¹⁰⁰ The Constitutional Court can therefore only review the proper exercise of that discretion by the federal state, i.e. its misuse or abuse.¹⁰¹

Compared, in particular, with the latest adaptation of subsidiarity in the European context, the German case provides us with a very strong top-down approach to subsidiarity. Even though the codification of the principle in the Basic Law still comprises – in principle – the presumption of primary competence of the *Länder* authorities, the final determination of the proper exercise of competence is left up to the discretion of the federal legislator.

C. Preliminary conclusions

As our previous assessment has shown, there are a large variety of different conceptions of subsidiarity, all of which focus on different aspects of the deferment of authority. All concepts seem to agree in the key assumption that there should be a general presumption of

⁹⁹ Compare: THEODOR MAUNZ, *Art. 72, in Grundgesetz Kommentar* (Theodor Maunz & Günther Dürig eds., 2010), marginal no. 17.

¹⁰⁰ BverfGE 4, 18; 4, 127; 6, 71; 11, 60; 38, 11.

¹⁰¹ BverfGE 2, 224.

preference for the exercise of authority at the lower level. Nonetheless, one key differentiation criterion seems to be the preference for either the smaller or the greater level in decisions on the allocation of authority. Some approaches, like the European or the German model, prefer a top-down approach where the higher level possesses significant discretion in deciding on whether it is most suited to adopt the decision, whereas other concepts seem to be concerned with giving the utmost leeway to the lower/smaller level, and keeping the decision on the allocation of authority at the higher level as a last resort. The complementarity concept and current US approach to legislative devolution are good examples of this approach. It also seems that those normative conceptions which focus on the ability of subsidiarity to further democratic decision-making would also prefer this bottom-up approach to the concept. Sweeney's normative concept facilitates the actual decision on where to allocate decisions about the core and content of human rights, but it does not provide the procedural tools for how best to execute this decision, and by what means.

Moreover, it seems that the different legal concepts of subsidiarity were developed specifically to match the needs of the particular system in question, even though a certain trend towards a focus on the lower/smaller level is discernable. The complementarity principle in the ICC Statute focuses on willingness and ability, in order to allow for the withdrawal of jurisdiction from the national to the international level. This ensures the prosecution of the heinous crimes involved. At the EU level, subsidiarity seems to be born out of the compromise to ensure the proper functioning of the EU institutions, while paying due regard to particularities at the national levels. The "yellow card" procedure in the Lisbon Subsidiarity Protocol introduces an even greater preference for devolution to the national level. Possibly, this was an ultimate reaction to the protests against and ultimate repudiation of the Constitutional Treaty by the national states. And even though the German concept may be

representative of a similar top-down approach to subsidiarity, the constitutional reform of 2006 which transferred a significant number of legislative competences back to the *Länder*,¹⁰² factually evidences that the current trend is heading towards the stronger involvement of the *Länder*. The US conceptions, on the other hand, may be characterized by a strong focus on the states, mostly because of the constitution's stronger emphasis on a truly federal state.¹⁰³ However, recent attempts to provide for more flexible approaches show that too rigid a differentiation between the powers of the states and the federal state can create difficulties; especially if the states want to adopt standards that the federal state is not prepared to adopt.

Finally, it appears that all classic branches of (state) authority can benefit from the application of the subsidiarity principle. As our assessment showed, the concept has been employed to assess the allocation of jurisdiction – in the case of the ICC Statute - the exercise of executive competences – in case of the EU - or the exercise of legislative competences – in the cases of the US and Germany. Yet, if it came to the particularities of subsidiarity in one of the branches, like the adjudicative, there might be special demands with regard to the actual implementation of the concept. For example, as the judiciary should be endowed with independence and impartiality, it seems difficult to envisage the involvement of democratic institutions in decisions on the allocation of authority at the adjudicative level. Just consider a similar veto right of national parliaments in the complaints proceedings before human rights supervisory bodies. And on an even more general level, it also appears to conflict with the

¹⁰² On the German Federalist Reform compare: MICHAEL KLOEPFER, *Bemerkungen zur Föderalismusreform*, Die Öffentliche Verwaltung (2004).

¹⁰³ HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Columbia Law Review (1954), 543f.

very concept of human rights protection, which aims to protect the individual from unlawful interference by the state. Should national parliaments therefore have a say in determinations of what consists a human rights violation?

To conclude, a form of subsidiarity which gives maximum discretion to the national level seems most suitable for international human rights law. This rests mainly on the consideration that there is no clear hierarchy which establishes that either the international or the national level enjoys ultimate supremacy over the other. Moreover, the national level is usually the sole bearer and guarantor of human rights obligations. However, a definition of subsidiarity for human rights law may vary according to the various functions human rights treaty bodies exercise at the international level, and according to the different procedures which are connected to those functions. Concerning review-type complaint proceedings, it may well be that a concept like complementarity could actually best channel individual complaints to the treaty bodies. I will explore this further in the following paragraphs.

IV. The second challenge: the demands of human rights law

I will now address on how the subsidiarity principle plays out in international human rights law. I will particularly focus on human rights review; mostly for reasons of space and since it is in this area that the principle becomes most prevalent. I will thus assess the application of subsidiarity at the three different levels of international human rights review: at the level of admissibility, where I will address the ability to review the committees' decisions under a separate heading; at the level of substantive law; as well as at the remedies level. The part concentrates on the case law of the HRC, the CERD and the CAT for the years 2008-2010, with exceptions for leading cases. I will only address the leading cases for the examples of the ECtHR and the IACtHR.

D. The admissibility level

The procedural rules adopted by the states parties to the regional ECHR and ACHR, as well as to the Optional Protocols of the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ICAT) and the prerequisites developed in the case law of the ECtHR, the IACtHR and the UN treaty bodies ensure by various means the accessibility of the complaints system for individual complainants, while at the same time preventing its being blocked by too many and unsubstantiated complaints and paying due regard to national human rights review mechanisms. States are still the main guarantors of human rights; and due to their limited judicial powers and lack of integration with the national judicial systems, it is difficult to see the treaty bodies as a ‘fourth instance’ in relation to the national level.¹⁰⁴ I will highlight the most prominent rules which ensure this balance in the following.

¹⁰⁴ Compare: ECtHR *Kovács v. Hungary*, Application no. 8174/05, ECHR [2008], Judgment, 17 July 2008; *Edwards v. United Kingdom*, Application No 4647/99, 15 EHRR 417, *Dikici v. Turkey*, Application no. 18308/02, unreported, Judgment, 20 October 2009; *Aktar v. Turkey*, Application No. 3738/04, unreported, Judgment 2 February 2010; *Shalimov v. Ukraine*, Application no. 20808/02, unreported, Judgment, 4 March 2010. However, due to the stated reasons, and because of the non-binding character of the decisions of the treaty bodies, it is even more difficult to regard the Optional Protocol procedures as a sort of ‘constitutional’ or ‘fourth instance’ procedure.

1. The local remedies rule

The most elementary rule which ensures a prioritization of the deference of human rights adjudication to the national level is the local remedies rule. The IACtHR rightly held in the *Velásquez Rodruiguez* Case that the rule is the best expression for that international jurisdiction merely “reinforces or complements domestic jurisdiction”.¹⁰⁵ We find it in the procedural rules of all treaty bodies, the ECtHR and the IACtHR/IACHR.¹⁰⁶ Essentially, the rule provides that no petition or complaint will be assessed by the adjudicatory body before all local remedies have been exhausted at the national level. Sometimes, it is supplemented by time limitations. For example, the ICERD and the ECHR provide that a petitioner must have submitted his or her petition within six months after the last local decision.¹⁰⁷ However, all human rights bodies have also acknowledged that the rule may be deviated from in certain circumstances, in particular if a remedy prove to be inadequate or ineffective.¹⁰⁸

¹⁰⁵ IACtHR, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, (Ser. C) No. 4 (1988), para. 61. Compare: IACtHR, *Gómez Paquiyauri Brothers v. Peru*, (Ser. C) No. 110 (2004), Separate Opinion AA Cançado Trindade, para 25, who held that the principle of subsidiarity is there to “perfect the national legal protection systems”.

¹⁰⁶ Compare Article 5(2) ICCPR First Optional Protocol, Art. 22(5)(b) ICAT; Art. 2 CERD Rules of Procedure, Art. 35(1) ECtHR, Art. 46 ACHR.

¹⁰⁷ Compare ICERD Rules of Procedure, Rule 91(1)(e) and (f), Art. 35(1) ECHR; Art. 46(1)(a) ACHR.

¹⁰⁸ Compare: CAT, *Josu Arkauz Arana v. France*, Communication No. 063/1997, CAT/C/23/D/63/1997, Views , 9 November 1999, para. 6.1; Art. 46(2)(a)ACHR; IACtHR, *Velásquez Rodríguez Case*, *supra* note 105, para 64; ECtHR, *Akdivar et al v. Turkey*, Application no. 21893/93 ECHR 1996 IV, Judgment, 16 September1996, 1210; *Aksoy v.*

2. No assessment of situations subject to international investigations

A matter will not be assessed by a human rights adjudicatory body if it has already been part of other international investigation or settlement proceedings.¹⁰⁹ This rule, which mirrors the local remedies rule, secures the subsidiarity of supranational review proceedings in relation to other international courts and tribunals.

3. Sufficient substantiation

Some treaty bodies rely on the criterion of sufficient substantiation. Essentially, it is concerned with the fact that the claimant has to support allegations that his rights were violated by legal reasoning or evidence. The criterion prevents claimants from simply alleging, for example, that national decisions on their case before it came to the Committee were wrong or unfounded. At the international level, it is used both by the HRC and the CAT and has been developed through the case law of those two treaty bodies.¹¹⁰ The CERD has not adopted the

Turkey, Application No. 21987/93, ECHR 1996 IV, Judgment, 18 December 1996, 2275; Art. 5(2)(b) ICCPR First Optional Protocol;

¹⁰⁹ Art. 5(2)(a) ICCPR First Optional Protocol; Rule 86(2)(c) CAT Rules of Procedure; Rule 84(1)(g) CERD Rules of Procedure; Art. 46(1)(c) ACHR, Art. 35(2)(b) ECHR.

¹¹⁰ Compare: Human Rights Committee, *Singh v. New Zealand*. Communication No 791/1997, CCPR/C/72/D/791/1997, Admissibility, 12 July 2001, at para. 6.10. CAT, *X v. Switzerland*, Communication No. 17/1994, U.N. Doc. A/50/44 at 57 (1994), Views, 22 August 1994, para. 4.2. The criterion is not inherent in, for example, article 2 of the First Optional Protocol to the ICCPR.

criterion. Following its case law, the CERD will address the further substantiation of a claim only in the merits phase.¹¹¹

4. Abuse of the right to submission

Following article 3 of the First Optional Protocol to the ICCPR, submissions are inadmissible if they constitute an abuse of the right of submission or are incompatible with the rights of the Covenant. With the coming into force of Protocol 14 to the ECHR on 1 June 2010, the doctrine has also been formally introduced into the rules of procedure of the ECtHR. Its article 12 demands that the Court declare inadmissible “any individual application submitted under article 34, if it considers that (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.”¹¹²

5. Denial of justice

Finally, almost all regional as well as international human rights adjudicatory bodies use the *denial of justice* doctrine to filter out relevant cases.¹¹³ It tackles the factual aspect of subsidiarity¹¹⁴ and concerns the evidence admissible before a human rights supervisory body, in particular the evidence already presented at national judicial proceedings prior to the case being taken to the international level. Both the HRC and the CERD relied upon this doctrine

¹¹¹ Compare: CERD Committee, *Z.U.B.S. v. Australia*, Communication No. 006/1995, CERD/C/55/D/6/1995, Opinion, 26 August 1999, at para. 6.1.

¹¹² Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention, of 13 May 2004, ETS No. 194.

¹¹³ Y SHANY, *Regulating Jurisdictional Relations between National and International Courts* (Philippe Sands & Ruth Mackenzie eds., Oxford University Press. 2007), 191.

¹¹⁴ *International Human Rights and Fact-Finding*. (2009), 13.

in their case law and held that they will not review national decisions which deal with a violation of the rights of the complainant, unless these decisions were clearly arbitrary or amounted to a denial of justice.¹¹⁵ More precisely:

“it is not its task to decide in the abstract whether or not a provision of national law is compatible with the Covenant, but only to consider whether there is or has been a violation of the Covenant in the particular case submitted to it”.¹¹⁶

This denial of justice criterion does not apply to the admissibility procedure of the CAT. Even though the CAT is called upon to assess individual communications on the basis of all evidence provided to it by both the individual and the respondent state,¹¹⁷ it has the special competence under article 20 of the Torture Convention to conduct an inquiry if it receives information that torture is systematically exercised on a state party’s territory.¹¹⁸ Also the

¹¹⁵ HRC, *Smartt v. Republic of Guyana*, Communication No. 867/1999, CPR/C/81/D/867/1999, 19 August 2004, at para. 5.7; HRC, *G.J. v. Trinidad and Tobago*, Communication No. 331/1988, CCPR/C/43/D/331/1988, 5 November 1991, at para. 5.2; HRC, *Walid Nakrash and Liu Qifen v. Sweden*, Communication No. 1540/2007, CCPR/C/94/D/1540/2007, HRC, 19 November 2008, at para. 7.3.

¹¹⁶ CERD, *Murat Er v. Denmark*, Communication No 040/2007, CERD/C/71/D/40/2007, Views, 8 August 2007, para. 7.2.; HRC, *MacIsaac v. Canada*, Communication No. 55/1979, CCPR/C/OP/2 at 87 (1990), 14 October 1982, at para. 10.

¹¹⁷ Compare: Art. 22 (4) ICAT.

¹¹⁸ Compare: Rules of Procedure of the CAT, U.N. Doc. CAT/C/3/Rev.3 (1998), Rule 77- 79; further compare CAT, *Z.K. v. Sweden*, Communication No. 301/2006, CAT/C/40/D/301/2006, Views, 9 May 2008, para. 8.3 with reference to (A/53/44), annex IX, CAT General Comment No. 1, paragraph 9.

ECtHR and the IACtHR are free to evaluate all evidence brought before it, including inferences from the facts and the parties submissions;¹¹⁹ they may also initiate fact-finding missions if it considers the evidence to be incomplete, though this occurs only on rare occasions in practice.¹²⁰ Nonetheless, the ECtHR is reluctant to engage with findings of facts which have been previously assessed by a national court of the state party involved.¹²¹ It has frequently held:

“it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them”¹²²

Rather, to the view of the ECtHR, it will require “cogent elements” for it to depart from the national court’s findings.¹²³ Therefore, the approach of not assessing national jurisprudence remains the same, at the European and international levels. It is only the quality

¹¹⁹ ECtHR, *Nachova v Bulgaria*, Application Nos. 43577/98 and 43579/98, Judgment, ECHR 2005-VII, 6 July 2005, para. 147; IACtHR, *Velásquez Rodríguez Case*, *supra* note 105, para. 127 and 138.

¹²⁰ Rule A1 (3) of the annex to the Rules of the ECtHR; Art. 45 Rules of the IACtHR. The Inter American Commission even carries out on site missions. See: HÉCTOR FAÚNDEZ LEDESMA, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects* (Inter-American Institute of Human Rights. 2008), 398.

¹²¹ Compare: P. Leach et al, *supra* note 114 *ibid*.

¹²² See, for example, ECtHR, *Klaas v Germany*, Application No. 15473/89, Judgment, Series A no. 269, 22 September 1993, para. 29. Compare: P. Leach et al., *supra* note 114, 13.

¹²³ See, for example, ECtHR, *Tanli v Turkey*, Application No. 26129/95, ECHR 2001-III, Judgment, 10 April 2001, para. 110.

of the national court's reasoning either amounting to a denial of justice, or giving rise to 'cogent reasons' which gives rise to an intervention of the human rights body.

6. Preliminary conclusions

Out of the four UN treaty bodies assessed, the CAT pays the least deference to the national level. This may be due to the severity and seriousness of the prohibition of torture, which the Committee is called upon to oversee. Torture is an international crime,¹²⁴ and the prohibition is often quoted as being part of *ius cogens*.¹²⁵ This may have motivated the drafters of the convention to equip the CAT with greater investigative powers. Generally, the treaty bodies, the ECtHR and the IACtHR pursue, through the adoption of and development of various rules of procedure, like the local remedies rule, the criterion of sufficient substantiation and the denial of justice rule, an approach which takes due account of the primary responsibility of the national level to adjudicate human rights violations. This reflects one of the key aspects of procedural subsidiarity. Nonetheless, the treaty bodies also retain the competence to assume jurisdiction in exceptional cases. Those are indicated by the exceptions to the local remedies rules, such as adequacy and efficiency, which have proven

¹²⁴ Compare: Art. 3 b) and 5 f Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993) (ICTY Statute); Art. 3 Statute of the International Criminal Tribunal for Rwanda (1994) (ICTR Statute); Art. 7(1)(f), 8(1), (2)(a)(ii) ICC Statute.

¹²⁵ Compare: ICTY, *Prosecutor v. Čelebići et al.*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 98, para. 454; *Prosecutor v. Furundžija*, Trial Chamber Judgment, Case No.: IT-95-17/1-T, 10 December 1998, para. 144; *Prosecutor v. Kunarac et al.*, ICTY Trial Chamber Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 466.

crucial in cases where there is a gross pattern of human rights violations.¹²⁶ In those cases, the exceptions to the local remedies rule have the same weight and importance like the criteria of unwillingness and inability in the Rome Statute.¹²⁷ Therefore, this approach can well become a standard approach for gross and serious human rights violations.

Another procedural, i.e. institutional, aspect of subsidiarity relates to the competences of the treaty bodies to modify admissibility rules. The human rights bodies have the possibility to react to changes and new developments by adopting new rules of procedure.¹²⁸ By exercising this competence, the treaty bodies retain a certain power to ultimately assess whether states parties complied with the overall commands of subsidiarity. To name just one example concerning the reporting procedure, the HRC just recently modified its reporting procedure to the extent that states may now voluntarily consent to respond to a list of issues, presented by the Committee, instead of submitting an overall report which covers their compliance with all rights guaranteed by the ICCPR.¹²⁹ Even though the adoption of new admissibility criteria for the complaints procedure usually requires a modification of the covenants proper,¹³⁰ the implied powers doctrine, which aims at ensuring the effective

¹²⁶ IACtHR, Velásquez Rodríguez Case, *supra* note 105, para. 126.

¹²⁷ Compare: JO STIGEN, *The Relationship between the International Criminal Court and National Jurisdictions - The Principle of Complementarity* (The Raoul Wallenberg Institute Human Rights Library ed., Martinus Nijhoff. 2008), 226.

¹²⁸ Art. 26(d) ECHR; Art. 39 and 60 ACHR; Art. 39(2) ICCPR, Art. 18(2) ICAT, Art. 12(1)(a) and (3) ICERD.

¹²⁹ See HRC, *supra* note 11, at iii, iv and 8, para. 39.

¹³⁰ At the European Level, the further reform of the ECtHR could only proceed after the ratification of Additional Protocol 14 by Russia on 1 June 2010.

exercise of the powers accorded to the treaty bodies under their respective covenants,¹³¹ permits the treaty bodies to develop some new admissibility criteria via their case law. The HRC adopted the sufficient substantiation criterion in this manner.¹³² The ECtHR, by contrast, is more reluctant to resort to this policy; perhaps because it is often subject to criticism by the member states.¹³³

7. Further review

Regional human rights protection systems with regional human rights courts, like the ECtHR and the IACtHR, almost always provide for a second appeal level with the power to review the first instance body's decisions.¹³⁴ As their decisions are binding,¹³⁵ they can be subjected to further review at the initiative of either the national state or the complainant,

¹³¹ International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, ICJ Reports, Advisory Opinion, 11 April 1949, 182; compare: JAN KLABBERS, *An introduction to international institutional law* (Cambridge University Press, 2002), 67 *et seq.*

¹³² *Supra* at IV.D.3.

¹³³ In Norway, the Court has been criticized for its approach to evolutive treaty interpretation, of being too concerned with details, and for extending its scope of jurisdiction, both with regard to the substantive law and to the subjects (See: NOU 2003:19 *Makt og demokrati. Sluttrapport fra Makt og demokratiutredningen*). And an alliance of British parties, prior to the UK elections of May 2010, advocated a repeal of the Human Rights Act, which implements the ECHR.

¹³⁴ For the European system see Arts. 30, 31 ECHR. For the Inter American System see: Art. 61 (1) of the ACHR.

¹³⁵ Compare Article 46 ECHR, Art. 68 (1) ACHR.

prior to their implementation. At the international level the possibility to review decisions of the treaty bodies is very limited. Even though the covenants and their protocols define the treaty bodies' competences, neither the ICCPR, the ICAT nor the ICERD contain any provision which allows a full revision of its decisions/views upon the initiative of either the individual concerned or a state party. This can also be related to the non-binding nature of the CAT's and CERD's views.¹³⁶ There is no immediate need for further or an appellate type of review. If a state considered the views to contain an unsupportable position, it could simply refrain from implementing them. Notwithstanding the foregoing, there is almost no doubt that the Views of the treaty bodies are of a *de facto* binding character.¹³⁷ The HRC has established that both its Views and its General Comments serve as authoritative statements of the current state of the law of the ICCPR.¹³⁸ This has most recently been affirmed by the International Court of Justice in the *Diallo* case, which argued that "great weight" must be given to the Committee's interpretations.¹³⁹ It has also been held that the Views of the Committee possess

¹³⁶ But see: HRC, *supra* note 77, at para. 11 and 13.

¹³⁷ Compare: HJ STEINER, et al., *International Human Rights in Context : Law, Politics and Morals* (Oxford University Press. 2008), 915; M NOWAK, et al., *The United Nations Convention against Torture* (Oxford University Press. 2008), 777. But see: C TOMUSCHAT, *Human rights: between idealism and realism* (Oxford University Press, USA 2 ed. 2008), at 220 and WALTER KÄLIN & JÖRG KÜNZLI, *The Law of International Human Rights Protection* (Oxford University Press. 2009), at 225.

¹³⁸ HRC, *supra* note 77, para. 13.

¹³⁹ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports Judgment, Merits, 30 November 2010, para. 66.

a judgment-like quality.¹⁴⁰ An omission to implement the treaty bodies' Views thus requires strong reasons on behalf of the national state.

Despite the foregoing, the HRC's, CERD's and CAT'S procedures provide for a limited possibility of review of the admissibility decisions of the committees in individual complaints proceedings. The rules of the CAT permit a reassessment of the admissibility decision upon the initiative of either a Committee member or the complainant.¹⁴¹ Before the CERD, such review may be initiated by the petitioner only.¹⁴² The rules of the HRC are even more limited: they allow for a reassessment of the admissibility decision in the merits procedure in the light of any explanations or statements submitted by the state party during the process of assessment of the complaint.¹⁴³ Yet, this reassessment depends on the exercise of judicial discretion by the HRC, even though it may have been triggered by the information submitted by the state party.

Last but not least, the greater human rights protection system at the UN level offers some further opportunity to review certain individual or collective human rights violations. The UN Human Rights Council provides, amongst others, for special procedures which aim at generally addressing specific human rights violations,¹⁴⁴ as well as for a Complaints

¹⁴⁰ HRC, *supra* note 77, para. 11. Statement of the Chairperson Y. Iwasawa of the HRC at the Committee's hundredth session ,Stocktaking and Prospects'. See: <http://vimeo.com/16823400>.

¹⁴¹ Compare Rule 110 (2) CAT Rules of Procedure.

¹⁴² Compare Rule 93 (2) CERD Rules of Procedure.

¹⁴³ Compare Rule 99 (4) HRC Rules of Procedure.

¹⁴⁴ Compare Rodley, *supra* note 10, at 887, for an assessment of those procedures.

Procedure which deals with serious or systematic violations of human rights.¹⁴⁵ Whereas the special procedures address specific human rights violations via the nomination of Special Rapporteurs, who assess either thematic or regional human rights issues, the Complaints Procedure tackles violations of a more systematic nature. It was introduced in 2007 as a successor to the “1503 procedure” which was established by ECOSOC resolution 1503 (XLVIII) of 27 May 1970.

If the treaty bodies provided for a broader right to review their decisions, this would open an opportunity for discussions about the proper exercise of authority by the treaty bodies, both concerning the procedural level as well as substantive human rights. I have already demonstrated that considerations about the proper exercise of authority by institutions interacting at various levels, i.e. either the regional or the international and the national, is a vital part of the principle of subsidiarity.¹⁴⁶ Broader review functions would further match the court-like functions that the committees assume under their Optional Protocols and open for a possibility of both the complainant and the state to challenge the ‘authoritative character’ of the committee’s Views.

E. The substantive level: the merits phase

The substantive level of human rights review is another interesting arena for the consideration of subsidiarity. Here, national peculiarities can be taken into account in several ways: first, through the actual formulation of exceptions to the human rights provisions in the

¹⁴⁵ For general information on the Human Rights Council Complaint procedure see:

<http://www2.ohchr.org/english/bodies/chr/complaints.htm>.

¹⁴⁶ *Supra* at II.A.1, at 11.

UN human rights covenants and, second, through the explicit referral of the interpretation of a particular right to the national level.

Let me first turn to the explicit deferral of a substantive decision to the national level. The ICCPR and ICERD contain various provisions which facilitate this decision. Pursuant to article 4 (1) of the ICCPR, states may avail themselves of the human rights obligations of the Covenant in the event of a public emergency. This emergency does not excuse a violation of the rights enshrined in articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 of the Covenant.¹⁴⁷ Other references to national particularities are included, for example, in article 8 (3) (b);¹⁴⁸ 10 (2) (b)¹⁴⁹; 12 (3)¹⁵⁰, 13,¹⁵¹ 14 (1),¹⁵² 18 (3)¹⁵³ 19 (3),¹⁵⁴ and 21.¹⁵⁵ The ICERD contains references to national particularities in its article 1(3) and (4) which deal with the legal provisions of states concerning, amongst others, nationality and citizenship and allow states to take special measures to further the development of particular groups or minorities within their territory to ensure their equal enjoyment of human rights. Because of the special

¹⁴⁷ Compare article 4 (2) ICCPR.

¹⁴⁸ Referring to the case of hard labour as a punishment.

¹⁴⁹ Exceptional circumstances allowing for the mingling of accused and convicted internees.

¹⁵⁰ Restrictions on the freedom of movement.

¹⁵¹ Allowing for the expulsion of aliens, for example by reference to national security.

¹⁵² Exclusion of the press and general public from a trial for reasons of public morals, etc.

¹⁵³ Exceptions to the freedom of thought and religion.

¹⁵⁴ Restrictions on the freedom of expression.

¹⁵⁵ Restrictions on the freedom of assembly. They must be ‘necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’.

character of the prohibition of torture as an international crime, the ICAT allows no substantive exception for torture. No exceptions may be based on national particularities or a national emergency. Pursuant to article 2 (2) and (3) ICAT, torture cannot be justified or excused by reference to a state of war or a threat of war, or by superior orders of state officials. Therefore, we can assess interpretative subsidiarity by reference only to the ICCPR and the ICERD.

Usually, the determination and interpretation of what sort of state action may belong to the accepted realm of exceptions referring to public order, health or safety, public morals, or national security are the most difficult for any tribunal. Regional human rights courts like the IACtHR or the ECtHR have developed their own approaches to this issue. The method utilized by the ECtHR is well known: it uses the margin of appreciation doctrine to pay deference to national states with regard to the interpretation of the rights of the ECHR.¹⁵⁶ The IACtHR has also used the doctrine.¹⁵⁷ The approach used by the HRC is not as uniform. On only a few occasions has the HRC discussed the margin of appreciation doctrine of the

¹⁵⁶ See, for example: ECtHR, '*Case relating to certain aspects of the laws on the use of languages in education in Belgium*' (Belgian Linguistic Case) (merits), App. No 1474/62; 1677/62, 1691/62, 1769/63, 1994/63, 2163/64, Judgement of 23 July 1968, (1968) Series A No. 6, 35, para. 10; *Golder v. United Kingdom*, Application no. 4451/70, Judgment, 21 February 1975, Series A no. 18, pp. 21-22, para. 45; *Handyside v. United Kingdom*, App. No 5493/72, Judgment of 7 December 1976 (1976) Series A No. 24, para. 50; *Engel and others v. The Netherlands*, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100.

¹⁵⁷ See: IACTHR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, (Ser. A) No. 4, paras. 58-59.

ECtHR.¹⁵⁸ In some cases concerning violations of article 27 of the ICCPR the HRC developed a distinct approach to national discretion -the denial of justice approach- which does not equal the ECtHR's margin of appreciation doctrine. This denial of justice approach has last been used in the *Poma Poma v. Peru* case, where the HRC found that the deprivation of an indigenous community of water to support its livelihood and livestock through Peru's granting of concessions to use that water to private companies amounted to a violation of article 27 of the Convention. In this case, the HRC first highlighted that a state has a certain discretion – or leeway – in economic decisions directed towards its own economic development. It then held:

“economic development may not undermine the rights protected by article 27. Thus, the leeway the State has in this area should be commensurate with the obligations it must assume under article 27.” The Committee also points out that measures the impact of which amounts to a *denial of the right* of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of people belonging to that community would not necessarily amount to a *denial of the rights* in article 27.”¹⁵⁹ (emphasis added)

¹⁵⁸ HRC, *Länsman et al. v. Finland*, Communication No. 511/1992, CCPR/C/52/D/511/1992, 26 October 1994, para. 9.4; CCPR, *Hertzberg et. al v. Finland*, Communication No. R.14/61, CCPR/C/OP/1 at 124 (1985), Views, 2 April 1982, at para. 10.3; HRC, *Winata v. Australia*, Communication No. 930/2000, CCPR/C/72/D/930/2000, para. 26 July 2001, 7.3.

¹⁵⁹ HRC, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, CCPR/C/95/D/1457/2006, 24 April 2009, para. 7.4.

Further cases which contain similar references to either a certain discretion or leeway of the national state are the *Länsman v. Finland* case and the *Winata* decision of the HRC.¹⁶⁰ The CERD, on the other hand, has not yet discussed similar concepts of paying deference to national courts and national decision-making processes.

Those examples of practice concerning substantive human rights evidence that subsidiarity as interpretative deference is an important element of decisions concerning substantive human rights. However, the practice also indicates that interpretative deference can be given by using various approaches. The HRC held that the deferral of interpretative powers to the national level was an issue only when the very core of a right was concerned: it must not deny the exercise of the very right by its beneficiary. By contrast, the ECtHR's approach is a positive one. The Court utilizes its own discretionary powers to determine on a case-by-case basis whether the national level should be accorded a margin of appreciation in interpreting both positive and negative obligations under the ECHR. Considering the outcry and call for invocation of the margin of appreciation doctrine of eastern European states in the *Lautsi* case,¹⁶¹ as well as all the controversies that have emerged around that doctrine in human rights scholarship,¹⁶² this approach is at times difficult to understand and/or hard for

¹⁶⁰ *Supra* note 158.

¹⁶¹ Ten states intervened as 'third parties' in the *Lautsi* proceedings before the Court's Grand Chamber. For a recent discussion see: <http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/>. Compare: *Lautsi v. Italy*, Application No. 30814/06, Grand Chamber, Judgment 18 March 2011, unreported.

¹⁶² Compare the contributions of YUTAKA ARAI-TAKAHASHI & JAMES CRAWFORD, The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR (2002) (Texte remanié de Thesis Ph D Faculty of law University of Cambridge 1998,

the national states to accept. On the other hand, the approach used by the HRC in Art. 27 cases, seems to match this treaty body's organizational structure. The approach builds upon an ultimate threshold –the denial of the right. It leaves a maximum of interpretative discretion to the national levels. This seems to correspond to the wide applicability of the HRC's views and General Comments: the ICCPR has been ratified by 167 states¹⁶³ and 113 states are parties to its Optional Protocol.¹⁶⁴ Decisions of the HRC need to accommodate a large variety of local traditions, customs and interpretations of the rights enshrined in the ICCPR.

F. The remedies level

Our assessment of the application of the subsidiarity principle at the remedies level of international human rights review will be relatively short. Because their views are non-binding, the power of determination of all UN human rights treaty bodies is limited to the

Intersentia); JEFFREY A BRAUCH, *The margin of appreciation and the jurisprudence of the European Court of Human Rights : threat to the rule of law*, 11 *The Columbia journal of European law* (2004/2005); RONALD MACDONALD, *The Margin of Appreciation*, in *The European System for the Protection of Human Rights* (Franz and Macdonald Matscher, Ronald and Petzold, Herbert ed. 1993), 83-124; YUVAL SHANY, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *The European Journal of International Law* (2005).

¹⁶³ Status of ratifications as of 4 February 2011: see

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

¹⁶⁴ Status of ratifications as of 4 February 2011: see

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

communication of their views to the state party in question for enforcement. There is no enforcement mechanism in cases of non-compliance.¹⁶⁵ Hence, the full responsibility for remedying a human rights violation remains with the national level. This entails, for example, that the determination of the exact amount of compensation owed to a victim of a human rights violation,¹⁶⁶ remains within the discretion of the state party.

Nonetheless, it seems at the moment that the HRC, the CERD and the CAT are currently developing their approaches to remedies for human rights violations. In the past, the HRC did not prescribe any particular remedies in cases concerning human rights violations. Until 2009, a state was often merely called upon by the HRC to “provide the author with an effective remedy and reparation measures are commensurate with the harm sustained”.¹⁶⁷ The Committee often merely continued that the state party had an obligation to take the necessary measures to ensure that similar violations did not occur in the future.¹⁶⁸ Most recently, the HRC’s practice has been developing more and more and tending towards approaches which prevailed before regional human rights courts, such as the IACtHR or the ECtHR, in the earlier stages of their existence. The HRC’s recommendations have become more specific; they now include recommendations which point towards particular remedies, such as the “the

¹⁶⁵ IAN BROWNLIE, *Remedies in the Sphere of Human Rights* 2New Zealand Yearbook of International Law (2005), at 171.

¹⁶⁶ Compare: HRC, *Zdenek Ondracka and Milada Ondracka v. Czech Republic*, Communication No. 1533/2006, CCPR/C/91/D/1533/2006, 31 October 2007, at para. 9.

¹⁶⁷ HRC, *supra* note 159; at para. 9.

¹⁶⁸ *Ibid.*

speedy conclusion of the proceedings and compensation“,¹⁶⁹ or a review of the state’s legislation.¹⁷⁰ A typical provision for remedies can now contain recommendations such as:

„In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation, specifically in relation to the citizenship requirement in Act No. 87/1991, to ensure that all persons enjoy both equality before the law and equal protection of the law.“¹⁷¹

The CAT’s recommendations for remedies are similar to the most recent of the HRC’s. Often, the CAT calls upon the defendant state to investigate the violation of the convention and bring the perpetrators to justice and provide the victim with compensation.¹⁷² And even though the CERD’s rules of procedure do not provide for the Committee to recommend concrete remedies,¹⁷³ out of the three human rights bodies under scrutiny, the CERD’s recommendations on remedies appear the most advanced. The Committee usually

¹⁶⁹ Compare the HRC’s latest views: *Mr. Charles Gurmurkh Sobhraj v. Nepal*, Communication No. 1870/2009, U.N. Doc. CCPR/C/99/D/1870/2009, 11 August 2010, at para. 9.

¹⁷⁰ HRC, *Nancy Gschwind v. The Czech Republic*, Communication No. 1742/2007, CCPR/C/99/D/1742/2007 (2010), 20 August 2010, at para. 9.

¹⁷¹ HRC, *Bohuslav Zavrel v. The Czech Republic*, Communication No. 1615/2007, CCPR/C/99/D/1615/2007 (2010), 31 August 2010, at para. 11.

¹⁷² Rule 112 (5) Rules of Procedure CAT. Compare: CAT, *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, CAT/C/39/D/269/2005, 22 November 2005, at para. 18.

¹⁷³ Rule 90 (2) of the CERD Rules of Procedure.

recommends compensating the petitioner, that the discriminatory legislation be amended and demands that the defendant state take all the necessary measures to prevent the repetition of the violation in the future. The CERD also usually requests the state to make its Views publicly available within its territory.¹⁷⁴

Recently, the HRC also introduced a second paragraph at the end of its views which asks the state for “information about the measures taken to give effect to its views...”,¹⁷⁵ to allow for the follow-up on the state’s implementation in the particular case. The request is standard procedure before the CERD and the CAT. Before the HRC this information needs to be submitted within 180 days; the time-limit before the CAT and the CERD is 90 days.¹⁷⁶ Even though the delivery of this information, just like the Views as such, cannot be carried out at the international level, it provides for a soft review of the state’s implementation practice.

Compared to the regional practice with regard to remedies against human rights violations, the UN human rights bodies are certainly most lagging behind. The practice of the ECtHR and the IACtHR evidences that both courts provide for much more specific and targeted remedies than the international level. The ECHR contains a clause in its article 41 which deals with the necessity to award just satisfaction to the victim of a human rights violation, and the Court has developed a vast case law on the interpretation of that clause as well as on the further remedies available before it. Moreover, Protocol 14 to the ECHR

¹⁷⁴ Compare: CERD, *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, CERD/C/68/D/34/2004, 15 March 2006, at para. 9.

¹⁷⁵ Compare HRC, *supra* note 159, para. 10; CAT, *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, CAT/C/39/D/269/2005, 22 November 2005, at para. 18.

¹⁷⁶ Compare: Rule 90 (2) of the CERD Rules of Procedure.

introduced in the pilot judgment procedure the opportunity to recommend very specific remedies, like specific changes to a particular law, to prevent the launch of similar cases before the Court.¹⁷⁷ The IACtHR, on the other hand, has announced that issues concerning the award of compensatory damages are to be decided by international law.¹⁷⁸ It established in the *Velásquez Rodruiguez* case that the scope, the characteristics as well as the beneficiaries. of the law on damages for human rights violations is governed by international law.¹⁷⁹ Accordingly, compliance with a judgment on reparations is not subject to modifications by the respondent state through invocation of provisions of its own domestic law.¹⁸⁰ The IACtHR is also renowned for its creative approach to remedying human rights violations in the Inter-American human rights protection system, and makes a large variety of non-pecuniary damages awards.¹⁸¹ For example, in *Heliodoro Portugal v. Panama*, the Court ordered the

¹⁷⁷ Compare: www.echr.coe.int/.../StockholmdiscoursFribergh0910062008.pdf and: www.echr.coe.int/.../Information_Note_on_the_PJP_for_Website.pdf.

¹⁷⁸ Compare: DINAH SHELTON, *Remedies in international human rights law* (Oxford University Press. 2005), 294.

¹⁷⁹ IACtHR, *Velásquez Rodríguez Case (Compensatory Damages)*, Ser. C, No. 7 (1990), 21 July 1989, para. 44.

¹⁸⁰ D Shelton, *supra* note 178, at 300.

¹⁸¹ With its approach, the Court went far beyond the original provision of Art. 63 of the IACHR, which provides in its para. (1): “ If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of

defendant state to publish the pertinent parts of the ruling in a local newspaper and in the country's Official Gazette; to provide medical and psychological treatment for the victim's immediate family; to name a street in memory of the victim; to acknowledge its international responsibility in a public ceremony attended by high-ranking state officials and the victim's heirs; and to criminalize the crimes of torture and forced disappearances to satisfy Panama's obligations under the Convention against Forced Disappearances and the Convention against Torture.¹⁸² Cases like *Heliodoro Portugal v. Panama* evidence that there is a broad spectrum of possible approaches to remedies in international human rights review and the international and regional case law shows that the idea of subsidiarity can play out differently at the remedies level. It can either support the approach that the UN treaty bodies tend to take, which leaves to the national level the ultimate determination of the exact compensation to be paid. However, the principle does not prohibit more creative approaches to remedies, such as before the IACtHR. The basic idea behind subsidiarity, i.e. the exercise of authority by the smallest or lowest entity still applies, even if the remedies are determined by the supranational level: it is still the national state which carries out the treaty organ's recommendations. In addition, national states have an obligation under the human rights covenants to remedy violations or provide measures to ensure that they do not occur in the future.

Following this last argument, the principle of subsidiarity would not hinder the treaty bodies to decide on even more concrete remedies, such as the provision of a large variety of concrete non-pecuniary damages awards. Even though such a decision certainly invaded a

such right or freedom be remedied and that fair compensation be paid to the injured party.”

Compare: D Shelton, *supra* note 178, at 299.

¹⁸² IACtHR, *Case of Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C No. 186, 12 August 2008, paras. 241-263.

state's sovereignty more deeply than the current practice, which leaves the decision on 'how' to compensate human rights violations up to the state. Yet, one also needs to take into account that states are actually the defendants in individual complaint proceedings before the treaty bodies. As subsidiarity essentially requires a discussion on whether the competences to deal with the issue of remedies need to be allocated at either the international or the national level, one could argue that the decision on the provision of a particular remedy to the victim should best be dealt with at the international level. It serves the best interests of the individual concerned, as well as fair trial considerations, such as the timely closure of proceedings and the complainant's right to a remedy.¹⁸³ Moreover, the treaty bodies are called upon 'further [to] achieve the rights of their respective covenants' and to 'receive and consider communications from individuals subject to [their]... jurisdiction'.¹⁸⁴ Finally, given the fact that the usual rate of compliance with the treaty bodies' recommendations on remedies is

¹⁸³ There are various examples which evidence that those fair trial considerations actually bind international courts and tribunals. Compare: *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Nuremberg 30th September and 1st October 1946 (London, H.M.S.O., 1946), 39, referring to the principle of justice; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993), 8, para. 29, which called upon the ICTY to adjudicate, not to 'legislate the law'. Compare, for example: *Prosecutor v Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* Case IT-94-1-AR72 Appeals Chamber 2 October 1995, paras. 42 and 45; *Prosecutor v. Čelebići et al.*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 416f.

¹⁸⁴ See the preamble to the First Optional Protocol to the ICCPR and article 1 of that protocol.

usually not very high, the recommendation of a larger variety of specific remedies, including symbolic remedies, could also give greater satisfaction to the victims of violations.

V. Practical implications for subsidiarity in human rights law

The current overview over the practical challenges to subsidiarity demonstrates that the principle comes into play at every level of international human rights law; it applies at the procedural level as well as at the level of substantive human rights law. The assessment has shown that rules like the local remedies rule, the sufficient substantiation rule or the denial of rights doctrine already implement the basic ideas behind the principle at all relevant levels. I have already indicated some areas where subsidiarity considerations could actually help modifying those existing rules, such as at the admissibility or remedy level. Nonetheless, certain practical considerations can further provide suggestions how subsidiarity could or should best be implemented in international human rights law. I will name and discuss some of them in the following paragraphs, but a more detailed assessment must be left to another publication.¹⁸⁵

First and foremost, one has to take into account of the various parallel complaint systems which exist at the international and regional level. Not only has every human rights convention an independent treaty body which oversees both individual complaints as well as the compliance of state parties with their provisions, also the Human Rights Council provides for both for individual and collective complaint mechanisms in cases of human rights

¹⁸⁵ Compare the excellent assessment of H Keller, A Fischer and D Kühne, *supra* note 4, for the further reform of the ECtHR.

violations.¹⁸⁶ Subsidiarity considerations could help integrating those procedures, or facilitate their interaction. For example, the treaty bodies could be awarded with a right to refer admissible but serious or widespread and systematic human rights violations to the Human Rights Council; in particular, to avoid the doubling of processes at the international level.

Second, it is obvious that there are great variances to respect and protect human rights at the various national levels.¹⁸⁷ Many Views of the treaty bodies are never implemented.¹⁸⁸ This may necessitate a scrutiny of serious human rights violations at the international level.¹⁸⁹ One suggestion which is in line with one of the theoretical conceptualization of subsidiarity I discussed in this article, is the formulation of specific exceptions to the local remedies rule which resemble the complementarity principle. They allow for an assessment of a human rights violation at the international level, if the national state proves to be unwilling and unable. Also a collective complaints mechanism with a *locus standi*, for example, for NGOs could be introduced. This is currently being discussed for the Optional Protocol to the

¹⁸⁶ *Infra*, at III A.2. For an in depth assessment of the relationship of the treaty bodies with the Human Rights Council see: NIGEL S. RODLEY, *United Nations Human Rights Council, Its Special Procedures and Their Relationship with the Treaty Bodies— Complementarity or Competition?*, in Human Rights Treaty Bodies (Geir Ulfstein & Helen Keller eds., 2011), forthcoming.

¹⁸⁷ Compare: H Keller, A Fischer and D Kühne, *supra* note 4, at 1043.

¹⁸⁸ Committee, at 61, referring to Uzbekistan, which has not implemented any of the Committee's Views on individual communications.

¹⁸⁹ H Keller, A Fischer and D Kühne, *supra* note 4, at 1032.

Convention on the Rights of the Child.¹⁹⁰ Another possibility is the introduction of a preliminary ruling procedure,¹⁹¹ which would also increase cooperation between the international and the national level and serve as a forum for arbitrating differences with the national states. This procedure enables national courts to call upon the treaty bodies to decide upon a human rights issue, prior to giving their own ruling. An advisory opinion procedure would have the same effect: it would allow courts of final appeal to call upon the treaty bodies to give their opinion upon a particular matter. There are many suggestions which would pay greater respect to the principle of subsidiarity at the admissibility stage.¹⁹² Yet, this would also require more profound changes to the UN human rights treaty body system, on which consensus is often most difficult to attain.

Third, the application of subsidiarity at the level of substantive human rights law is closely tied to the fact that – in the current institutional setting - human rights obligations are

¹⁹⁰ See: Comments of the Committee on the Rights of the Child on the Proposal for a Draft Optional Protocol, UN.Doc. A/HRC/WG.7/2/3, 13 October 2010. The collective complaints mechanism was also discussed for the Optional Protocol to the ICESCR, but did not survive the negotiations.

¹⁹¹ ANDREW Z. DRZEMCZEWSKI, *European human rights convention in domestic law : a comparative study* (Clarendon Press ; Oxford University Press. 1983), 346 *et seq.*

¹⁹² Compare the suggestions for reforming the ECtHR: H Keller, A Fischer and D Kühne, *supra* note 4, at 1043-1048; JOCHEN ALBRECHT FROWEIN, *The European Court of Human Rights overwhelmed by applications: problems and possible solutions: international Workshop: Heidelberg December 17-18 2007* (Max Plack Institute for International Law and Comparative Law ed., Springer. 2009), 29-37, 51-55.

primarily owed by the national state. Therefore, decisions upon possible exceptions to international human rights provisions require a certain amount of deference to be paid to the national level. Hence, only one question prevails: how should this deference be paid? For the wider Europe, the ECtHR decided to employ the margin of appreciation doctrine to define those areas of substantive law where deference should or should not be given. Yet, this approach remains diffuse when it comes to the ultimate determination of which decisions should be encompassed by the margin and which decisions fall outside it. The HRC, on the other hand, appear to have adopted a more justiciable approach, at least with regard to questions concerning article 27 of the ICCPR. The denial of rights approach merely points to the outer limits of the exercise of discretion by national courts and other authorities. This method leaves much room for national interpretation and provides for a clear decision on when deference should or should not be given. Even though subsidiarity allows for any of the two approaches discussed, any of the solutions followed works best if it provides a clear and justiciable solution. To me, this is the denial of rights approach, as it builds upon an ultimate threshold.

Last, even though the implementation of the treaty bodies' views seems to be a major problem, the current trend of the treaty bodies to recommend concrete and specific remedies can at least provide specific instructions to national states and help with the further follow up of communications. My assessment showed that it would not conflict with considerations of subsidiarity if the treaty bodies issued even more detailed and extensive decisions on particular remedies for human rights violations.

VI. Implications for the theoretical conceptions of subsidiarity

The assessment of both the theoretical and practical challenges to subsidiarity in the field of international human rights law has revealed many aspects, but the most important is that

subsidiarity considerations at the practical level vary as much as at the theoretical level. There does not seem to exist one simple answer on what subsidiarity implies in either of the two areas. The practical assessment showed that the various issues in international human rights law can often be countered with more than one solution. In addition, theoretical solutions seem to differ depending on the particularities on the powers concerned, and the field of law in question. Drawing upon those practical results which have arisen, I will attempt to sketch certain parts or features of subsidiarity in international human rights law in this ultimate part.

Given the mostly non-binding nature of the UN human rights supervisory system, as well as the natural focus on the national state as the bearer of human rights obligations, it appears that a strong focus at the national level must also be part and parcel of every theoretical approach to subsidiarity pursued in that area of law. Top-down conceptions do not seem to fit here, not least because they build on a strong supranational/greater level and on the existence of a more or less hierarchical relationship between the supranational and the national levels. Rather, the focus should be on a bottom-up approach, because the powers of the international human rights institutions are so limited. Moreover, due to these particularities, a strong conceptual approach to subsidiarity would not fit international human rights law either. Approaches that focus, for example, on one particular element to automate decisions on the transfer of decision-making power presuppose that a core of powers exists at either level which is free from intrusion by the other level.¹⁹³ Yet, human rights law focuses on a core of obligations rather than on a core of sovereign powers, which is free from any obligations.

In addition, as the issues arising at the remedies level of human rights review have demonstrated, the ultimate concept of subsidiarity in international human rights law must

¹⁹³ Compare: R Schapiro, Polyphonic Federalism, *supra* note 70, at 93.

allow for discussions about the proper allocation of authority. This has also been highlighted by some more recent assessments of the concept.¹⁹⁴ Therefore, possibly a combination of several approaches to subsidiarity fits the various issue areas concerned by international human rights law. If great variances regarding the prosecution and investigation of serious human rights violations persist at the national levels, and if the lack of resources and the number of individual complaints continue to increase at the international level, admissibility criteria could, for example, well be constructed along the unwillingness and inability criteria of the ICC Statute, even though this would further limit the access by individuals to the human rights bodies. But even further modifications are feasible, such as an integration of the special procedures before the Human Rights Council with the individual complaints procedures.

From a broader perspective, a combination of Sweeney's with Schapiro's polyphonic federalist concept could provide a working approach for international human rights law. First, the two approaches combined build mostly on normative criteria. This matches the current lack of an explicit codification of any type of subsidiarity at the international level. Thus, subsidiarity can take effect only as an interpretative principle. Second, the concepts allow for discussions about the proper allocation of decision-making authority. Sweeney's modification of Waltzer's theory accords only decisions which concern a right's very core to the supranational level. Third, the proposed concept is able to reflect subsidiarity in procedural and substantive human rights law, where subsidiarity usually applies. Schapiro's concept provides a significantly flexible account of subsidiarity for the procedural or institutional level which suits the current international set-up, where no View or General Comment is formally

¹⁹⁴ SYMPOSIUM, *Editorial Comments*, 27 Common Market Law Review (1990), at 183; R Schapiro, Polyphonic Federalism, *supra* note 70, at 63, Davies, *supra* note 6, at 79.

binding on the national state. Both the national and the international levels enjoy interpretative authority in their respective jurisdictions. There is no World Court on Human Rights, which enjoys ultimate interpretative authority with regard to human rights violations. The problem of finality does not arise. Schapiro's criteria of pluralism and dialogue ensure the significant interaction of the national with the international level. With regard to the substantive law, the approach seems to open a viable way to allocate decisions about interpretative authority at the level of substantive human rights law. It adequately mirrors the considerations and the balancing of interests between the state's interests and the effective protection of individual rights which takes place when decisions on interpretative deference are concerned. It secures a maximum of interpretative authority for the national level while giving the ultimate power to decide on a human right's very core to the international level.