

# What is subsidiarity in international human rights review and how do we tell it when we see it?<sup>1</sup> – DRAFT PAPER -

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## I. Abstract

*Subsidiarity is a widely applicable concept. It has been referred to in various ways for various fields of international law and it assumes different functions in each area of law. Therefore it is not extraordinary that the principle is also increasingly referred to by current human rights scholarship, as a tool to address some of the current problems prevailing in this field. And whereas most scholars agree that the principle should apply in human rights law, there is still much difference as to the exact scope and field of application of this principle. This contribution will thus address three major issues: it will first assess the general forms and features that subsidiarity has assumed in various fields of international law. Thereafter, the contribution will attempt to sketch the principle's scope of application in international human rights law. Lastly, the contribution will identify, which particular form of the principle suits the demands of human rights law.*

## II. Introduction

In present day human rights law, the principle of subsidiarity is on almost every agenda. Interestingly, it is invoked both by the sceptics, as well as by the reformists of the human rights system. 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. In the Declaration, the principle forms the common basis for modified admissibility criteria and the coherent application and interpretation of the existing rules of the convention, and is used as strong element in the fight against the ever growing backlog of the Court. The Court has also developed a more substantive approach to subsidiarity via its jurisprudence on the margin of appreciation.

Also outside the rather peculiar framework of the European Convention on Human Rights, have practice and scholarship tackled the subsidiarity principle on various occasions. The admissibility criteria of the human rights treaty bodies recognize the subsidiarity of human rights review, for example with the exhaustion of local remedies rule. Moreover, the UN treaty bodies developed a doctrine which resembles the margin of appreciation doctrine of the European Court of Human Rights with regard to the substantive law. International legal scholarship has generally been overly than positive about the use of the principle of subsidiarity in human rights law. Several publications tackled its use in rather broad strokes, emphasised its nature as a structural or ordering principle of international human rights law<sup>2</sup> or suggested its use as a panacea for problems in multi-level

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<sup>1</sup> I must credit RY Jennings and JR Spencer, *What is international law and how do we tell it when we see it?* (The Cambridge-Tilburg law lectures 3rd series, Kluwer Law International, Deventer, Boston 1983) for this title.

<sup>2</sup> U. Fastenrath in: Blickle, Peter, Hüglin, Thomas O., Wyduckel, Dieter (eds.) *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche Staat und Gesellschaft Rechtstheorie, Beiheft 20*, Berlin Duncker und

relationships in the international legal order,<sup>3</sup> without referring much to how their suggestions could or should work in practice. Only recently have few authors called for a more nuanced application of the principle of subsidiarity.<sup>4</sup>

On the other hand, it seems that the principle also provides a perfect solution for some of the major sceptics of the international human rights regime. This is due to the principle's general aim of directing decisions to the national level. With the national level in the focus, the principle can therefore provide a safeguard against the ever growing role of human rights treaty bodies supervising both individual complaints and the general compliance of the states parties to those covenants. Before the ECtHR and the Human Rights Committee (HRC), the margin of appreciation doctrine is invoked more and more frequently by defendant states.<sup>5</sup> And even though the UN treaty bodies routinely refrain from pronouncing any view on this doctrine, this frequent invocation at the international level demonstrates the urge of states to safeguard their national interests.

This paper tries to unfold some of the scholarly fascination with the principle of subsidiarity by assessing its specific use as an ordering principle of international human rights review. Even though many scholars have addressed subsidiarity in international human rights law, only some have tried to sketch the actual implications of its application at the level of international judicial review. The paper will assess whether subsidiarity is really able to provide an adequate answer to the current specificities, challenges and problems of international human rights review, like the growing backlog of the judicial organs or an increased number of states not adequately responding and remedying human rights violations. Can subsidiarity provide an adequate filtering mechanism in this particular setting? And how would subsidiary review have to be designed to comply with the principle's proper implications?

The structure of the paper is as follows: it will first approach the general idea of subsidiarity and investigate the principle's various forms of use at the national, European and international level. Subsequently it will trace the accounts of subsidiarity in international human rights law. The paper will particularly assess how the principle has been made use of by those UN treaty bodies which have an individual complaint procedure up and running (i.e., the CCPR, CERD and the CAT). The paper will critically assess the approaches which have resulted thus far and whether the human rights bodies have developed sufficiently stable criteria to fulfil the ultimate aim of subsidiarity. In its final assessment, the paper will turn to the question of whether further criteria would be needed, and in this event what additional criteria would be required in order to best respond to the individual problems faced by the UN treaty bodies.

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Humblodt, 475ff; P Carozza, 'Subsidiarity as a structural principle of international human rights law' 2003 97 *American Journal of International Law* 38ff; D Shelton, 'Subsidiarity and human rights law' 2006 27 *1/4 Human rights law journal* 4ff; L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' 2008 19 *European journal of international law* 125-159.

<sup>3</sup> M. Milanovic in: Y. Shany and T. Broude (eds.) *The Shifting Allocation of Authority in International Law* Oxford, Hart 2009.

<sup>4</sup> WM Carter, 'Rethinking Subsidiarity in International Human Rights Adjudication' 2008-2009 30 *Hamline Journal of Public Law and Policy* 319 - 334. Compare also the contribution of G Davies, 'Subsidiarity as a Method of Policy Centralisation' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart, Osford, Portland 2008) 79-98 on the application of the principle in EU Law.

<sup>5</sup> To be filled out.

### III. What is subsidiarity and how do we tell it when we see it?

#### A. Introduction

The general idea behind subsidiarity is not alien to any legal system where different legal entities are bound to interact. In fact, the concept is a rather simple tool. It addresses the deferral of a decision to the smallest unit existent in an association of smaller entities, held together by one or several larger entities that are higher in rank and hierarchy. Against this backdrop, subsidiarity is generally invoked to regulate the exercise of (decision-making) competences between the various entities operating in a particular legal system. From a legal scholar's viewpoint, subsidiarity's nature is best described as inheriting a legal principle, not a legal rule.<sup>6</sup> Hence, it is more a form of legal reasoning, than hard and fast law (subsidiarity as *ratio legis*, no *lex*).<sup>7</sup>

Nonetheless, even though the general notion of subsidiarity appears simple, the concept becomes more complex when its concrete application in a particular area of law is concerned. Various criteria have been named along the lines of which the competences should be divided and the general reasoning behind their invocation varies greatly. The majority of writings take a functional approach, which focuses on the procedural and institutional implications of the principle. However, often enough the prerequisites of subsidiarity are also normative in nature, thus emphasising the best solution to the circumstances at hand.

Functional approaches may stress that the focus should be on the private level, as opposed to the governmental, or on the intensity of action conducted at the various levels.<sup>8</sup> They may also refer to which entity can exercise its respective powers most effectively, there may be a provision that the greater entity shall exercise powers only if necessary, or if the smaller is unwilling or unable to exercise its powers, and there may be a preference for the exercise of all powers on either the smaller or the greater entity. Sometimes, functionalists may also invoke the principle's character and nature as an ordering principle for civil societies. With regard to that ultimate matter, functionalist accounts then overlap with normative accounts. Those latter accounts may argue that that either form of the principle may foster the general order, democratic participation or the federalist tradition of a society as a whole. For instance, Kumm, recently affirmed that

“subsidiarity helps structure and guide meaningful debates about the appropriate sphere of autonomy or sovereignty, defined as the sphere in which a state does not owe a kind of obligations to the international community and can govern itself as it deems fit. Turned around, it is also a

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<sup>6</sup> It may be useful to recall Dworkin's famous distinction between principles and rules: “Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.” (R. Dworkin, *Taking Rights Seriously*, 24). “[A principle] states a reason that argues in one direction, but does not necessitate a particular decision.” (ibid. 26).

<sup>7</sup> J Isensee, 'Subsidiarität, das Prinzip und seine Prämissen' in P Blickle, TO Hüglin and D Wyduckel (eds), *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche Staat und Gesellschaft, Rechtstheorie, Beiheft 20* (Duncker und Humblodt, Berlin 2001) 169.

<sup>8</sup> E Comments, 'The Subsidiarity Principle' 1990 27 *Common Market Law Review* 183.

principle that helps define the appropriate scope of international law and thus guides and limits the interpretation and progressive development of international law.”<sup>9</sup>

In the following part we will examine the various forms subsidiarity has assumed in different fields of national and international law, including human rights law. We will focus on the allocation and exercise of competences between the different entities involved. This will help us to understand the functioning of the concept in different legal and theoretical environments. Thereafter, we focus on the realist challenge, namely the actual application of elements of subsidiarity in international human rights law.

## **B. Accounts of subsidiarity, forms and features**

Subsidiarity is just not one concept of deference, but has been further qualified by various prerequisites, concepts and theories. We find approaches referring to the general idea of deference, as well as others, which further qualified how deference shall be rendered and under which circumstances. Authors and concepts found in international law have referred to criteria like necessity, efficiency or unwillingness and inability. We will now illustrate those concepts, as well as their general theoretical background, as well as the prevailing concepts that apply in international human rights law.

## **C. The basic idea: recognition of smaller entities and deferral of decision-making power**

### **1. Introduction**

In very early versions of subsidiarity, which rather touch upon the principle’s nature as an ethical principle, subsidiarity meant but the factual recognition of the existence of smaller entities in relation to bigger ones. This version of subsidiarity may be found in rules guiding the relationship of the Roman empire with some churches,<sup>10</sup> or the writings of the Greek philosopher Aristotle.<sup>11</sup> In this ancient form, subsidiarity merely emphasised the fact that existing sub-units should be recognized, or taken for granted,<sup>12</sup> and thus consisted of a rather one-dimensional, top-down concept. The focus clearly was on the mere *recognition* of the smaller entity.

### **2. Deferral of decision-making**

A modern version of the antique idea of subsidiarity would emphasise the deferral of decision-making powers, without further qualifying conditions for this deferral. This basic notion of

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<sup>9</sup> M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, Cambridge 2009) 291.

<sup>10</sup> IE Linnan, 'Subsidiarity, Collegiality, Catholic Diversity and their Relevance to Apostolic Visitations' 1989 49 *The Jurist* 403.

<sup>11</sup> Isensee 139, 140.

<sup>12</sup> A Føllesdal, 'Subsidiarity and democratic deliberation' in A Føllesdal and P Koslowski (eds), *Democracy and the European Union* (Springer, London 1998) 11

subsidiarity is also the one which is most frequently mentioned when assessing the subsidiarity in international human rights law. And judging from its general nature and structure, there seems no doubt about the necessity and importance of considering subsidiarity in international human rights law. The concept seems almost inherent in its very concept<sup>13</sup>: subsidiarity mirrors the vertical nature of human rights obligations at the level of admissibility, substantive law and at the remedy level. Human rights law guarantees the individual freedom from the state, and it is primarily the national state which is the bearer and guarantor of the obligation.<sup>14</sup> The subsidiarity principle reflects this fact: international human rights law 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, the local remedies rule. 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 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 allegories 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'.<sup>15</sup> Subsidiarity can apply also 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 a particular legislation like before the European Court of Human Rights, or be ordered to build a memorial, even.<sup>16</sup> The concrete design of the Court's and treaty bodies' procedure will ultimately decide on how much discretion will be accorded to the state. Lastly, subsidiarity may also take note of the interaction between the international and the national level and thus offer review of the exercise of competences of the international level. There are multiple ways of constructing this review: either a second, pre-trial or appellate level takes care of this review, or the international body is rendered with a *Kompetenz-Kompetenz* to review the exercise of its own jurisdiction.<sup>17</sup>

### 3. Functionalist and normative accounts of deference

As the accounts of even the basic form of subsidiarity vary depending on the underlying theoretical construction, we can differentiate those understandings of the principle which focus on the institutional aspects of subsidiarity and those who focus on its implications for interpretation and realization of norms at the regional and international level. Authors of the latter kind may also emphasise that subsidiarity may further, contribute and convey certain key values to the international society, such as democracy or the effective realisation of human rights.

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<sup>13</sup> Compare: Carozza 40.

<sup>14</sup> M Milanovic, 'Norm Conflict in Interantional Law: Wither Human Rights?' 2009 20 Duke Journal of Comparative and International Law 70.

<sup>15</sup> Compare: ICESCR, General Comment No. 3, Nature of States Parties' Obligations, P 14, U.N. Doc. E/1991/23, annex III at 86 (1990).

<sup>16</sup> The Inter-American Court of Human Rights possesses some great discretion with this sort of remedies.

<sup>17</sup> Compare, for example, the Grand Chamber proceedings at the European Court of Human Rights.

*a) Functionalist accounts: subsidiarity as a procedural principle, analytical tool and interpretative aid*

If understood mainly as a structural principle, subsidiarity is meant to refer to jurisdiction, competences, and procedural implications for the actors and organizations involved in human rights review.<sup>18</sup> Nonetheless, the functional role of the principle is often hard to separate from its normative implications. Therefore, even those who stress its nature as an ordering principle often refer to its alleged normative features, too.

One famous account of subsidiarity as structural and normative principle of international human rights law is provided by Carozza, who identified subsidiarity as a structural, i.e. ordering principle of international human rights law as well as its inherent ethical value.<sup>19</sup> He argued that the principle's importance for international human rights law lied in the fact that it could "make sense of the discretion accorded to states to interpret and implement human rights, at the same time that it provides a basis for determining the appropriate limits of that latitude."<sup>20</sup> To his view, the principle could not only explain and enlighten very concrete concepts of interpretation like the margin of appreciation doctrine and admissibility rules like the exhaustion of local remedies rule, it could also justify the existence of "a variety of sub- and supranational levels of association and authority"<sup>21</sup> and thus provide a greater respect and understanding for diversity and pluralism in the global community and of human rights law, in particular.<sup>22</sup>

Addressing the functions of subsidiarity as a structural principle and value in European human rights law, Helfer recently preferred the application of "embeddedness" over subsidiarity.<sup>23</sup> Nonetheless, as we will see in due course, many of the features he named for being encompassed by the concept of embeddedness are actually part of notions of subsidiarity, applied in other fields of law or even in human rights law. According to Helfer, embeddedness is the penetration of the surface of the state by international courts and the ensuing interaction of that court with government decision-makers and private actors to influence domestic politics.<sup>24</sup> This definition emphasises both a structural and the value based understanding. To Helfer's view, both the normative and functional aspects of embeddedness best served the main purpose of human rights review, namely the effective realization of human rights, as well as they could help to overcome some problems of the current set up and design of European human rights review, like the ECtHR's flooding with repetitive claims.<sup>25</sup> The concepts of subsidiarity and deference, on the other hand were too formalistic and exclusive to cover the wide spectrum of claims which formed part of the Court's daily work, opined Helfer.<sup>26</sup>

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<sup>18</sup> T Spijkerboer, 'Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' 2009 International Journal of Refugee Law 73, 74.

<sup>19</sup> Carozza 42.

<sup>20</sup> Ibid 63.

<sup>21</sup> Ibid 67.

<sup>22</sup> Ibid 68.

<sup>23</sup> Helfer 125-159.

<sup>24</sup> Ibid 131.

<sup>25</sup> Ibid 130.

<sup>26</sup> Ibid 130, 142.

Moreover, embeddedness would improve the compliance with the convention's system<sup>27</sup> and several of the Interlaken reform proposals had already taken up the idea enshrined in the concept.<sup>28</sup>

Helpers concepts depends on what one considers to be part of the principle of subsidiarity. It seems that Helfer regards it more as a strong legal concept with clear procedural implications, whereas embeddedness focussed more on facilitating the 'softer' factual interaction of the human rights courts and the member states and the value character of subsidiarity. This understanding of subsidiarity as a hard structural concept addressing competences and procedures seems also have been a reason for a recent critique raised by Carter, which argued against an application of subsidiarity in human rights law. Carter argued, in particular, that an application of the principle at the level of substantive human rights law undermined the universality of international human rights, because it lead to the development of a variety of substantive human rights standards.<sup>29</sup> Moreover, Carter argued that subsidiarity should be regarded with caution at the remedy level. To his view, it would be "better for international tribunals to take the lead in defining remedies for violations of treaties within their purview."<sup>30</sup>

#### ***b) Normative accounts: thick and thin human rights and democratic deliberation***

In contrast to the functionalist approach to subsidiarity, a few writings (exclusively) refer to the normative implications of the concept of subsidiarity. Again, here we must differentiate between those who see very concrete normative effects of applying subsidiarity, and those who are more concerned with the general theoretical implications and understandings of the principle.

##### ***i. Thick and thin human rights***

The pure normative understanding of subsidiarity is probably one of the most complex. It addresses subsidiarity from a moralist perspective, distinguishing between thick and thin moralities and corresponding aspects of the principle. Within this overall concept, subsidiarity, in particular the as expressed by the margin of appreciation doctrine of the ECtHR, is viewed as the institutional solution to how to fill out the substantive content of human rights norms, in particular.<sup>31</sup> The principle of subsidiarity, as well as the ECtHR's fourth instance and margin of appreciation doctrine ensure that the convention mechanisms are subsidiary to the actions of member states.<sup>32</sup> The view differentiates between the core and the outer layers of human rights norms. Borrowing from Waltzer's terminology of thick and thin legal rules,<sup>33</sup> this view argues that the thin moral concept of a right, corresponds to the definition of a right's very core, whereas a thick concept would concern the outer

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<sup>27</sup> Ibid 133.

<sup>28</sup> Ibid 151.

<sup>29</sup> Carter330.

<sup>30</sup> Ibid 332.

<sup>31</sup> J Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' 2005 54 02 International and Comparative Law Quarterly 471.

<sup>32</sup> Ibid, 472.

<sup>33</sup> M Walzer, *Thick and Thin* (University of Notre Dame Press, Notre Dame 1994) .

layers of the right, or its ultimate implementation in practice.<sup>34</sup> In essence, the doctrine stipulates that the 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 it would well be involved when outer layers and further particularities of application are at stake (i.e. the so called thick moral concept of the right).

Sweeney's normative account of subsidiarity and his application of a core rights doctrine to the European Convention on Human Rights may provide a useful tool of qualitative differentiation when decisions about the implementation of certain human rights guarantees are concerned. Yet, his explicitly moral account has already found entry into "positivist" human rights doctrine. As indicated, the Committee on Economic and Social and Cultural Rights, in its General Comment No. 3 has also made a differentiation between core rights obligations and obligations which just concern the outer layer of social and economic rights.<sup>35</sup>

## *ii. Democratic deliberation*

One final function, which has been ascribed to the application of subsidiarity concerns the furtherance of democratic deliberation in decision-making processes, mostly at the national level. Here, it is argued that subsidiarity can foster and structure political argument to the benefit of public deliberation.<sup>36</sup> This has been advanced both for the application of subsidiarity in EU law, as well as for its application in international human rights law.

Concerning EU law, MackCormick, argued that subsidiarity may provide a useful tool in discussions about adequate levels of decision-making.<sup>37</sup> He named four aspects of subsidiarity as important in a multi-levelled environment, like that of the EU. The first element he named is market-subsidiarity, which enables individuals in the community to make free choices about matters they ought to be free to decide. Moreover, communal subsidiarity, ensured by rights such as freedom of marriage or freedom of association ensured participation of the individual members of the community. Third, rational legislative subsidiarity ensured swift and effective legislative decisions at all levels involved. Finally comprehensive subsidiarity is concerned with practices and fora of deliberation open and accessible for all members of the community.<sup>38</sup> To his view, in particular the latter form of subsidiarity contributed greatly to democratic forms of decision-making, even at the supra-state level.<sup>39</sup>

Scrutinizing subsidiarity's role and application in international human rights law, Shelton, in particular emphasised that subsidiarity can have an influential effect on democratic processes. To her view, the principle was particularly beneficial in discussions about the appropriate decision-making level<sup>40</sup> and the actual actors involved in the decision-making process. She held, in particular, that subsidiarity

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<sup>34</sup> Sweeney, 470, 471.

<sup>35</sup> See above, at ...

<sup>36</sup> A Føllesdal, 'Subsidiarity' 6 *Journal of political philosophy* 211.

<sup>37</sup> N MacCormick, 'Democracy, subsidiarity, and citizenship in the 'European Commonwealth'' 1997 16 4 *Law and Philosophy* 350ff.

<sup>38</sup> *Ibid* 354.

<sup>39</sup> *Ibid* 355.

<sup>40</sup> Shelton 6, 7.



could act as a safeguard to the rights of a minority against the majority,<sup>41</sup> mostly because the concept ensures both the recognition as well as the participation of smaller entities in decision-making processes.

The democracy supporting view on subsidiarity stirs up more questions than it provides answers to both the concept of subsidiarity and democracy. First and foremost, the deferral of decision-making processes to smaller entities constitutes neither a sufficient, nor necessary requirement for the implementation of democratic decision-making processes. It involves but one necessary procedural adjustment to the process as such, because it ensures that deliberation takes place at a lower level, but it does not ensure that any individual actually becomes involved with the decision-making. Even if one starts from a perspective on democracy which is mostly concerned with institutional procedures and prerequisites, any realisation of the democratic principle would still require that the decision-making process actually involves a demos as such, or a representative part of it.<sup>42</sup>

If democracy is understood as a value which provides both social and material equality as well as institutions<sup>43</sup> the relationship between subsidiarity and democracy gets even more unclear. It leaves open, what subsidiarity could sensibly add to the very implications of those human rights concerning or furthering democratic deliberation, such as the freedom of expression, the right to form trade unions or rights concerning the freedom of conscience, the freedom of the press etc. To a greater and lesser extent, those very rights serve the same purpose of safeguarding the rights of a minority against the majority.

### *c) Assessment*

The discussion reveals that subsidiarity can have different implications, some of which fit the concept of human rights review better than others. For example, an entirely functional approach to subsidiarity, which focuses only on the procedural attribution of competences might miss out on a qualitative evaluation on who might best be suited to actually take the decision in a multi-levelled orders.<sup>44</sup> Functional considerations do not open any space for a discussion of which of several levels could handle an issue most effectively.<sup>45</sup> Following a critique by Davies, the principle of subsidiarity - functionally understood - just provides an efficient solution to the conflict. A further critique against functional or procedural conceptions of subsidiarity is that they put the central policy goal beyond decision-making and exclude an additional assessment about the substantive issue or point of law which –following subsidiarity- should be deferred to a lower level for decision making.<sup>46</sup> A qualitative assessment may only be provided by those normative approaches to subsidiarity that distinguish between thick and thin conceptions of rights and by Helfer's conception of embeddedness, which shall provide a further element of *interlinking* the national with the international level. Moreover, it

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<sup>41</sup> Ibid 11.

<sup>42</sup> J Schumpeter, *Capitalism, socialism and democracy* (Allen and Unwin, New York 1942) 269.

<sup>43</sup> Compare: M Beutz, 'Functional democracy: Responding to failures of accountability' 2003 44 2 *Harvard International Law Journal* 405, 406.

<sup>44</sup> compare: Davies 79. Davies developed her argument mainly for the field of EU law, but it equally applies to other international organizations or human rights treaty bodies (ibid.).

<sup>45</sup> Ibid 82, 86.

<sup>46</sup> Ibid 79, 88f.

may be more difficult to transpose the thick and thin differentiation it to question on admissibility criteria or remedy matters. Furthermore, it is also doubtful whether the criterion of *embeddedness* or *interlinkage* may provide appropriate solutions to questions involving for example, serious violations of human rights.

#### D. Unwillingness and inability

One often quoted example of a general account of the principle subsidiarity is enshrined in pope Pius XI' encyclical of 1931, which was often criticized as providing but a very weak answer to the growing fascism in Germany. Pius invoked the principle both in its functional and normative account as ordering principle for civil society<sup>47</sup> 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.”<sup>48</sup>

In contrast to the early Greek and roman notions, the encyclical reveals both the value character of subsidiarity, as well a two-fold conception of the concept. The encyclical refers both to the *allocation* as well as to the *exercise* of competence by the higher entity.<sup>49</sup> 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 unwilling or unable, the decision will not be deferred.

In an international law context, this concept of subsidiarity with the criteria of unwillingness and inability of the exercise of competences by the smaller entity as a requirement for the greater to step in is reflected finds reflection in the principle of complementarity of the Rome Statute of the International Criminal Court (ICC Statute).<sup>50</sup> 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”<sup>51</sup> and the case is of sufficient gravity to justify the exercise of the Court's jurisdiction.<sup>52</sup> The principle serves two purposes: First, to prevent the Court from being flooded with claims, and second, to respect the sovereignty of national states parties to the Statute as much as possible.<sup>53</sup> The two prerequisites, unwillingness and inability are spelled out in article 17 (2) and (3) of the Rome 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 intent of bringing the

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<sup>47</sup> See the discussions in: Shelton 4, and Carozza 41.

<sup>48</sup> Pius XI, AAS 23 (1931), para. 79.

<sup>49</sup> Føllesdal.

<sup>50</sup> Compare: articles 1, 15, 17, 18 and 19 ICC Statute

<sup>51</sup> Article 17 (1) (a) Rome Statute of an International Criminal Court.

<sup>52</sup> Article 17 (1) (d) Rome Statute of an International Criminal Court.

<sup>53</sup> Similarly: A Cassese, *International Criminal Law* (Oxford University Press, Oxford 2008) 343; SA Williams and WA Schabas, 'Issues on Admissibility, Art. 17' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2 edn, C.H. Beck/Hart/Nomos, München, Oxford 2008) marginal No. 1.

person to justice.<sup>54</sup> Inability, on the other hand, is given in case 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.<sup>55</sup>

The two-fold version of subsidiarity of Pius XI and the Rome Statute clearly focuses on respect of the sovereignty of the states involved in the process. It thus presents us with a bottom-up approach to subsidiarity, where the smaller entities are at the centre of all action being carried out, and the greater entities step in only if and when that lower level does not function adequately enough to solve the problem.

### E. Federalist conceptions

A libertarian and confederal version of subsidiarity, focuses on the *veto power* of the sub unit against super-majoritarian decisions.<sup>56</sup> The concept is derived of American federalist thought and liberal political theory.<sup>57</sup> Though the main concepts and rules currently in force may fit into some broader notion of subsidiarity, the present set up of American federalism focuses on other conceptions, even though legislation factually often leaves discretion to the states.<sup>58</sup> In the U.S., the interaction of the states and the federation is governed by the doctrines of federal pre-emption and frustration of congressional purpose, as a way for congress to establish its preference for federal over state regulation and exclude federal regulation of a given matter.<sup>59</sup> In essence, because congress can pre-empt the rule in a states, congress therefore has the ultimate authority in decisions about what should be regulated by federal rules and what should be regulated by the states. Nonetheless, federal jurisprudence has developed a general presumption against pre-emption, though in a mild version.<sup>60</sup> Hence, even though it may not focus on the very idea and notion of subsidiarity which may be found in the European and international context, American federalism still contains some of the more general concepts, which inform those more particular notions of subsidiarity ,i.e. deference, in particular in the form adopted by the U.S. supreme court, which focuses on the primary responsibility of the states, and not the federation.

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<sup>54</sup> Article 17 (2) Rome Statute of an International Criminal Court.

<sup>55</sup> Article 17 (3) Rome Statute of an International Criminal Court.

<sup>56</sup> A Føllesdal, 'Subsidiarity' 6 Journal of Political Philosophy 204.

<sup>57</sup> P Pettit, Republicanism: A Theory of Freedom and Government (Clarendon Press, Oxford 1997); Q Skinner, 'The idea of negative liberty: philosophical and historical perspectives' in R Rorty, Q Skinner and JB Schneewind (eds), Philosophy in History (Cambridge University Press, Cambridge 1984). Compare GA Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' 94 Columbia Law Review, at 406: „subsidiarity is foreign to the law and practice of federal legislation.“

<sup>58</sup> GA Bermann, 'National parliaments and subsidiarity : an outsider's view' 2008 4 2008 European constitutional law review , 414f.

<sup>59</sup> Ibid, 424.

<sup>60</sup> Ibid, 425.

## F. Efficiency

The European concept of subsidiarity focuses on the *efficiency* of the supra-majoritarian entity to render decisions, both regarding the allocation and the exercise of the Union's competences. Starting with the treaty of Maastricht, all subsequent EU/EC treaties recognized subsidiarity as an independent principle.<sup>61</sup> The current wording in Article 5 (3) of the Lisbon treaty evidences this<sup>62</sup>:

"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." (emphasis added)

The application of the principle has last been appropriated by the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Lisbon.<sup>63</sup> Usually both principles are considered as guiding principles for the decision-making process of the EC/EU and it is generally held that subsidiarity concentrates on the "whether" of the exercise of Union competences, and proportionality the "how".<sup>64</sup> Prior to the adoption of the Lisbon protocol on subsidiarity and the Lisbon treaty, the European version of subsidiarity seemed to be guided by a "top-down" approach to the principle, where the main assessment of the proper application of the principle took place at the EU level. Even though the application of the principle was fully justiciable, with the ECJ having discussed the first cases of its breach,<sup>65</sup> the main discretion and determination of what sort of competences may factually exercised by the Union took place at Union level.<sup>66</sup> The three main preconditions for the application of subsidiarity were 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 must have been proportionate.<sup>67</sup> The most recent decision of the ECJ concerning the legality of cap prices on roaming on public mobile telephone networks within the Community pursuant to directive 717/2007 exemplifies this approach.<sup>68</sup> In that decision, the Court first affirmed that art. 95 could also serve as a basis for the Community's competences regarding mobile phone roaming. Furthermore, the Court affirmed that there was a

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<sup>61</sup> Compare article 5 (3) the EEC Lisbon Treaty for the latest codification of the principle. The principle was already contained in the Single European Act of 1986, but it addressed only environmental legislation (compare R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' 2009 68 3 Cambridge Law Journal 526).

<sup>62</sup> But see: *ibid*, 531.

<sup>63</sup> 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, pp.206-209.

<sup>64</sup> Schütze, 532.

<sup>65</sup> Compare: ECJ, Judgment, No. C-84/94, I-5755, 12 November 1996, Judgment, No. C-233/94, I-2405, 13 May 1997; ECJ, Judgment, No. C-491/01, 2 July, 2002, I-11453; ECJ, Judgment, No. C-58/08, 8 June 2010.

<sup>66</sup> For the 1997 protocol in its latest 2006 version see: Official Journal C 321 E , 29/12/2006 pp. 308 – 311. Compare: ECJ, Judgment, No. C-84/94, I-5755, 12 November 1996, Judgment, No. C-233/94, I-2405, 13 May 1997; ECJ, Judgment, No. C-491/01, 2 July, 2002, I-11453; ECJ, Judgment, No. C-58/08, 8 June 2010.

<sup>67</sup> Compare also the BAT Tobacco case: ECJ, Judgment, No. C-491/01, 2 July, 2002, I-11453, paras 182, 183.

<sup>68</sup> ECJ, Judgment, No. C-58/08, 8 June 2010.

need for a Community regulation in order to contribute to a smooth functioning of the community market and the regulation in directive 717/2007 did not exceed this intended aim.<sup>69</sup>

Even though the new Lisbon protocol did not to change this approach, it nevertheless strengthens the role of national parliaments in the observation of those processes and thus provides for a more bottom-up perspective in the assessment of the observation of the principle. It adds the additional criterion that the exercise of EU authority must not interfere with national autonomy.<sup>70</sup> Pursuant to article 6 of the new protocol, national parliaments may now object to the observation of subsidiarity and proportionality in the EU legislative process.<sup>71</sup> Nonetheless, it remains yet to be seen whether the new 'yellow card' approach of the protocol will lead to a truly different definition of subsidiarity, which does not concentrate on the EU level as the main point of reference.

## G. Necessity

There are further examples of subsidiarity, which focus on a bottom-up approach to subsidiarity. We have already considered one, i.e. the complementarity approach of the Rome Statute. The German adaptation of the principle expresses a similar emphasis. The adoption of subsidiarity in the German constitution is often held to be owed to the German effort of decentralizing and ordering the state's federal structures after the national socialist experience<sup>72</sup> and expresses one of the first versions of subsidiarity as a legal principle, which greatly influenced its adaptation at the European level, in particular.<sup>73</sup> In light of the foregoing, subsidiarity is commonly thought of as ordering the relationship between the national states (*Länder*) and the German federal state.<sup>74</sup> Nevertheless, the German Basic Law explicitly mentions subsidiarity only in relation to the relationship of the federal state with the European Union.<sup>75</sup> There is no provision in the basic law, which requires a *general* legitimization of the federation to exercise its authority.<sup>76</sup> Article 72 (2) of the Basic Law addresses subsidiarity only with regard to the exercise of legislative competences.<sup>77</sup> Article 72 (2) awards legislative competences to the federal government in certain areas of law

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<sup>69</sup> ECJ, Judgment, No. C-58/08, 8 June 2010, para. 76, 77.

<sup>70</sup> Schütze, 533.

<sup>71</sup> 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, article 6. Compare the assessment by *ibid*, 531ff.

<sup>72</sup> Carozza 50.

<sup>73</sup> Schütze, 525, 526.

<sup>74</sup> Shelton, 4; Carozza 50 and note 67.

<sup>75</sup> Compare: article 23 (1) and (1a) of the Basic Law.

<sup>76</sup> J 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, Berlin 2001), 1968, bes. S. 106ff, 143ff, 178ff, 220ff, 295ff, 313ff.

<sup>77</sup> Mostly, this provision is quoted by scholars assessing German subsidiarity. Compare: G Taylor, 'Germany: a slow death for subsidiarity?' 2009 7 1 International journal of constitutional law 139.

“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)<sup>78</sup>

Every legislative initiative of the federation in those areas listed in article 72 (2) Basic Law must thus comply with the criterion of providing equivalent living standards. Even though Art. 72 (2) Basic Law provides a justiciable codification of subsidiarity, judicial review of the legislative’s compliance with Art. 72 (2) requirements is limited.<sup>79</sup> The German Constitutional Court has held that the legislative owes a broad margin of in determining whether federal legislation is ‘necessary’ in the terms of article 72 (2). Following the established jurisprudence of the Constitutional Court, also the determination of what constitutes a necessity lies within the discretion of the legislative.<sup>80</sup> The Constitutional Court can only review the proper exercise of that discretion, i.e. its misuse or abuse.<sup>81</sup>

In comparison to the latest adaptation of subsidiarity in the European context, the German case hence provides us with an even stronger top-down approach to subsidiarity, where the final determination of the proper exercise of competence is left up to the discretion of the legislator and the constitutional Court possesses only limited review competences.

## H. Conclusions

The review of the general conception of subsidiarity and possible fields of application has demonstrated that the principle is a very flexible concept with various meanings and forms in various contexts, and that scholars and courts alike have to take good care of agreeing on *one* particular way of application of subsidiarity in their respective field of international law. The only reliable answer that our assessment has yielded is that, first and foremost, subsidiarity involves the deference of decision-making competences from a greater to a smaller entity. Secondly, subsidiarity is concerned with further preconditions which regulate the concrete allocation, or exercise, or both, of authority by that greater entity.

Therefore, the concept focuses either on the greater entity, or on the smaller. As we have seen, the conceptions vary. From the viewpoint of the smaller entity, the strongest concept of subsidiarity is probably the federalist concept, which renders it with a veto power to prevent infringements of their areas of competence. Because it focuses on the exercise of competences through the smaller entity, it provides a bottom-up approach to subsidiarity. The papal encyclical and international criminal law concept of subsidiarity provide a slightly less strong, but still bottom-up approach to subsidiarity, because they refer to the greater entities’ competences only in the exceptional case of the smaller entity’s unwillingness or inability. The German and EU concepts, on the other hand, generally focus on a top-down approach, rendering even less leeway in decision-making to the smaller entity and leaving the greater entity to decide on cases when it has overstepped its competences.

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<sup>78</sup> 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](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#GGengl_000P72).

<sup>79</sup> Compare: Maunz/Dürig, GG, 57. Ed 2010, Art. 72 Rn. 17.

<sup>80</sup> BverfGE 4, 18; 4, 127; 6, 71; 11, 60; 38, 11.

<sup>81</sup> BverfGE 2, 224.

## **IV. The realist challenge: aspects of subsidiarity in the case law of the UN human rights treaty bodies**

In this part of the paper we will now turn to the actual application of subsidiarity in current human rights law review. This can inform both the theories we assessed before, as well as the various forms and functions that the principle has assumed in other fields of international law. As we have tried to demonstrate throughout this paper, subsidiarity can apply at three different levels of judicial review: at the constitutional level, concerning the assumption of jurisdiction or competence of the judicial institution, at the level of admissibility and at the level of substantive law. Those different levels are also relevant when we assess the application of subsidiarity at the level of international human rights review.

### **A. The constitutional level: jurisdiction**

Discussing the use of subsidiarity at the level of jurisdiction of the UN treaty bodies is relatively easy: even though the covenants and their protocols may define their treaty bodies' competences, neither the ICCPR, the ICAT nor the ICERD contain any provision which allows a full revision of their bodies' exercise of jurisdiction upon initiative of either the individual concerned or a state party. The treaty bodies provide only for a limited possibility to review the admissibility decisions of the committees in individual complaint proceedings. The rules of the CAT permit a reassessment of the admissibility decision either upon initiative by a Committee member or the complainant.<sup>82</sup> In case of the CERD, such review may be initiated by the petitioner only.<sup>83</sup> The defendant state may not initiate such review. The rules of the CCPR 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.<sup>84</sup> Yet, this reassessment is carried out by the CCPR out of its own merit, even though it may have been triggered by the information of the state party.

The introduction of a provision allowing for the full review of the proper exercise of the treaty bodies' jurisdiction seems meritorious for several reasons. First, it would permit a proper revision of the Committees decisions, concerning both the admissibility as well as merits phase. Second, it would make sense when considering the multiple powers that they exercise outside the individual complaints framework: the treaty bodies issue General Comments which tackle the interpretation of the rights enshrined in the covenants, as well as concluding observations upon state reports. In the follow-up procedure, they are called upon to comment on the further implementation of their recommendations upon state reports. At the same time, the human rights performance of states under several of the UN covenants is also assessed by the Human Rights Council, in the Universal Periodic Review mechanism. And even though the treaty bodies they enjoy much freedom and

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<sup>82</sup> Compare Rule 110 (2) CAT Rules of Procedure.

<sup>83</sup> Compare Rule 93 (2) CERD Rules of Procedure.

<sup>84</sup> Compare Rule 99 (4) Rules of Procedure of the Human Rights Committee,

leeway with regard to the exercise of those latter competences,<sup>85</sup> they miss out a judicial review for all those powers. States parties cannot contest the exercise of any of the powers of the treaty bodies.

## **B. The procedural level: admissibility**

Concerning the admissibility phase of an individual complaint, the procedural rules of treaty bodies have employed various ways of ensuring that they are not flooded by complaints, while at the same time taking into account national human rights review mechanisms. The most important element during the admissibility phase, which takes account of the subsidiarity of international human rights review, is the local remedies rule. However, also other admissibility requirements prioritise deference of human rights adjudication to the national level.

The admissibility criteria of the ICCPR are all contained in the ICCPR's additional protocol one. Pursuant to article 1 of the ICCPR's 1<sup>st</sup> Optional Protocol, an individual, or pursuant to article 27 of the Covenant, minorities or peoples, can launch a complaint against a state party to the protocol, if she is victim of a State violation of a rights granted to her. Pursuant to article 2 of the Optional Protocol, individual complaints are also inadmissible if not sufficiently substantiated. This criterion is not inherent in article 2, but has been developed by the jurisprudence of the CCPR.<sup>86</sup> Moreover, following article 3 of the Protocol, submissions are inadmissible, if they constitute an abuse of the right of submission, or are incompatible with the rights of the covenant. Finally, the complainant needs to have exhausted local remedies.<sup>87</sup> In addition, the matter will not be assessed by the CCPR, if it has already been part of another procedure of international investigation or settlement.<sup>88</sup>

The admissibility criteria for petitions to the CERD are almost identical to those of the ICCPR. They are contained in article 14 (7) (a) of the ICERD, supplemented by Rule 91 of the ICERD rules of procedure. Compared to the ICCPR's criteria, only two of the CERD's admissibility requirements are regulated differently. First, the ICERD has added a time limit to the local remedies rule: a petitioner must have submitted his or her petition within six months after the last local decision.<sup>89</sup> Moreover, the CERD has not developed the additional criterion that a complaint must be sufficiently substantiated. Following the case law of the CERD, the Committee will be allowed to consider the substance of the claim only in the merits phase.<sup>90</sup>

There is one more admissibility criterion which has been developed by the case law of the CERD and the CCPR, which pays due regard to the subsidiarity of international human rights review. It concerns the admissible evidence before the CERD and the CCPR, in particular, the evidence, which has already presented at national judicial proceedings prior to bringing the case to the international level. Both the CCPR and the CERD will not review national jurisprudence dealing with a violation of the rights of

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<sup>85</sup> The CCPR, in particular, has been criticised for its assumption of a Kompetenz-Kompetenz with regard to the review of reservation of states parties to the ICCPR. (...) And also its latest General Comment No. 31, on the 'binding' nature of its views upon individual complaints has met significant critique. (...)

<sup>86</sup> Compare: *Moti Singh v. New Zealand*, Communication No. 791/1997, Admissibility, 12 July 2001, para 6.11.

<sup>87</sup> Compare Article 5 (2) ICCPR Additional Protocol I.

<sup>88</sup> Compare Article 5 (2) ICCPR Additional Protocol I.

<sup>89</sup> Compare Rule 91 (1) (e) and (f) Rules of Procedure ICERD.

<sup>90</sup> Compare: *CERD, Z.U.B.S. v. Australia*, Communication No. 006/1995, Opinion of 26 August 1999, para 6.1.



the complainant under national law, unless these decisions bore a clearly arbitrary decision, or amounted to a denial of justice.<sup>91</sup> The committees both held: “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”.<sup>92</sup>

This additional criterion does not apply for the admissibility procedure of the CAT. The CAT actually has the competence to freely assess the facts and evidence based upon the full circumstances of the case, following Art. 20 of the Torture Convention.<sup>93</sup> The further admissibility criteria of the CAT are contained in article 22 (1), (2), (3) and (5) of the CAT and in article 107 of the Rules of procedure. They are identical with the criteria of the CCPR. The CAT has also adopted the criterion that the complaint must be substantiated.<sup>94</sup> Ultimately, the CAT thus pays less deference to the national level than the CCPR and the CERD. This may be due to the severity and seriousness of the prohibition of torture, the observance of which the -Committee is called upon to oversee. Torture is an international crime,<sup>95</sup> and the prohibition is usually quoted to be part of the international *ius cogens*.<sup>96</sup> Such considerations may have motivated the drafters of the convention to render less deference to the national authorities, and equip the CAT with greater investigative powers.

### C. The substantive level: the merits phase

The substantive level of human rights review is probably the most interesting arena for the application 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 UN human rights covenants, and second, through an explicit referral of the interpretation of a particular right to the national level.

Let us first turn to the explicit regulation of the referral of a decision on the substantive law to the national level. The ICCPR, ICERD and ICAT contain various provisions, which allow for a deference of the decision on the possible restriction of rights to the national level. Pursuant to article 4 (1) of the ICCPR, states may avail themselves of the human rights obligations of the Covenant in case of a

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<sup>91</sup> CCPR, *Smartt v. Republic of Guyana*, Communication No. 867/1999, para 5.7; continuous jurisprudence, compare: *G.J. v. Trinidad and Tobago*, Communication No. 331/1988, 5 November 1991, CCPR/C/43/D/331/1988, para 5.2; *Walid Nakrash and Liu Qifen v. Sweden*, Communication No. 1540/2007, CCPR/C/94/D/1540/2007, 19 November 2008, para 7.3.

<sup>92</sup> CERD, *Murat Er v. Denmark*, Communication No 040/2007, 8 August 2007, para 7.2.; CCPR, *Maclsaac v. Canada* (Communication No. 55/1979, 14 October 1982, para 10.

<sup>93</sup> Compare: Rules of Procedure of the Committee Against Torture, U.N. Doc. CAT/C/3/Rev.3 (1998), Rule 77-79; further compare CAT, *Z.K. v. Sweden*, Communication 301/2006, 9 May 2008, para 8.3 with reference to (A/53/44), annex IX, CAT General Comment No. 1, paragraph 9.

<sup>94</sup> Compare *X v. Switzerland*, ICAT No. 17/1994, para 4.2.

<sup>95</sup> 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); Art. 3 Statute of the International Criminal Tribunal for Rwanda (1994); Art. 7 (1) (f), 8 (1), (2) (a) (ii) Rome Statute of the International Criminal Court.

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

public emergency. This emergency may not excuse a violation of the rights enshrined in articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 of the Covenant.<sup>97</sup> Other references to national particularities are entailed, for example in article 8 (3) (b);<sup>98</sup> 10 (2) (b)<sup>99</sup>; 12 (3)<sup>100</sup>, 13,<sup>101</sup> 14 (1),<sup>102</sup> 18 (3)<sup>103</sup> 19 (3),<sup>104</sup> 21.<sup>105</sup> The ICERD contains references to national particularities in its Art. 1 (3) and (4) which deal with the legal provisions of states concerning, amongst others, nationality and citizenship and allow national 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 character of the prohibition of torture as an international crime, the Torture Convention allows no substantive exception to 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 to war, or by superior orders of state officials. "

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 is one of the most difficult for any tribunal. The treaty bodies, just like the European Court of Human Rights, have developed their own approach of dealing with this determination. It constitutes the second approach to deference at the level of substantive law. The approach of the European Court developed is well known: it utilizes the margin of appreciation doctrine to award deference to national states with regard to the interpretation of the rights of the ECHR.<sup>106</sup> The treaty bodies, on the other hand, seem to have developed their own approach to award discretion to national states. Only on a few occasions has the CCPR discussed the margin of appreciation doctrine of the European Court of Human Rights,<sup>107</sup> and the Committee Members are adamant about denying of applying the doctrine. Generally, the treaty bodies, and, most frequently, the CCPR, employ their own approach, i.e. the denial of justice approach.

The best example of this denial of justice approach is probably the recent *Poma Poma v. Peru case*, where the CCPR found that the deprivation of an indigenous community with water to support their living and livestock through Peru's granting of concessions to use that water to private companies

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<sup>97</sup> Compare article 4 (2) ICCPR.

<sup>98</sup> Referring to hard labour as a punishment.

<sup>99</sup> Exceptional circumstances allowing for the mingling of accused and convicted internees.

<sup>100</sup> Restrictions to the freedom of movement.

<sup>101</sup> Allowing for the expulsion of aliens, for example by reference to national security.

<sup>102</sup> Exclusion of the press and general public from a trial for reasons of public morals, etc.

<sup>103</sup> Exceptions to the freedom of thought and religion.

<sup>104</sup> Restrictions to the freedom of expression.

<sup>105</sup> Restrictions to the freedom of assembly must be provided by law. 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'.

<sup>106</sup> See, for example: '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*, judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45; *Handyside v. United Kingdom*,; (App. No 5493/72), ECtHR, Judgment of 7 December 1976 (1976) Series A No. 24, para 50; *Engel and others v. The Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100.

<sup>107</sup> *Länsman et. Al. V. Finland*, Communication No. 511/1992, 26 October 1994, CCPR/C/52/D/511/1992, para 9.4; CCPR, *Hertzberg et. al v. Finland*, Communication No. R.14/61, 2 April 1982, para 10.3; CCPR, *Winata v. Australia*, Communication No. 930/2000, 26 July 2001, CCPR/C/72/D/930/2000, para 7.3.

amounted to a violation of Art. 27 of the Convention. In this case, the Committee pointed out that a state has a certain discretion – or leeway – in the economic decisions directed towards its own economic development. However, the Committee held that “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 whose impact 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 persons belonging to that community would not necessarily amount to a *denial of the rights* of article 27. (emphasis added).<sup>108</sup>

The CCPR employed the approach also on other occasions in the merits of its views.<sup>109</sup> However, the reasoning of the Committee in the merits is quite particular. Under the headline of the allegation of the violation of the covenant’s rights as formulated by the petitioner, the Committee often concentrates exclusively on an assessment of the facts, which is followed by the short conclusion whether the rights of the Covenant have been violated.<sup>110</sup> Hence, it is very difficult to trace whether the denial of justice approach has actually been employed by the Committee to open for some discretion of the judiciary or other national authorities. The Committee usually refrains from making such a statement. The layout of the Committees assessment, which concentrates on whether the facts give rise to a violation of the Covenant, without or only seldom reference to the applicable law, makes it also very easy for it to omit a reference to the state’s discretion. Considering those uncertainties revolving around the approach, it is even more difficult to differentiate the proper application of the denial of justice approach in the merits phase from its use at admissibility level, where it serves to filter out the admissible facts.

The use of the approach by the CERD and the CAT is similar to the CCPR’s overall reasoning on a denial of justice, which we referred to in the preceding paragraph. It may be illustrated by the findings of the CERD in the *Zentralrat Deutscher Sinti und Roma et al. v. Germany* decision,<sup>111</sup> where the Committee was called upon to assess whether the provisions of the German Criminal Code provided sufficient protection against acts of racial discrimination. The Committee determined that “it is not ...[it’s] task to decide in the abstract whether there has been a violation in the particular

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<sup>108</sup> *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, CCPR/C/95/D/1457/2006, 24 April 2009, para 7.4.

<sup>109</sup> *Meer and Shulamit Vaisman v. Latvia*, Communication No 650/1995, 7 May 1998, para 12.2; *A. V. New Zealand*, Communication No. 754/1997, 3 August 1999, para 7.3; *Vavidel Sathasivam and Parathesi Saraswathi v. Sri Lanka*, Communication No. 1436/2005, 31 July 2008, para. 6.4; *Valery Luyanchik v. Belarus*, Communication No. 1392/2005, 3 December 2009, *Konstantin Bankin v. Russian Federation*, Communication No. 1310/2004, 24 April 2008, *José Luis García Fuenzilla v. Ecuador*, Communication No. 480/1991, 15 August 1996, para 9.3; *Bakhrudin Kurbonov v. Tajikistan*, Communication No. 1208/2003, 19 April 2006, para 6.3; *Margaret Paul v. Guyana*, Communication No. 728/1996, 21 December 2001, para 9.3; *Clifford MacLawrence v. Jamaica* Communication No 702/1996, 29 September 1997, para 5.4; *Glenn Ashby v. Trinidad and Tobago*, Communication No. 580/1994, 19 April 2002, para 10.2.

<sup>110</sup> Compare: *Kurbonov v. Tajikistan*, Communication No. 1208/2003, 19 April 2006, para 6.3 and 6.5; *Babkin v. Russian Federation*, Communication No. 1310/2004, 24 April 2008, 13.2, in which the Committee could not find a violation of article 7 of the Covenant; similarly: *A. V. New Zealand*, Communication No. 754/1997, 3 August 1999, para. 7.3, which was contested by the Committee Members Scheinin and Pocar in their joint dissent (see para 5 of the dissent, annexed to the views).

<sup>111</sup> CERD, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Communication No. 38/2006, CERD/C/72/D/38/2006, 3 March 2008.

case.”<sup>112</sup> But also with regard to the concrete facts, it held that [t]he material before the Committee does not reveal that the decisions of the District Attorney and General Prosecutor, as well as that of the Brandenburg Supreme Court, were manifestly arbitrary or amounted to a denial of justice.”<sup>113</sup> Also the case law of the CAT reveals the application of this approach.<sup>114</sup>

#### D. The remedies level

Our assessment of the application of the subsidiarity principle at the remedies level of international human rights review can remain relatively short. All UN treaty bodies accord the full responsibility for remedying a human rights violation to the national level. Unlike the ECtHR, the committees do not prescribe particular remedies in particular cases. Before the CCPR, the state is merely called upon to “provide the author with an effective remedy and reparation measures are commensurate with the harm sustained. The state party has an obligation to take the necessary measures to ensure that similar violations do not occur in the future.”<sup>115</sup> The recommendations for remedies before the CAT are slightly more concrete. Usually, 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 a grant of compensation.<sup>116</sup> Although the rules of procedure of the CERD do not foresee the Committee to recommend concrete remedies<sup>117</sup> its recommendations on the remedies appear the most advanced. The Committee usually recommend the compensation of the petitioner, the change of discriminative legislation and demands that the defendant state take all the necessary measures to prevent the repetition of the violation in the future. Moreover, the CERD also requests the state to make its opinion publicly available within its territory.<sup>118</sup>

Only recently has the Human Rights Committee introduced a second paragraph at the end of its views which requests from the state “information about the measures taken to give effect to its views...”.<sup>119</sup> The request is standard procedure before the CERD and the CAT. Before the Human Rights Committee this information needs to be submitted within 180 days, the time-limit before the CAT and the CERD is 90 days.<sup>120</sup>

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<sup>112</sup> CERD, Zentralrat Deutscher Sinti und Roma et al. v. Germany, Communication No. 38/2006, CERD/C/72/D/38/2006, 3 March 2008, para 7.

<sup>113</sup> CERD, Zentralrat Deutscher Sinti und Roma et al. v. Germany, Communication No. 38/2006, CERD/C/72/D/38/2006, 3 March 2008, para 7. Compare: CERD, Murat Er v. Denmark, Communication No 040/2007, Opinion of 8 August 2007, para 7.2, which also referred to the decisions of the Human Rights Committee to bolster its position.

<sup>114</sup> see G.K. v. Switzerland, Communication No. 219/2002, 7 May 2003, CAT/C/30/D/219/2002, para 6.12.

<sup>115</sup> Compare: ICCPR, Ángela Poma Poma v. Peru, Communication No. 1457/2006, CCPR/C/95/D/1457/2006, 24 April 2009, para 9.

<sup>116</sup> 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, para 18.

<sup>117</sup> Rule 90 (2) of the CERD Rules of Procedure.

<sup>118</sup> Compare: CERD, Mohammed Hassan Gelle v. Denmark, Communication No. 34/2004, CERD/C/68/D/34/2004, 15 March 2006, para. 9.

<sup>119</sup> Compare ICCPR, Ángela Poma Poma v. Peru, Communication No. 1457/2006, CCPR/C/95/D/1457/2006, 24 April 2009, para 10; CAT, Ali Ben Salem v. Tunisia, Communication No. 269/2005, CAT/C/39/D/269/2005, 22 November 2005, para 18.

<sup>120</sup> Compare: Rule 90 (2) of the CERD Rules of Procedure.

Compared to what sort of remedies are already possible in certain areas of international human rights review, the UN human rights bodies are certainly the ones most lagging behind. The ECtHR just introduced with the pilot judgment procedure the possibility to recommend a very particular remedy, like the specific change of a particular legislative to prevent the launch of similar cases before the Court.<sup>121</sup> The Inter-American Court of Justice, on the other hand, is renown for its creative approach to remedy human rights violations in the Inter-American human rights protection system, and now awards a large variety of non-pecuniary damages.<sup>122</sup> For example, in the *Heliodoro Portugal v. Panama* case, the Court ordered the 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 to the victim's immediate family; to name a street in memory of the victim; to acknowledge their international responsibility in a public ceremony attended by high-ranking state official and the victim's heirs; and to typify the crimes of torture and forced disappearances to satisfy Panama's obligations under the Convention against Forced Disappearances and the Convention against Torture.<sup>123</sup>

The idea of subsidiarity neither recommends nor prohibits such creativity, as it is still the national state, which carries out the human rights bodies' recommendations. The provision of a large variety of concrete non-pecuniary damages certainly invades more into a state's sovereignty than leaving 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. Thus, one could also argue that the decision on the provision of a particular remedy to the victim does not belong to the realm a state's competence but rather to the one of the treaty body. It is usually not in the interest of states to restrict and punish itself for its own violations of international obligations. Hence, it may be further argued that a human rights treaty body does not fulfil its own mandate if it provides only unclear and vague remedies, such as proposing the provision of an "effective remedy" or "reparation measures". Such an understanding of the treaty bodies' obligations to provide specific remedies does not alter the states' obligations under the covenants to remedy violations or provide for measures for them not occurring in the future. Finally, given the fact that the usual rate of compliance with the treaty bodies' recommendations on remedies, is usually not very high, the recommendation of a larger variety of specific remedies, including symbolic remedies, could also render greater satisfaction to the victims of violations.

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<sup>121</sup> Compare: [www.echr.coe.int/.../StockholmdiscoursFriborgh0910062008.pdf](http://www.echr.coe.int/.../StockholmdiscoursFriborgh0910062008.pdf) and: [www.echr.coe.int/.../Information\\_Note\\_on\\_the\\_PJP\\_for\\_Website.pdf](http://www.echr.coe.int/.../Information_Note_on_the_PJP_for_Website.pdf)

<sup>122</sup> With its approach, the Court went far beyond the original provision of Art. 63 of the Inter-American convention, 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 such right or freedom be remedied and that fair compensation be paid to the injured party."

<sup>123</sup> I/A Court H.R., Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs, Judgment, 12 August 2008. Series C No. 186, paras. 241 - 263.

## V. Final conclusions and further suggestions

Our assessment of the use of subsidiarity in international human rights law has revealed that there is a strong need for subsidiarity at all four levels of international human rights review, namely at the constitutional, the procedural, substantive and remedy level.

Our assessment of the application of subsidiarity at the constitutional level, and subsequent conclusion that international human rights law currently lacks any recognition of the principle at this level, triggers the question, whether international human rights law would be in need of such a justiciable definition of discretion at the constitutional level. A comparison with the codification of the principle in the Rome Statute, or in the EEC Treaty, showed that the introduction of subsidiarity also at this level is of great importance. Its introduction to international human rights review would certainly be meritorious. Currently, there is no possibility to challenge the decisions of the Human Rights Committee or the CAT or the CERD. Still, the human rights treaty organs decide on important issues of national human rights interpretation, which should be able to further judicial review. Not every decision of the European Court of Human Rights on the application of the margin of appreciation doctrine has been fortunate and neither should decisions of the treaty bodies on the denial of justice approach go unchallenged. The adoption of a review mechanism at the international level would also render more credibility to the treaty bodies' decisions and states would possibly have less occasion of criticizing the Committee's decisions. Finally, this sort of procedure would also complement the implementation of subsidiarity proceedings at the other levels.

It is possibly of greatest importance to install an adequate recognition of subsidiarity at the procedural level, that is at the level of admissibility. Currently, the treaty bodies address subsidiarity at the admissibility level only in a very rudimentary manner. It finds expression in the exhaustion of local remedies rule and in the rules developed by the Committees which deal with the admission of evidence. However, it seems that many of the practical problems which have been pointed to arise at this level. The procedural level has also been the first, which was addressed by reform proposals of the European Court of Human Rights, which should deal with methods and means of reducing the growing backlog of cases or the amount of repetitive cases. One suggestion for a better implementation of subsidiarity at this level would be to install a procedure similar to the complementarity procedure at the International Criminal Court for those large scale or repetitive human rights violations. Based on the requirements of unwillingness and inability, such procedure would have the advantage of rendering the human rights body with a definite competence for giving an opinion and an opportunity to address the mass occurrence of violations in an effective manner. It would also come closest to the traditional definition of the notion of subsidiarity presented earlier in this paper. To achieve this latter aim, the human rights bodies would of course need more leeway in their suggestions of remedies and needed to be very specific in their suggestions of particular remedies. The procedure should apply independently of the individual complaint procedure. It could also be combined with it, like the pilot judgment procedure, so that the initiation of complementarity proceedings barred all subsequent individual complaints of the same matter. Another possibility could be the implementation of a preliminary ruling procedure, where national courts can call the treaty bodies to decide upon a human rights issue, prior to their own ruling. Also an advisory opinion procedure would fit here, which would allow courts of last instance to call upon the treaty bodies to render their opinion upon a particular matter. Many more suggestions could implement subsidiarity

more effectively at the admissibility stage.<sup>124</sup> Yet, given the near impossibility to change the current treaty body system, most of these propositions will possibly remain an utopia.

The application of subsidiarity at the level of substantive law is closely tied to the fact that human rights obligations are primarily owed by the national state. Moreover, decisions upon possible exceptions to international human rights provisions require a certain amount of deference to be rendered to the national level. International human rights treaty bodies cannot ultimately determine what is an adequate decision when it comes to national morals and politics, public health or security. Hence, with regard to the substantive law, only one question prevails, i.e. how should this deference be rendered? With regard to the interpretation of substantive human rights, the European Court of Justice has decided to apply its margin of appreciation doctrine. Yet, this approach remains very diffuse when it comes to the ultimate determination of which decisions should be encompassed by the margin and which decisions should fall out of it. Ultimately, this final decision seems to be part of the sole judicial discretion of the ECtHR. The UN treaty bodies, on the other hand, seem to have adopted a more justiciable approach when it comes to the subsidiarity of human rights interpretation. In their denial of justice approach, they have determined the outer limits of the exercise of discretion by national courts and other authorities. The CCPR, CERD and CAT will only interfere with their decisions, if they are manifestly arbitrary, or amount to a denial of justice. In any case, they must have been reasonable and proportionate. In comparison to the ECtHR's approach, this approach of the treaty bodies appears more clear. Even though it may not be easy to determine, in which case the decision-making of a national authority has overstepped its permissible discretion, the criteria of arbitrariness and denial of justice render a general idea of the ultimate bar to discretion. By contrast, the ECtHR needs to determine each time anew, if a new set of facts will be encompassed by the margin or not.

Yet, the treaty bodies' approach suffers from another great deficiency: it is almost indifferentiable from the approach which serves to filter out the admissible evidence in the admissibility phase of the views. There is a simple way to avoid those misunderstandings. The Committees should consider a drastic change of their assessment in the merits, so that it is clear that this part is geared towards an assessment of whether the facts correspond to the law. The main purpose of the merits is neither a pure assessment of the facts, nor of their admissibility. This would improve both the legibility and the intelligibility of the committee's views in general, as well as of those cases, in which states are endowed with the discretion to interpret a particular human right.

Finally, our discussion on the remedies system of the treaty bodies has shown that subsidiarity can also open some room for discussions about the proper allocation of competences, prior to its application. This actually disproves Davies' argument, who held that subsidiarity would suppress those discussions. Yet, subsidiarity focuses also on the ability and willingness of the entities involved to exercise certain competences. Therefore, the principle may actually help considering to which entity competences should best belong. In the remedies case, there is a presumption of unwillingness or inability for the national state to adequately deal with the matter, because of the role of the state in the proceedings. It is a rather easy task for the treaty bodies to interpret their

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<sup>124</sup> Compare the suggestions for the reform of the ECtHR in: JA Frowein, *The European Court of Human Rights overwhelmed by applications: problems and possible solutions: international Workshop: Heidelberg December 17-18 2007* (Springer, Berlin 2009)

rules of procedure and additional protocols in a way to shift the competence to decide on particular, or even non-pecuniary remedies to their side, as such decision belongs to their implied powers. For example, the first optional protocol to the Covenant on Civil and Political Rights, which enables the Human Rights Committee to consider individual complaints, as well as the CCPR's rules of procedure does not contain any provision on the remedies.<sup>125</sup> There is no need to further discuss, which particular remedies the treaty bodies could or should recommend. This decision depends very much on the circumstances of each individual case. There are possibly as many suggestions as there exist for improving the admissibility procedure.

GA Bermann, 'National Parliaments and Subsidiarity : An Outsider's View' 2008 4 European constitutional law review 453-459

M Beutz, 'Functional Democracy: Responding to Failures of Accountability' 2003 44 Harvard International Law Journal 433-472

P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' 2003 97 American Journal of International Law 38

WM Carter, 'Rethinking Subsidiarity in International Human Rights Adjudication' 2008-2009 30 Hamline Journal of Public Law and Policy 319-334

A Cassese, *International Criminal Law* (Oxford University Press, Oxford 2008)

E Comments, 'The Subsidiarity Principle' 1990 27 Common Market Law Review 181-184

G Davies, 'Subsidiarity as a Method of Policy Centralisation' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart, Oxford, Portland 2008) 79-98

JA Frowein, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions: International Workshop: Heidelberg December 17-18 2007* (Springer, Berlin 2009)

A Føllesdal, 'Subsidiarity and Democratic Deliberation ' in A Føllesdal and P Koslowski (eds), *Democracy and the European Union* (Springer, London 1998)

L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' 2008 19 European journal of international law 125-159

J Isensee, 'Subsidiarität, Das Prinzip Und Seine Prämissen' in P Blickle and others (eds), *Subsidiarität Als Rechtliches Und Politisches Ordnungsprinzip in Kirche Staat Und Gesellschaft, Rechtstheorie, Beiheft 20* (Duncker und Humblodt, Berlin 2001)

J 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, Berlin 2001)

RY Jennings and JR Spencer, *What Is International Law and How Do We Tell It When We See It?* (The Cambridge-Tilburg Law Lectures 3rd Series, Kluwer Law International, Deventer, Boston 1983)

M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in J Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, Cambridge 2009) 258-324

IE Linnan, 'Subsidiarity, Collegiality, Catholic Diversity and Their Relevance to Apostolic Visitations' 1989 49 The Jurist 399

N MacCormick, 'Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'' 1997 16 Law and Philosophy 331-356

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<sup>125</sup> Article 5 (4) of the Protocol merely provides: "The Committee shall forward its views to the State Party concerned and to the individual." Similarly Rule 100 (3) of the CCPR's rules of procedure provides: "The Views of the Committee shall be communicated to the individual and to the State party concerned."



M Milanovic, 'Norm Conflict in Interantional Law: Wither Human Rights?' 2009 20 Duke Journal of Comparative and International Law 69-128

J Schumpeter, *Capitalism, Socialism and Democracy* (Allen and Unwin, New York 1942)

R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' 2009 68 Cambridge Law Journal 525-536

D Shelton, 'Subsidiarity and Human Rights Law' 2006 27 Human rights law journal 4-11

T Spijkerboer, 'Subsidiarity And'arguability': The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' 2009 International Journal of Refugee Law

J Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' 2005 54 International and Comparative Law Quarterly 459-474

G Taylor, 'Germany: A Slow Death for Subsidiarity?' 2009 7 International journal of constitutional law 139-154

M Walzer, *Thick and Thin* (University of Notre Dame Press, Notre Dame 1994)

SA Williams and WA Schabas, 'Issues on Admissibility, Art. 17' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2 edn, C.H. Beck/Hart/Nomos, München, Oxford 2008)