

Subsidiarity in the Practice of International Courts

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I. INTRODUCTION

SUBSIDIARITY AS AN idea about the allocation of competence has two inseparable facets. On one side of the coin, it signifies that decision-making ought to be taken primarily at a lower level of governance. On the other side of the same coin, subsidiarity allows a shift of competence to a higher level of governance when a matter is not appropriately dealt with at the lower level. By prima facie favouring local decision-making, subsidiarity makes a particular normative claim that the protection of autonomy, diversity, and individual liberty should be prioritised over effectiveness, coherence, and unity that demand centralised decision-making at a higher level of governance.¹ While subsidiarity is a relatively unfamiliar lexicon in international law, the idea is already embedded in the decentralised structure of international law which is based on the principle of sovereign equality, the autonomy of each state, and its consent to be bound by a rule without any higher centralised law-maker.

The idea of subsidiarity has gained renewed significance since the mid-twentieth century due to incremental change in the decentralised processes in which states make, apply, and enforce international law. One of the most visible changes is the presence of international courts and tribunals in the international legal order. International courts have not only increased in number² but have also assumed the multiple functions

¹ See George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review* 331, 339–44; Augusto Zimmermann, 'Subsidiarity, Democracy and Individual Liberty in Brazil' in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Dordrecht, Springer, 2014) 85, 88–89.

² See Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709, 709–23; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, Oxford

to apply the rules of international law and progressively develop them.³ The visible presence of international courts in the development of international law renewed the question of competence allocation between states and international courts.

This chapter aims at examining the idea of subsidiarity in the practices of international courts. Just as the notion of subsidiarity itself, this inquiry has two facets. First, the chapter analyses how international courts preserve a state's decision-making competence. Second, it considers how a shift of competence to international courts is justified in practice. Among a wide range of international courts and tribunals, this chapter puts a special focus on the jurisprudence of the European Court of Human Rights (ECtHR) which has encountered, especially during the last decade, the question of competence allocation between member states and the Court. Subsidiarity in this chapter is about favouring national 'decision-making'; this means that subsidiarity here does not prioritise domestic 'law' over international 'law'.⁴

The question examined in this chapter is not merely a theoretical interest. The inquiry has been gaining practical relevance since international judicial decisions have met confrontational responses from national authorities. A well-known example is a response to the ECtHR decision in *Hirst v UK (No 2)*⁵ over the prisoners' voting entitlement. The UK Parliament disagreed with the ECtHR on the basis that the decisions on the prisoners' right to vote 'should be a matter for democratically-elected lawmakers'.⁶ In addition to the widely discussed human rights examples, Prabhash Ranjan in this edited volume exposed non-judicial national

University Press, 2003) 3–7. Before the 1990s, the active international and regional courts included: the ICJ, the ECJ, the Court of Justice of The Andean Community (established in 1979), the Court of Justice of the Benelux Economic Union (in 1958), the European Court of Human Rights (in 1959), and Inter-American Court of Human Rights (in 1979). Since the 1990s, many other international courts and tribunals have been established: eg, International Tribunal for the Law of the Sea (established in 1982), the Appellate Body of the World Trade Organization (in 1995), International Criminal Court (in 1998), and African Court on Human and Peoples' Rights (in 1998). See Shany, *ibid* 5–7.

³ See Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Berlin; New York, Springer, 2012); Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 *European Journal of International Law* 7.

⁴ cf Leonard FM Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, (discussing subsidiarity primarily as a matter of the relationships between EU law, human rights treaties, and national law in the context of fundamental rights protection).

⁵ *Hirst v United Kingdom (No 2)* App no 74025/01, ECHR 2005-IX (ECtHR, Grand Chamber, 6 Oct 2005).

⁶ House of Commons Votes and Proceedings, Sessions 2010–11, No 115, 10 Feb 2011 (234 in favour, 22 against) available at: www.publications.parliament.uk/pa/cm201011/cmvote/110210v01.htm.

contestations against international investment arbitration,⁷ and Shotaro Hamamoto provided an insight into the reasoning of the *Metalclad* case in which the British Columbia Supreme Court partially set aside an arbitral award.⁸ Given the confrontational national reception, it is worth examining the extent to which international courts preserve a state's autonomous decision-making process.

This chapter starts with overviewing the different historical contexts to which the idea of subsidiarity has been invoked (section II). It then moves on to examine how international courts resolve the question of competence allocation. International courts preserve a state's autonomy in multiple phases of their decisions (section III). This is combined with a shift of competence to international courts when a state's decisions are of such a quality that, among others, they deny justice, exclude involvement of the legislature, or suffer from systematic problems (section IV). An analysis of the idea of subsidiarity in the practices of international courts sheds light on the kind of normative values upheld by international law and the rule of law at the international level (section V and conclusion).

II. A HISTORICAL OVERVIEW OF SUBSIDIARITY

Historically, the idea of subsidiarity has been employed in several different social and political contexts.⁹ This section outlines three major contexts which nurtured the notion of subsidiarity and thereby provides a background to the analysis of competence allocation between states and international courts.

Subsidiarity was first articulated as a 'principle' as part of Catholic social thought. Pope Pius XI coined the term 'principle of "subsidiary function"' in *Quadragesimo Anno* in 1931¹⁰ as a principle of social pluralism which acknowledges diversity and yet still assumes each society's contribution

⁷ Ch 5 (Ranjan) of this volume.

⁸ Ch 4 (Hamamoto) of this volume.

⁹ See Gerald Neuman, 'Subsidiarity' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn, Oxford, Oxford University Press, 2013) 360, 360–63; Isabel Feichtner, 'Subsidiarity' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Online, New York, Oxford University Press, 2008).

¹⁰ Pope Pius XI, 'Quadragesimo Anno, On Reconstruction of the Social Order', Encyclica of Pope Pius XI (15 May 1931) available at: www.papalencyclicals.net/Pius11/P11QUADR.HTM, paras 78, 80. While it was Pope Pius XI that employed the term 'subsidiary' as a principle, Pope Leo XIII's earlier encyclical in 1891 already regarded the protection of workers' dignity as the duty of state and, at the same time, called for the limits of state intervention. See Pope Leo XIII, 'Rerum Novarum, on Capital and Labor', Encyclica of Pope Leo XIII (15 May 1891) available at: www.papalencyclicals.net/Leo13/l13rerum.htm, paras esp 33, 35–36.

to the common good.¹¹ The Catholic version of subsidiarity is close to the etymological origin of the term; subsidiarity is the paraphrase of ‘subsidiary’ which comes from the Latin word *subsidium*, meaning ‘help’ or ‘aid’.¹² A higher community performs a ‘subsidiary’ function, or more appropriately, an ‘auxiliary’ role, in order to support a lower community.¹³ In the Catholic social thought, the principle of subsidiarity ultimately serves human flourishing, and one’s immediate human communities were considered as a best site for achieving it.¹⁴

Second, subsidiarity has been employed in the context of federal states as an idea for the allocation of powers between a federal government and constituent states.¹⁵ In the US, subsidiarity is arguably implicit in the allocation of powers between the federal and state governments,¹⁶ although the principle of subsidiarity has been invoked in the political processes rather than in legal practices.¹⁷ The idea is also adopted in Germany¹⁸ as part of the wider attempts to divide the powers within the state that had experienced the totalitarian regime.¹⁹ In Italy, the Constitution contains an explicit reference to subsidiarity regarding the allocation of administrative functions between the municipalities and other larger institutions.²⁰

¹¹ Patrick McKinley Brennan, ‘Subsidiarity in the Tradition of Catholic Social Doctrine’ in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Dordrecht, Springer, 2014) 29, 34–41.

¹² See Jonathan Chaplin, ‘Subsidiarity: the Concept and the Connections’ (1997) 4 *Ethical Perspectives* 117, 118–19.

¹³ See *ibid* 118.

¹⁴ *ibid* 118–19; Brennan, ‘Subsidiarity in the Tradition of Catholic Social Doctrine’ (n 11).

¹⁵ Johannes Althusius (1557–1630) has developed a theory of subsidiarity as part of the modern federalist thought: see further Ken Endo, ‘The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors’ (1994) 44 *Hokkaido Law Review* 2064, 2043–33 (the largest page number comes first in descending order); Andreas Føllesdal, ‘Survey Article: Subsidiarity’ (1998) 6 *Journal of Political Philosophy* 190, 200–03.

¹⁶ See Alex Mills, ‘Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws’ (2010) 32 *University of Pennsylvania Journal of International Law* 369, 431–35; David P Currie, ‘Subsidiarity’ (1998) 1 *Green Bag 2d* 359.

¹⁷ George A Bermann, ‘Subsidiarity as a Principle of US Constitutional Law’ (1994) 42 *American Journal of Comparative Law Supplement* 555. The US Constitution does not expressly provide subsidiarity, although the constitutional provisions express the idea that those powers not conferred to the federal authorities are reserved to the states: *ibid* 555–58.

¹⁸ Art 72(2) of the German Basic Law embodies the notion of subsidiarity: ‘The Federation shall have the right to legislate ... 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’ (Basic Law for the Federal Republic of Germany, in the revised version published in the Federal Law Gazette Part III, classification no 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I, 944)).

¹⁹ Endo, ‘The Principle of Subsidiarity’ (n 15) 2051.

²⁰ Constitution of the Italian Republic, Art 118(1).

Finally, subsidiarity has been a principle of EU law, most notably by the Maastricht Treaty,²¹ which explicitly included the principle of subsidiarity in order to give assurance to member states that the Union (then Community) would respect democratic self-governance and cultural diversity.²² The principle of subsidiarity was adopted in conjunction with the expansion of the powers of European institutions under the Maastricht Treaty in an attempt to safeguard the powers of member states.²³

As contrasted with EU law, international law did not, traditionally, give rise to the strong need for discussing and invoking the idea of subsidiarity. The unfamiliarity is not because of the absence of the idea itself in international law. Rather, as noted at the beginning of this chapter, the decentralised structure of international law, which preserves the autonomy of each state's decision-making, almost took the idea of subsidiarity for granted. The issue of competence allocation nevertheless gained renewed importance by the growing presence of international courts whose internationally binding decisions direct the manner in which the states exercise their authority against individuals and private entities.

III. PRESERVING A STATE'S COMPETENCE

The idea of subsidiarity appears to play a role in various stages of international judicial decision-making. At the stage of admissibility, international courts often favour letting domestic authorities first deal with an application submitted to the courts (A). At the level of merits, international courts may preserve a state's autonomous decision-making by adjusting the intensity of review (B) and the extent to which the courts specify remedial measures (C).

²¹ Treaty on European Union, Treaty of Maastricht, 7 February 1992, 1992 OJ (C191) 1; 31 ILM 253 (1992). See Consolidated Versions of the Treaty on European Union (2010) OJ C83/13 Art 5. Art 5(3) provides: '3. 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'.

²² See Bermann, 'Taking Subsidiarity Seriously' (n 1) 334.

²³ Mills, 'Federalism in the European Union and the United States' (n 16) 392–93. Nevertheless, it is argued that the principle of subsidiarity was supported by relevant actors for opposite reasons; the UK regarded it as an antidote to federalism, while Germany regarded it as a step towards the development of federalism: Alessandro Colombo, *The Principle of Subsidiarity and European Citizenship* (Milan, Vita e Pensiero, 2004) 9–10. There are obviously a large number of studies regarding subsidiarity in EU law and governance: see, eg, Bermann (n 1); Theodor Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle' (1994) 14 *Yearbook of European Law* 203; Grainne de Búrca, 'Proportionality and Subsidiarity as General Principles of Law' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000) 95.

A. Rule of Exhaustion of Local Remedies and the Principle of Complementarity

At the phase of admissibility, one of the mechanisms through which an international court safeguards national competence is a rule of exhaustion of local remedies. It is a rule of customary international law that local remedies must be exhausted before the institution of international proceedings,²⁴ and the non-exhaustion of local remedies renders inadmissible a claim of state responsibility.²⁵ While the rule of exhaustion of local remedies had originally developed in the context of diplomatic protection,²⁶ the rule has been adopted by the major human rights treaties as one of the criteria according to which human rights courts (and treaty-monitoring bodies) assess the admissibility of complaints.²⁷

The rule on the exhaustion of national remedies reflects the idea that 'in some situations, domestic courts ought to be viewed as more appropriate fora' for taking a first look at international legal claims.²⁸ A linkage

²⁴ *Interhandel* [1959] ICJ Reports 6, (Preliminary Objection, Judgment of 21 March 1959), 27; 'Draft Articles on Diplomatic Protection with Commentaries' ILC Report UN Doc A/61/10 (2006) 71 (Art 14, commentary, para 1). The exhaustion rule applies insofar as a state's claim originates from private claims, even if the case concerns a violation of a treaty and injuries to the state itself: see *Elettronica Sicula S.p.A (ELSI)* [1989] ICJ Reports 15 (Judgment of 20 July 1989); Matthew H Adler, 'The Exhaustion of the Local Remedies Rule after the International Court of Justice's Decision in *ELSI*' (1990) 39 *The International and Comparative Law Quarterly* 641. Amerasinghe noted in 1990 that the issue is not whether the rule is a part of customary international law, but how and when it applies to different situations: Chittharanjan F Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius Publications Limited, 1990) 29.

²⁵ See 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II 2 Yearbook of the International Law Commission 26 Art 44(b) (concerning the admissibility of claims); James R Crawford and Thomas D Grant, 'Exhaustion of Local Remedies' in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (n 9) para 5. In this sense, the exhaustion rule is generally treated by international courts as a procedural (admissibility) rule, although the denial of local remedies can separately constitute a wrongful act: see *ibid* paras 35–41.

²⁶ See generally, eg, Edwin M Borchard, 'The Local Remedy Rule' (1934) 28 *The American Journal of International Law* 729; Theodor Meron, 'Incidence of the Rule of Exhaustion of Local Remedies, The' (1959) 35 *British Year Book of International Law* 83; Chittharanjan F Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge; New York, Cambridge University Press, 2004).

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950, ETS 5, 213 UNTS 221 (1950) Art 35 (1) ('The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'); International Covenant on Civil and Political Rights, 16 Dec 1966, 999 UNTS 171 (1966) Art 41(1)(c) (inter-state complaints); Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec 1966, 999 UNTS 302 Arts 2, 5(2)(b) (individual complaints); American Convention on Human Rights, 22 Nov 1969, 1144 UNTS 123, OAS Treaty Series No 36 (1969) Art 46(1)(a); African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217; 21 ILM 58 (1982) Arts 50, 56(5).

²⁸ Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford, Oxford University Press, 2007) 178. See also *ibid* 16, 28, 128.

between the idea of subsidiarity and the rule of exhaustion of remedies is particularly evident in the jurisprudence of the ECtHR, which has, from the early stage of its life, emphasised the subsidiary character of the conventional mechanism.²⁹ The ECtHR in *Vučković v Serbia* acknowledged an indispensable role of the rule of exhaustion of domestic remedies in the system of the European Convention of Human Rights (ECHR), which is subsidiary to the national systems and assumes an effective remedy at the national level.³⁰

Not all international courts operate based on the idea of leaving domestic courts to decide matters first. A case in point is an investor-state arbitration based on investment treaties which expressly waive the exhaustion rule.³¹ One of the main purposes of investment arbitration is precisely 'to avoid the use of domestic courts'.³² National courts are not an attractive forum from the perspective of investors, who are often concerned about the lack of judicial independence and the political obstacles to enforcing judgments at the domestic level.³³ In the context of investment arbitration, demand for avoiding domestic proceedings thus, in general, outweighs a need for preserving national decision-making competence.

Albeit in a specific and extraordinary circumstance, another principle which favours national decision-making at the stage of admissibility is the principle of complementarity provided in the Statute of the International Criminal Court (ICC).³⁴ Domestic justice is given priority on the basis that

²⁹ eg, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium (Merits)* App nos 1474/62 et al (1968), Ser A No 6 (ECtHR, Judgment of 23 July 1968) [10]; *Handyside v United Kingdom* App no 5493/72, (1976) 1 EHRR 737, (1979) 1 EHRR 737 (ECtHR, 7 Dec 1976) [48]. The principle of subsidiarity was explicitly adopted by Protocol No 15 to the ECHR: see (n 45) below.

³⁰ *Vučković and Others v Serbia* App nos 17153/11 et al (ECtHR, Grand Chamber, 25 March 2014, Preliminary Objection) [69]. See also, eg, *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999) [74] ('rule is based on the assumption, reflected in Article 13 of the Convention ... that there is an effective remedy available in respect of the alleged breach in the domestic system'); *Kudła v Poland* App no 30210/96 (ECtHR, Grand Chamber, 26 Oct 2000) [152].

³¹ The exhaustion requirement is waived by ICSID Convention, which is referred to by many investment treaties: see Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 UST 1270, 575 UNTS 159, Art 26; *Emilio Agustín Maffezini v The Kingdom of Spain* ICSID ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 Jan 2000, para 22. For non-ICSID arbitration, see, eg, SCC Arbitration V079/2005 *RosInvestCo UK Ltd v The Russian Federation* (Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction, Oct 2007) para 153. The exhaustion rule cannot be tacitly dispensed: *Elettronica Sicula S.p.A (ELSI)* (n 24) para 50. Nevertheless, in non-ICSID cases, the consent to investor-state arbitration is considered as a waiver of the principle of exhaustion of local remedies: see, eg, *RosInvestCo UK Ltd v The Russian Federation* para 153.

³² Christoph Schreuer, 'Interaction Of International Tribunals And Domestic Courts In Investment Law' in A W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)* (Leiden, Brill Academic Publishers, 2011) 71, 71.

³³ See *ibid* 71–72.

³⁴ See Rome Statute of the International Criminal Court, 37 ILM 1002 (1998); 2187 UNTS 90 pre-para 10, Art 1. In principle, the ICC's complementarity is contrasted with the International

it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.³⁵ Just as in the case of the rule of exhaustion of domestic remedies, the principle of complementarity preserves decision-making at the national level with regard to the investigation and prosecution of certain international crimes.³⁶

B. Margin of Appreciation

At the phase of merits, the idea of subsidiarity is precisely embodied in the margin of appreciation developed by the ECtHR as a judicial doctrine.³⁷ It adjusts the intensity of review by the Court and thereby preserves space for a state's autonomous decision-making. According to the jurisprudence of the ECtHR, a certain margin of appreciation is accorded to national authorities who make an initial assessment as to whether a fair balance between competing interests is struck in a particular case involving human rights.³⁸ In general, the margin would be wide if there were no European consensus and if the cases raised 'complex issues and choices of social strategy'.³⁹ For instance, with regard to certain sensitive issues such as euthanasia,⁴⁰ incest,⁴¹ and the display of religious symbols in public

Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These ad hoc international criminal tribunals and national courts have concurrent jurisdiction, and the former has primacy over the latter: Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by 25 May 1993 by Security Council Resolution 827 (last amended by Resolution 1877 of 7 July 2009) Art 9; Statute of the International Criminal Tribunal for Rwanda UN Doc S/Res/955 (1994); 33 ILM 1598 (1994) Art 8. At the same time, the ICTY's 'Completion Strategy' can be understood as one materialisation of the idea of subsidiarity: see Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *Journal of International Criminal Justice* 655.

³⁵ Rome Statute of the International Criminal Court (n 34) para 6 of the preamble.

³⁶ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge, Cambridge University Press, 2011) 191.

³⁷ The ECtHR observed that: the Court 'cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention': *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium (Merits)* (n 29) [I.B.10]. This paragraph is referred to in *Handyside*, a seminal case for the margin of appreciation doctrine: *Handyside v United Kingdom* (n 29) [48]. The comparable practices may still exist in other international courts: Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907.

³⁸ See, eg, *Dickson v The United Kingdom* App no 44362/04, ECHR 2007-V (ECtHR, Grand Chamber, 4 Dec 2007) [77].

³⁹ *ibid* [78].

⁴⁰ eg, *Pretty v The United Kingdom* App no 2346/02, ECHR 2002-III (ECtHR, 29 April 2002); *Haas v Switzerland* App no 31322/07 (ECtHR, 20 Jan 2011). In *Pretty*, Ms Pretty was refused governmental assurance that her husband would not face prosecution if he assisted her suicide. The ECtHR did not find a violation on the basis of the UK's margin of appreciation for this issue. The Court reached the similar conclusion in *Haas*.

⁴¹ eg, *Stübing v Germany* App no 43547/08 (ECtHR, 12 April 2012).

places,⁴² the ECtHR assumes that the national authorities have better knowledge of what is in the public interest.⁴³ A further analysis on the margin of appreciation is provided in the present volume by Birgit Peters, Shai Dothan, and Andrew Legg.⁴⁴

It is noteworthy that both the margin of appreciation and the principle of subsidiarity are gaining importance in the system of the ECHR. Protocol No 15 to the ECHR made an explicit reference to the principle and doctrine⁴⁵ for the purposes of enhancing the protection of human rights at the domestic level and alleviating the huge workload of the Strasbourg mechanism.⁴⁶ The ECtHR's Judge Robert Spano, in his lecture in 2014, characterised the Strasbourg Court's next phase as 'the age of subsidiarity'⁴⁷ in which the Court engages with 'empowering the Member States to truly "bring rights home"'.⁴⁸ The augmented importance of the principle of subsidiarity may represent the ECtHR's response to a call for an increased diversity in the protection of human rights.⁴⁹

C. Non-Specified Remedial Measures

At the stage of merits, the idea of subsidiarity is further reflected in the practice of remedial measures as a consequence of finding a violation. The ECtHR's basic approach is that the Court's judgments are essentially declaratory, and they leave a state with 'the choice of the means to be utilised in its domestic legal system' in order for the state to abide by the final

⁴² eg, in *Lautsi v Italy* (2011), the Court decided in favour of the Italian government, observing that the Court has a duty in principle to respect the contracting states' decisions with respect to the presence of religious symbols in public schools: *Lautsi and Others v Italy* App no 30814/06 (ECtHR, Grand Chamber, Judgment of 18 March 2011) [69]. The Court has also noted the lack of European consensus on this issue: *ibid* [70].

⁴³ See *Dickson v The United Kingdom* (n 38) [78].

⁴⁴ Chs 8 (Peters), 9 (Dothan), 10 (Legg) of this volume.

⁴⁵ Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS 213, 24.VI.2013, Art 1. Protocol No 15 was adopted following the Interlaken discussions in 2010, the declarations at Izmir in 2011, and the Brighton Declaration in 2012.

⁴⁶ See Dean Spielmann, 'Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', Speech at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (13 Dec 2013) available at: www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf, at 8.

⁴⁷ Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

⁴⁸ *ibid* 491. Judge Robert Spano observes that *Animal Defenders* and some other cases around 2009–14 already: 'demonstrate ... that the Strasbourg Court is currently in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity in conformity with Brighton and Protocol 15': *ibid* 498.

⁴⁹ See *ibid* 491.

judgment of the Court.⁵⁰ By not directing states how to remedy a violation, the ECtHR can further safeguard a state's competence.

The same level of trust in the domestic legal system might not have been built by the Latin American counterpart. Compared with the ECtHR, the Inter-American Court of Human Rights (IACtHR) has been known for its proactive approach to remedial measures that purport to restrict a state's autonomous decision-making.⁵¹ The IACtHR has been conducting a so-called 'quasi-criminal review' by ordering the specific modalities of national criminal prosecutions.⁵² Insofar as the remedial measures are concerned, the IACtHR thus appears to be less amenable to the idea of subsidiarity than the ECtHR.

At the same time, a gap between the ECtHR and IACtHR has been narrowed down as the Strasbourg Court has likewise begun to issue both general and individual remedial measures for the implementation of the Court's judgment.⁵³ Since the *Broniowski v Poland* case in 2004,⁵⁴ the ECtHR has adopted a 'pilot judgment' procedure,⁵⁵ in which the Court orders 'general' measures for the purpose of addressing systemic problems in the interests of other possibly affected persons.⁵⁶ The procedure aimed at effectively resolving in the national legal order a systemic problem underlying large numbers of repetitive cases, offering individuals more rapid

⁵⁰ *Marckx v Belgium* App no 6833/74, Ser A No 31 (ECtHR, 13 June 1979) [58]; ECHR (n 27) Art 46(1).

⁵¹ Alexandra Huneus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1. See also Neuman, 'Subsidiarity' (n 9) 372–73.

⁵² Huneus, 'International Criminal Law by Other Means' (n 51).

⁵³ Jannika Jahn, 'Ruling (In)directly through Individual Measures?: Effect and Legitimacy of the ECtHR's New Remedial Power' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 1 (analysing the practices of ordering specific 'individual' measures, which are relatively less known); Nino Tsereteli, 'The Relevance of the Principle of Subsidiarity for the Evolution of Remedial Regimes of Regional Human Rights Courts (ECtHR and IACtHR)' paper presented at the Workshop on Subsidiarity in Global Governance (19–20 June 2014) (extensively analysing the relevant decisions of the ECtHR and the IACtHR).

⁵⁴ *Broniowski v Poland* App no 31443/96, ECHR 2004-V (ECtHR, Grand Chamber, 22 June 2004). In *Broniowski*, the Court held that the Polish government breached the applicant's right to the peaceful enjoyment of his possessions by failing to provide compensatory property to which the applicant was entitled under the Polish legislation. The applicant was one of the so-called 'Bug River' claimants, who had to abandon their properties which, before the Second World War, had been located within the Polish borders. The Court accepted that a wide margin of appreciation had to be accorded to the Polish state (*ibid* [182]). Nevertheless, the Court found a violation on the ground that the applicant's disproportionate and excessive burden could not be justified by the legitimate general community interest (*ibid* [187]).

⁵⁵ Steering Committee for Human Rights (CDDH), the Council of Europe, 'Guaranteeing the Long-Term Effectiveness of the Control System of the European Convention on Human Rights', Addendum to the Final Report containing CDDH Proposals, CDDH(2003)006 Addendum Final (9 April 2003). On the pilot judgment procedure, see further Dominik Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights* (Leiden, Martinus Nijhoff Publishers, 2013).

⁵⁶ See (nn 91–93) below and corresponding text.

redress, and easing the Court's increasing caseload. The degree of specificity varies among general measures; they have been formulated both in a broad term⁵⁷ and in a much more specified manner.⁵⁸ The somewhat indeterminate jurisprudence of the ECtHR about remedial practices illustrates that the regional human rights court is trying to maintain its basic position to refrain from specifying appropriate remedial measures while responding to the need to address a systemic problem in the domestic legal order.⁵⁹

In addition to these general measures, since *Assanidze v Georgia*,⁶⁰ the ECtHR has developed the practices of ordering specific 'individual' measures that direct the manner according to which a state ought to implement the judgment.⁶¹ In *Assanidze v Georgia*, the Strasbourg Court, while reiterating the primary competence of the state to decide the manner of execution of a judgment, moved on to order the imprisoned applicant's release at the earliest possible date.⁶² By ordering these general and individual

⁵⁷ See, eg, *Hutten-Czapska v Poland* App no 35014/97, ECHR 2006-VIII (ECtHR, Grand Chamber, 19 June 2006) op [4]. In *Hutten*, the ECtHR directed Poland to secure in its domestic legal order 'a mechanism maintaining a fair balance' between the competing interests involved: *ibid*.

⁵⁸ eg, in *Suljagić v Bosnia and Herzegovina* on the treatment of bank deposits before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the ECtHR specifically directed the state to issue government bonds and pay outstanding instalments within 6 months: *Suljagić v Bosnia and Herzegovina* App no 27912/02 (ECtHR, 3 Nov 2009) [64], op [4]. cf *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* App no 60642/08 (ECtHR, Grand Chamber, 16 July 2014). In *Ališić*, the Court ordered the similar general measures, albeit in a less specific manner: see *Ališić*, *ibid*, op [10]–[11].

⁵⁹ eg, the ECtHR in *Hutten*, after having directed a state to take the general measures to remedy the systemic human rights violations, still noted that '[i]t is not for the Court to specify what would be the most appropriate way', while, at the same time, suggesting 'in passing' several options open to the state: see *Hutten-Czapska v Poland* (n 57) [239]. The delicate balance is also illustrated by the cases in which the ECtHR made 'suggestions' regarding the kind of remedial measures. For instance, in *Atanasiu v Romania*, the Court, while holding that the state must take general measures, merely 'suggest[ed]', on a purely indicative basis' the types of general measures that the state 'might take': *Maria Atanasiu and Others v Romania* App nos 30767/05, 33800/06 (ECtHR, 12 Oct 2010) [228], [230], op [6].

⁶⁰ *Assanidze v Georgia* App no 71503/01, ECHR 2004-II (ECtHR, Grand Chamber, 8 April 2004). In this case, the Court found the violations of the rights of the applicant who had been imprisoned despite the acquittal by the Georgian Supreme Court.

⁶¹ See further Jahn, 'Ruling (In)directly through Individual Measures?' (n 53).

⁶² *Assanidze v Georgia* (n 60) op [14(a)]. cf *Papamichalopoulos and Others v Greece (article 50)* App no 14556/89 (ECtHR, 31 Oct 1995), op [2]–[3] (requiring the state to return to the applicant the land occupied by the military, yet, at the same time, allowing the monetary payment as an alternative remedy). Likewise, the Court in *Ilaşcu* ordered the measures to secure the 'immediate release' of the imprisoned applicants: *Ilaşcu and Others v Moldova and Russia* App no 48787/99, ECHR 2004-VII (ECtHR, Grand Chamber, 8 July 2004) op [22]. The Court in *Slawomir Musiał v Poland* also ordered the transfer of the mentally ill detained persons to a suitable psychiatric hospital or an equivalent place: see *Slawomir Musiał v Poland* App no 28300/06 (ECtHR, 20 Jan 2009), op [4(a)] ('the respondent State is to secure at the earliest possible date adequate conditions of the applicant's detention in a specialised institution capable of providing him with necessary psychiatric treatment and constant medical supervision'); Jahn (n 53) 8–9.

measures, the ECtHR seems to have limited space for a state's autonomous decision-making with regard to a remedy for a violation of the ECHR.

In sum, this limited analysis suggests that the idea of favouring local autonomy subsists in the practices of international courts. At the level of admissibility, a state's competence is internationally preserved by the rule of exhaustion of local remedies under customary international law and by the principle of complementarity under the specific international treaty. At the stage of reviewing the states' acts or omissions, the margin of appreciation under the ECtHR's jurisprudence materialises the idea of subsidiarity, and, at the stage of ordering remedial measures, the regional human rights courts, to a varying degree, leave the choice of means to state parties.

IV. SHIFTING COMPETENCE TO INTERNATIONAL COURTS

As noted at the beginning of this chapter, subsidiarity is inseparable from an idea that international courts would step in should a state be no longer seen as an appropriate forum. This section elucidates, with particular reference to the ECtHR, some of the noteworthy criteria under international law, which justify a shift of competence to international courts. Such criteria illuminate some of the normative values that are respected in international law when it interacts with the national legal order, as will be later discussed in section V.

A. Denial of Justice and Ineffectiveness

At the level of admissibility, a shift of competence is justified by a range of criteria which render the rule of exhaustion of local remedies satisfied or inapplicable. In general, domestic authorities are no longer seen as appropriate fora if domestic proceedings are of 'undue delay'⁶³ or 'futility'.⁶⁴ There are also regime-specific criteria which justify a shift of competence from the national level to the international one. For instance, the American Convention on Human Rights explicitly provides the lack of due process of law, the denial of access to remedies, and unwarranted delay as exceptions to the exhaustion rule.⁶⁵ These conditions can be seen as part of the

⁶³ See 'Draft Articles on Diplomatic Protection with Commentaries' (n 24) Art 15(b).

⁶⁴ See *ibid* Art 15(a), (d).

⁶⁵ American Convention on Human Rights (n 27) Art 46(2)(a)–(c). For an overview of treaty provisions, see, eg, AO Adede, 'A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies' (1977) 18 *Harvard International Law Journal* 1.

somewhat outdated, yet still relevant, notion of a 'denial of justice', which is a traditional limit to the exhaustion of local remedies.⁶⁶

Apart from the traditional yardsticks such as undue delay and futility, the jurisprudence of the ECtHR⁶⁷ developed the additional criteria of the accessibility, effectiveness,⁶⁸ and sufficient certainty of domestic remedies.⁶⁹ In *Vučković and Others v Serbia*, the ECtHR held that the existence of remedies in question must be 'sufficiently certain not only in theory but in practice' in order to meet 'the requisite accessibility and effectiveness'.⁷⁰ In other words, a competence may shift to the international level if domestic proceedings are not accessible and effective. The ECtHR and IACtHR also take into account the personal circumstances of the individual applicants in deciding whether claims ought to be dealt with at the domestic level.⁷¹

With regard to the principle of complementarity under the ICC Statute, one of the criteria that justify a shift of competence is the 'unwilling or unable' test.⁷² Under Article 17(2) of the ICC Statute, 'unwillingness' is defined as a national decision for the purpose of shielding the person from criminal responsibility, an unjustified delay, or non-independent or non-impartial proceedings.⁷³ Under Article 17(3), 'inability' is due to 'a total or

⁶⁶ On the denial of justice, see Adede, 'A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies' (n 65) 9–12.

⁶⁷ In principle, the exhaustion of domestic remedies under the ECHR is supposed to be 'according to the generally recognised rules of international law': ECHR (n 27) Art 35(1). Yet the rule has been applied more flexibly before the ECtHR: see, eg, *Cardot v France* App no 11069/84 (ECtHR, 19 March 1991) [34]; *Lehtinen v Finland* App no 39076/97 (Admissibility Decision, 14 Oct 1999).

⁶⁸ *Vučković and Others v Serbia* (n 30) [71], [73].

⁶⁹ See, eg, *Vernillo v France* App no 11889/85 (ECtHR, 20 Feb 1991) [27]. In *Vučković*, the ECtHR held that the obligation to exhaust domestic remedies 'requires an applicant to make normal use of remedies which are available and sufficient ... The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness': *Vučković and Others v Serbia* (n 30) [71].

⁷⁰ *Vučković and Others v Serbia* (n 30) [71].

⁷¹ For the ECtHR, see *Akdivar and Others v Turkey* App no 21893/93 (ECtHR, Grand Chamber, 16 Sept 1996) [69]. The IACtHR also accepted, as exceptions to the rule of exhaustion of domestic remedies, an individual complainant's indigency and a general fear in the legal community to represent the individual: *Exceptions to the Exhaustion of Domestic Remedies* (Arts 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights) Inter-Am Ct HR (Ser A) No 11 (1990) (Advisory Opinion, 10 Aug 1990).

⁷² Under Art 17(1)(a) and (b) of the ICC Statute, the ICC first inquires whether a state with jurisdiction has investigated and either prosecuted or decided not to prosecute. If such investigation or prosecution exists, the ICC then decides whether the state is unwilling or unable genuinely to carry out the investigation or prosecution: Rome Statute of the International Criminal Court (n 34) Art 17(1)(a) and (b). The unwillingness and inability is assessed by the Prosecutor in deciding whether to initiate an investigation (Art 53(1)(b)) and whether to proceed to prosecution (Art 53(2)(b)) before the admissibility is ultimately determined by the Court.

⁷³ *ibid* Art 17(2)(a)–(c). See Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869, 899–902.

substantial collapse or unavailability of its national judicial system'.⁷⁴ As in the aforementioned case of the rule of exhaustion of domestic remedies, the 'unwilling or unable' test could be understood as originating in the classic concept of a denial of justice.⁷⁵

B. Non-Involvement of the Legislature

At the level of merits, one of the noteworthy criteria in the ECtHR's jurisprudence on the margin of appreciation is that the Strasbourg Court takes into account the involvement of a *legislative* body in assessing whether the impugned measures fall within the margin of appreciation and whether they meet the requirement of proportionality.⁷⁶ The crux is that the ECtHR differentiates between various branches of the state in deciding whether the Court should respect a state's autonomous decision.⁷⁷

For instance, the Grand Chamber in *Dickson v UK*⁷⁸ observed that the Court generally respects the 'legislature's policy choice' in cases where the wide margin is accorded to a state.⁷⁹ In finding a violation of Article 8 of the ECHR, the Grand Chamber took into account the fact that Parliament did not get involved in weighting competing interests and assessing the proportionality.⁸⁰ In a similar vein, in *Hirst v UK (No 2)* concerning the prisoners' voting,⁸¹ the ECtHR decided against the UK by observing that 'it cannot be said that there was any substantive debate by members of the legislature on the continued justification' for maintaining the restriction.⁸²

⁷⁴ Rome Statute of the International Criminal Court (n 34) Art 17(3). See Zeidy, 'Principle of Complementarity' (n 73) 902–04.

⁷⁵ Frédéric Mégret, 'Qu'est-ce qu'une juridiction « incapable » ou « manquant de volonté » au sens de l'article 17 du Traité de Rome? Quelques enseignements tirés des théories du déni de justice en droit international' (2004) 17 *Revue québécoise de droit international* 185.

⁷⁶ See, eg, *Shindler v The United Kingdom* App no 19840/09 (ECtHR, 7 May 2013) [118] ('the margin of appreciation available to the domestic legislature in regulating parliamentary elections'); *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 May 2010) [41] ('a wide margin of appreciation should be granted to the national legislature in determining whether restrictions ... can be justified ... and, if so, how a fair balance is to be struck').

⁷⁷ In the *Handyside* case, the Strasbourg Court already noted that the margin is 'given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws': *Handyside v United Kingdom* (n 29) [48].

⁷⁸ *Dickson v The United Kingdom* (n 38). In *Dickson*, the Grand Chamber decided whether the UK breached Art 8 (right to respect for private and family life) by refusing the prisoners' access to artificial insemination facilities. The Court found a breach on the basis that a fair balance had not been struck between the conflicting individual and public interests involved.

⁷⁹ *ibid* [78].

⁸⁰ *ibid* [83].

⁸¹ *Hirst v United Kingdom (No 2)* (n 5).

⁸² *ibid* [79]. The fact that Parliament voted for the relevant legislation was not satisfactory; the Strasbourg Court noted that 'there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality': *ibid*.

The involvement of the legislative body was also considered in several cases after *Hirst (No 2)*. In finding this time in favour of the UK, the ECtHR in *Doyle v UK* found merit in parliamentary scrutiny into the voting restriction on non-residents.⁸³ Likewise, the ECtHR put emphasis on the existence of parliamentary scrutiny in *Shindler v UK*⁸⁴ and in *Alajos Kiss v Hungary*.⁸⁵ In *Animal Defenders International*⁸⁶ concerning the right to freedom of expression, the Strasbourg Court, in assessing the proportionality of the impugned ban on political advertising, observed that '[t]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance' including 'to the operation of the relevant margin of appreciation'.⁸⁷ In finding that the measure was not a disproportionate interference with the right to freedom of expression, the ECtHR attached considerable weight to the extensive pre-legislative review by Parliament and subsequent domestic judicial scrutiny.⁸⁸ The ECtHR in *Evans* also made a particular reference to Parliament, noting that the key question was 'whether Parliament exceeded the margin of appreciation afforded to it'.⁸⁹

Overall, a series of Strasbourg cases illustrate that a shift of competence to the ECtHR can be justified according to the deliberative involvement of a legislative body. The ECtHR considered whether and how the national legislature was involved in weighting the competing interests and striking a fair balance with regard to the issues for which the state has the wide margin of appreciation.

⁸³ *Doyle v The United Kingdom* App no 30158/06 (ECtHR, Admissibility Decision of 6 Feb 2007) 4.

⁸⁴ *Shindler v The United Kingdom* (n 76). In this case, the ECtHR decided whether or not the UK violated the right to vote by preventing British citizens residing overseas for more than 15 years from voting. The Court decided in favour of the UK. The request for referral to the Grand Chamber was rejected. The ECtHR referred to the existence of parliamentary scrutiny as a relevant factor in holding that the restriction on non-residents' voting rights, about which the member state has the wide margin of appreciation, may be proportionate to the legitimate aim pursued: *ibid* [102], [117].

⁸⁵ *Alajos Kiss v Hungary* (n 76). In this case, the Court found that Hungary's blanket restriction on franchise of those under partial guardianship violated the right to vote. The Strasbourg Court, in finding a violation on the right to vote, noted the ostensible absence of legislative scrutiny in weighing the competing interests and assessing the proportionality of the restrictions on the right to vote, for which the national legislature has a wide margin of appreciation: *ibid* [41].

⁸⁶ *Animal Defenders International v The United Kingdom* App no 48876/08 (ECtHR, Grand Chamber, 22 April 2013). The Court decided whether or not the ban on political advertising in the UK violated the right to freedom of expression. The dispute concerned whether the interface with the rights was 'necessary in a democratic society' (Art 10(2) of the ECHR). The Court upheld the compatibility of the ban with Art 10 of the ECHR.

⁸⁷ *ibid* [108]. According to the Court, the core issue is whether 'in adopting the general measure [on political advertising] and striking the balance it did, the legislature acted within the margin of appreciation afforded to it': *ibid* [110].

⁸⁸ See *Animal Defenders International v The United Kingdom* (n 86) [114]–[116].

⁸⁹ *Evans v The United Kingdom* App no 6339/05 (ECtHR 2007, 10 April 2007) [91].

C. Systematic Problems

Finally, with regard to the remedial measures, the existence of systematic problems in the domestic legal mechanisms has driven both the IACtHR and ECtHR to take an interventionist approach to their remedial measures. From the outset, the IACtHR has been encountering the cases involving mass state-sponsored violations of fundamental rights. The need to alleviate the systematic human rights violations existing in the member states has presumably led the Court to take a proactive step to issue specific remedial measures.

The existence of a 'systemic problem' has also been one of the key criteria for the ECtHR to issue general measures.⁹⁰ In *Broniowski*, the ECtHR, while reiterating the traditional position that it is, in principle, not for the Court to determine appropriate remedial measures,⁹¹ moved on to identify in its operative paragraphs a 'systemic problem' connected with the 'malfunctioning of domestic legislation and practice',⁹² requesting that Poland take legal measures not only with regard to the applicant, but also a whole class of individuals who had similar property claims.⁹³

With regard to individual measures, the ECtHR's proactive approach has been justified by a wide variety of grounds. In *Assanidze v Georgia*,⁹⁴ in which the ECtHR for the first time issued an unconditional specific order for restitution in the operative part of its judgment,⁹⁵ the ECtHR justified it by the lack of other remedial measures, the particular circumstances of the case, and the urgent need to end the violation.⁹⁶ In *Oleksandr Volkov v Ukraine*,⁹⁷ the Chamber of the ECtHR ordered the reinstatement of the former Supreme Court judge, who had been dismissed in violation of his

⁹⁰ See, eg, *Hutten-Czapska v Poland* (n 57) [235]–[37], op [3]; *Suljagić v Bosnia and Herzegovina* (n 58) [64], op [3]; *Oleksandr Volkov v Ukraine* App no 21722/11, ECHR 2013 (ECtHR, 9 Jan 2013) [199] (albeit not in the operative paragraphs); *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (n 58) op [9].

⁹¹ *Broniowski v Poland* (n 54) [193].

⁹² *ibid* op [3]. In this case, the Court made it clear that 'general measures at national level are undoubtedly called for' in execution of the judgment and to remedy the systemic defect underlying the Court's finding of a violation: *ibid* [193].

⁹³ See *Broniowski v Poland* (n 54) op [4]. The Court then adjourned its consideration of applications deriving from the same general course: see *Broniowski*, *ibid* [198]; *EG v Poland and 175 Other Bug River Applications* App no 50425/99 (ECtHR, 23 Sept 2008). *cf* *Sejdović v Italy* App no 56581/00, ECRH 2006-II (ECtHR, Grand Chamber, 1 March 2006). In *Sejdović*, the Grand Chamber did not find it necessary to indicate any general measures at the national level, given that Italy implemented various legislative reforms which have yet to be applied by domestic courts: see *Sejdović*, *ibid* [122]–[24].

⁹⁴ *Assanidze v Georgia* (n 60).

⁹⁵ *Jahn* (n 53) 5.

⁹⁶ See *Assanidze v Georgia* (n 60) [202]–[03].

⁹⁷ *Oleksandr Volkov v Ukraine* (n 90). In this case, the Chamber decided that Ukraine violated the right to a fair trial of the applicant, who had been dismissed from the post of judge of the Supreme Court.

right to a fair trial.⁹⁸ *Oleksandr Volkov* went further than *Assanidze*, in that the Court justified such a specific ‘individual’ measure by the Ukrainian judiciary’s systemic problems which led the Court to suggest ‘general’ measures as well.⁹⁹ Namely, the lack of judicial independence and the judiciary’s systemic problems justified both individual and general remedial measures.

V. NORMATIVE VALUES OF SUBSIDIARITY

As demonstrated in section III, these are principles, rules, and practices which preserve a state’s decision-making competence. As discussed in section IV, such principles, rules, and practices are accompanied by a series of criteria under international law, with which to confer competence to international courts. The study of these two facets of the idea then leads us to consider a normative value underlying the idea of subsidiary in the context of allocation of competence between states and international courts. While such values may vary depending on specific treaties, courts, and cases, this section draws attention to the following four normative values which can be ascertained from the practices analysed in this chapter.

First, the idea of subsidiarity must have traditionally served to safeguard *state sovereignty*. The exhaustion of local remedies was indeed meant to protect the sovereignty of the host state and to prevent excessive intervention from other states’ attempts to resort to international judicial procedures.¹⁰⁰ From this normative value, the criteria such as ‘undue delay’ and ‘futility’ should be construed in such a way as to prevent, as far as possible, international courts from deciding on a matter. At the same time, if subsidiarity simply serves to safeguard state sovereignty, it may not add much to the traditional mechanisms, such as the formal separation of legal orders and the decentralised structure of the international legal order, that, albeit in an unsatisfactory manner, serve to counterbalance the authority exercised by international courts.

Second, the protection of sovereignty has then been counterbalanced by the protection of *individuals’ rights and interests* as another normative value underlying the practice of international courts which materialise the idea of subsidiarity. The protection of the sovereignty as a rationale for the idea of subsidiarity is particularly problematic for human rights cases which are meant to safeguard individuals’ rights from a state’s exercise

⁹⁸ *ibid op [9]* (‘Ukraine shall secure the applicant’s reinstatement in the post of judge of the Supreme Court at the earliest possible date’).

⁹⁹ See *Jahn’* (n 53) 9; *Oleksandr Volkov v Ukraine* (n 90) 199–202 (general measures) [207]–[208].

¹⁰⁰ See Shany, *Regulating Jurisdictional Relations Between National and International Courts* (n 28) 28.

of authority. The greater emphasis on individuals' interests is therefore reflected in the conditions on the basis of which human rights courts find the exhaustion rule being inapplicable or already satisfied. Human rights courts apply the exhaustion rule differently from the cases of diplomatic protection, apparently because the interests of individuals should enjoy greater emphasis than the case of traditional diplomatic protection.¹⁰¹

Third, the jurisprudence of the ECtHR with regard to the margin of appreciation suggests that *democracy* is one of the normative values accommodated in the practice concerning the idea of subsidiarity. As analysed in the previous section, the jurisprudence of the ECtHR has been taking into account the involvement of the legislature as one of the criteria for justifying a shift of competence to the international judicial venue. The consideration to the legislature's involvement is consistent with a justification for the doctrine of the margin of appreciation, which is to promote and respect democratic decisions within local communities unless the issues concern the protection of minorities.¹⁰² The Strasbourg Court's respect for national democracy is combined with the recognition of the lack of democratic legitimacy on the part of the international court itself.¹⁰³ According to Judge Spano, the Court has thus been adopting its 'qualitative, democracy-enhancing approach'¹⁰⁴ as a criterion in the application of the margin of appreciation and the subsidiarity principle. If the margin of appreciation can be seen as judicial deference to democratic legitimacy, it is not surprising that the Court occasionally makes a special reference to the legislator.

Finally, subsidiarity serves to safeguard the *legitimacy of international courts* themselves. The margin of appreciation, for instance, is understood as one way in which the ECtHR sustains the states' propensity for compliance and ultimately upholds judicial legitimacy.¹⁰⁵ If the Strasbourg Court exercises judicial discretion for sensitive issues which lack consensus, the Court is likely to be criticised for imposing obligations which are not agreed upon by member states, and is giving them a political excuse for not complying with the judgment.¹⁰⁶ By employing the margin, the ECtHR can

¹⁰¹ See Amerasinghe, *Local Remedies in International Law* (n 24) 83–86.

¹⁰² Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843, 849. As the former president of the ECtHR observed, national authorities enjoy an area of discretion owing to their role in 'the expression of the democratic will of their people': Luzius Wildhaber, *The European Court of Human Rights, 1998–2006: History, Achievements, Reform* (Kehl, NP Engel, 2006) 95.

¹⁰³ See Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp; New York, Intersentia, 2002) 239–41.

¹⁰⁴ Spano, 'Universality or Diversity of Human Rights?' (n 47) 499 (original emphasis omitted).

¹⁰⁵ See Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford, Oxford University Press, 2014) 155–56.

¹⁰⁶ See *ibid* 155–57.

be indeterminate on the sensitive issues while still subjecting them to the future assessment of the Convention.

VI. CONCLUSION

As contrasted with EU law, international law has been relatively unaccustomed to the language of subsidiarity. The relative unfamiliarity is due to the fundamentally decentralised structure of the international legal order, which did not give rise to the pressing need for introducing the idea of subsidiarity and counterbalancing the presence of higher authority. The traditional assumption was that international law is prescribed and enforced horizontally between states. This horizontal model has been, however, incrementally mismatched with an active role played by international courts in deciding on states' compliance with international law. Domestic confrontations against some of the decisions of international courts have shed new light on the idea of subsidiarity as a possible framework that guides the allocation of competence between states and international courts.

The present study cannot lead us to any general conclusion about the extent to which the idea guides a wide range of international courts and tribunals. This chapter makes a limited observation that there are certain principles, rules, and practices which favour decision-making at a lower level of governance. The rule of exhaustion of local remedies safeguards national competence; the ECtHR's margin of appreciation preserves space for a state's autonomous decision-making; and the ECtHR generally refrains from specifying the modalities of appropriate remedies. These practices develop side-by-side with the yardsticks under international law according to which international courts may regard domestic authorities as no longer appropriate.

While multiple normative values sustain the two facets of the idea of subsidiarity in the context of competence allocation between states and international courts, such normative values can be contradictory to each other. A tension between the protection of state sovereignty and the respect for individuals' rights is one of such contradictions. A traditional value of international law, and thus the idea of subsidiarity therein, is to protect state sovereignty and avoid interference from an external body. The prevention of international judicial supervision is, however, problematic especially for human rights courts which scrutinise a state's conduct for the benefit of individuals' fundamental rights. The rule of exhaustion of local remedies has therefore been applied more flexibly in the jurisprudence of the ECtHR which takes into account the interests of individual claimants. In the practice of the margin of appreciation, the ECtHR no longer treats a state as a single voice and places greater weight on the

legislature among domestic organs which benefit from the idea of subsidiarity. The consideration of the involvement of the legislature is, after all, a regime-specific trend. Nevertheless, it is noteworthy that an influential regional human rights court unpacks the state which is generally treated as a monolithic entity at the international level and employs the quality of decision-making processes as one of the criteria with which to decide to what extent national decisions ought to be preserved.

Overall, a study of the idea of subsidiarity in the context of international courts presents us with a nuanced picture about how international courts, which formally operate in the international legal order, interact with the national legal order. While the need for ensuring a state's compliance with international law calls for a shift of competence to international courts, as long as an application is submitted, international law has developed certain flexible criteria which both secure each state's autonomy and simultaneously allow international judicial supervision of domestic decision-making. Such a duality inherent in the idea of subsidiarity enriches our understanding about the rule of law at the international level which, as this chapter attempted to illustrate, preserves national autonomy while expecting it to be within international criteria about national decision-making.