Chapter 2
International Distribution of Conventionality Control Powers

The second aspect of the constitutionalisation of international adjudication is that human rights courts perform judicial review of national acts against the yardstick of convention parameters. It should be reminded here that the subsidiarity principle presumes that the *primary* responsibilities are incumbent on States Parties and that treaty mechanisms are essentially *subsidiary* to domestic systems.[223] As the primary guardians of human rights, States Parties are required to perform general obligations to respect and ensure treaty rights and to align their domestic law and practice in line with treaty criteria.[224] As a literal meaning, subsidiarity governing the allocation of public authority in systems of multilevel governance shows a preference for functions at the lowest level of governance.[225] Moreover, subsidiarity inversely reallocates authority to the higher level if, and to the extent that, the higher level is better placed to fulfil the task in question.[226] In other words, subsidiarity includes both the *negative* aspect of limiting the competence of higher entities in favour of lower ones, and the *positive* aspect of permitting the higher authority to interfere with the lower authority.[227]

Regarding the competence allocation between human rights courts and States Parties in conventionality control, Judge Eduardo Ferrer MacGregor presented a particularly remarkable opinion in *Cabrera Garcia and Montiel Flores v. Mexico*:

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223 Carozza (n 2) 56–68.

224 Ioannis Panoussis, 'L'obligation générale de protection des droits de l'homme dans la jurisprudence des organes internationaux' (2007) 70 *Revue trimestrielle des droits de l'homme* 427–461, 447–452.

225 Isabel Feichtner, 'Subsidiarity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press), updated in 2007, para 1.

226 Andreas L Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (Hart 2008) 193–213, 197.

227 Ken Endo, 'The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors' (1994) 46 *Hokudai Hogaku Ronsyu* 2064–1965, 2054–2052.

> [T]he 'concentrated control of conformity with the Convention' has been developed by the IACtHR since its very first judgements, submitting the actions and norms of the State, in each particular case, to an examination of said conformity. That 'concentrated control' was carried out, fundamentally, by the IACtHR. Now, it has been transformed into a 'diffused control of conformity with the Convention' by extending said 'control' to all the domestic judges as a requirement for action within the domestic forum, although the IACtHR retains its power as 'last interpreter of the American Convention' when the effective protection of human rights in the domestic forum is not achieved.[228]

At first glance, his view appears to indicate a complete transformation from the *centralised* model to the *decentralised* model of conventionality control. However, a careful reading of the last point illuminates the context-based variability between *centralisation* and *decentralisation* of conventionality control powers, depending on the effectiveness of human rights protection at the domestic level. Put differently, this is a reference to the coexistence of the *centralisation* and *decentralisation* models of authority allocation among human rights courts and national organs in accordance with the achievement level of conventionality control.

Based on this assumption, this present study demonstrates the dual pattern of power allocation (centralisation and diffusion) for conventionality control in light of subsidiarity. In particular, this book focuses on subsidiarity in providing national discretion for choosing remedial measures, namely *remedial subsidiarity*.[229] The chapter starts by reviewing the principle of subsidiarity that allocates judicial powers either to States Parties, especially domestic courts (Section 1-A), or regional courts (Section 1-B) depending on the level of human rights protection that is achieved. Given such a general observation, it then advocates the *hybrid* model of conventionality control under the principle of subsidiarity: *concentrated* conventionality control by human rights courts under *positive* subsidiarity (Section 2-A) and *diffused* conventionality control by national authorities under *negative* subsidiarity (Section 2-B).[230]

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228 Concurring Opinion of Judge *ad hoc* MacGregor Poisot, *Cabrera Garcia and Montiel Flores* (n 35) para 22.

229 Neuman (n 1) 371–374.

230 Outside the context of subsidiarity, human rights courts, as ultimate defenders of regional systems underpinned by human rights and democracy, have decisively faced human rights violations caused by undemocratic "abuse of pow-

1. Relationship between Regional and Domestic Courts

A. Distributing Powers for Domestic Courts

(i) Negative Subsidiarity for Allocating Powers to Domestic Courts

The subsidiarity principle is incorporated into the Convention provisions that assume collaboration between States Parties that have primary jurisdiction, and human rights courts that possess complementary competences. In other words, the subsidiary principle represents both the *negative* concept prioritising the Conventions' national implementation and the *positive* concept of permitting international control. As Ken Endo cautiously noted, '[t]hough only the *negative* sense of subsidiarity is quite often circulated, and […] its *positive* concept is of secondary importance at least in its origin, *both concepts* should not be neglected'.[231] The negative aspect of subsidiarity is defined as 'the *limitation* of competences of the "higher" organization in relation to the "lower" entity'.[232] Replacing the definition in the Convention contexts, the negative concept requires human rights courts to show deference to States Parties. Under *negative subsidiarity*, non-performance of international judicial control by human rights courts serves to 'reinforce the legitimacy of the sovereign's actions by suggesting that the sovereign is respecting the social compact'.[233]

The collective guarantee of human rights rests on the principle of *subsidiarity*, one of the structural principles of international human rights law, according to which sovereign States retain the primary responsibilities to respect and to ensure to all individuals within their jurisdiction the rights recognised in the relevant treaties. Paragraph 2 of the ACHR preamble originally provides subsidiarity: 'The American states signatory to the present Convention, […] recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are

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ers" in States Parties. See, Yota Negishi, 'Conventionality Control of Domestic 'Abuse of Power' Influencing Human Rights and Democracy' (2016) XXVI *Italian Yearbook of International Law* 243–264.

231 Endo (n 227) 2053 (emphasis added).

232 Ibid 2054–2053 (emphasis in original text).

233 Karen Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Resolution, Constitutional and Administrative Review' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 345–370, 353–354.

based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states'. As a more recently adopted document, the ECHR Protocol No. 15 adds in Article 1 the following new statement at the end of the preamble to the Convention: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

Rights to domestic remedies are also the cornerstone of the Convention systems based on the subsidiarity principle (Article 13 ECHR of the and Article 25 of the ACHR).[234] The rules on the exhaustion of domestic remedies are the counterparts of rights to domestic remedies (Article 35(1) of the ECHR and Article 46(1) of the ACHR). In line with generally recognised principles of international law on state responsibility, these rules presume that applicants exhaust local remedies before having recourse to international instances. These provisions also reflect the principle of subsidiarity because they allow States Parties the opportunity to remedy human rights violations in the first instance within their domestic legal orders and, thereby, protect them from unwarranted international proceedings.[235] In the sense that international instances aim to provide appropriate redress that domestic remedies fall short of meeting, the remedial powers of human rights courts are rooted in the subsidiarity principle (Article 41 of the ECHR and Article 63(1) of the ACHR).[236] According to IACtHR jurisprudence, the broad terms in Article 63(1) codify a customary law of state responsibility, namely the *Chorzów* principle of reparation.[237] There-

234 Concurring opinion of Judge Diego García-Sayán, *Cepeda Vargas v Colombia*, IACtHR, Series C, No. 213, Judgment on Preliminary Objections, Merits, Reparations and Costs of 26 May 2010, para 8; *Kudła v Poland*, ECtHR, App No 30210/96, Judgment on Merits and Just Satisfaction of 26 October 2000, para 152.

235 *Velásquez-Rodríguez v Honduras* (n 9) para 61; *Kudła v Poland* ibid para 152.

236 Concurring Opinion of Judge García-Sayán, *Cepeda Vargas* (n 234) para 14; Mark E Villiger, 'The Principle of Subsidiarity in the European Convention on Human Rights' in Marcelo G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Martinus Nijhoff 2007) 623–637, 631–633.

237 *Aloeboetoe and Others v Suriname*, IACtHR, Series C No 15, Judgment on Reparations and Costs of 10 September 1993, para 43.

fore, the Court indirectly interprets and applies the customary rule even when it directly interprets and applies this provision.[238] In contrast, the ECtHR has conferred a limited remedial power under Article 41, which is a *lex specialis* modifying one aspect of the general law on state responsibility that leaves other aspects applicable.[239]

Given the premise that national implementation is prioritised over international control, general obligations under human rights treaties incumbent on States Parties are classified into two categories. The first category is the *obligation to respect* the treaty rights and freedoms and *to ensure* their exercise (Article 2(1) of the ICCPR; Article 1 of the ECHR; Article 1(1) of the ACHR). Under these provisions, States Parties are required to uphold not only negative obligations to respect the rights and freedoms specified in the Conventions but also positive obligations to ensure their enjoyment.[240] To complement the case-by-case mandate, the second category more comprehensively imposes on States Parties the *obligation to harmonise* domestic legal systems with Convention standards (Article 2(2) of the ICCPR; Article 2 of the ACHR).[241] Although the ECHR does not have a provision concerning this second obligation, the ECtHR has developed its jurisprudence in Article 1 to include the second category of general obligations to harmonise domestic legal systems in line with the Convention.[242] According to the formal wordings of relevant provisions, the second obligation to harmonise is complementary to the first obligation to respect and ensure.[243]

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238 Lucius Caflisch and Antonio Augusto Cançado Trindade, 'Les conventions américaine et européenne des Droits de l'Homme et le droit international général' (2004) 108 *Revue générale de droit international public* 5–62, 40.

239 Commentary to ARSIWA (n 16) Art 32, para 2; Art 55, para 3.

240 *Velásquez-Rodríguez* (n 9) para 166; *Ireland v the United Kingdom* (n 80) para 239.

241 Riccardo Pisillo-Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme' (2009) Recoueil des cours 177–506, 311–389. See also, *Exchange of Greek and Turkish Populations*, PCIJ, Series B No 10, Advisory Opinion of 21 February 1925, 20.

242 *Maestri v Italy*, ECtHR (Grand Chamber), App No 39748/98, Judgment on Merits and Just Satisfaction of 17 February 2004, para 47 (stating that 'it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it').

243 For example, Article 2 of the ACHR put a condtion that '[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, [...]'.

As evidence of negative remedial subsidiarity, human rights courts initially adopted the *cost-centred* approach rather than the *victim-centred* approach.[244] In fact, the IACtHR in the first decade of its history denied the alleged violation of Article 25 of the ACHR without seriously considering whether domestic remedies were effective.[245] The procedural requirement of exhaustion of domestic remedies under Article 46(1)(a) 'allows the State to resolve the problem under its internal law before being confronted with an international proceeding' and was designed for the 'benefit of the State'.[246] During the same period, the San José Court focused on monetary 'fair compensation' enshrined in Article 63(1) of the ACHR for injuries suffered by victims.[247] In a similar way, the ECtHR categorically determined that the safeguards of Article 6(1) of the ECHR (right to a fair trial), implying the full protection of a judicial procedure, had been stricter as a *lex specialis* than those of Article 13.[248] The Strasbourg Court also relied on pecuniary compensation and declaratory relief as 'just satisfaction' stipulated in Article 41 of the ECHR.[249]

Remedial subsidiarity is also implied in the execution or compliance with the judgements of human rights courts. In the ECHR context, States Parties abide by the Strasbourg Court's judgement (Article 46(1)), and it shall be transmitted to the CoM, which shall supervise its execution (Article 46(2)).[250] When the implementation of comprehensive and complex measures, possibly of a legislative and administrative character, involve

244 Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of Internationall Law 270–332, 288–292.

245 For example, *Caballero-Delgado and Santana v Colombia*, IACtHR, Series C No 22, Judgment on Merits of 8 December 1995, para 66 (the Court determined that Art. 25 was not violated 'inasmuch as the writ of habeas corpus filed on behalf of the victim).

246 *Velásquez-Rodríguez* (n 9) para 61.

247 Douglas Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 191–223, 194.

248 *Brualla Gómez de la Torre v Spain*, ECtHR, App No 155/1996/774/975, Judgment on Merits and Just Satisfaction of 19 December 1997, para 41.

249 Bernhardt (n 3) 245–246.

250 For a variety of actors in the supervision process, see Andrew Drzemczewski, 'The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court' (2010) 28 *Netherlands Quarterly of Human Rights* 164-178; Lucja Miara and Victoria Prais, 'The Role of Civil Society in the Execu-

various authorities, the Strasbourg Court often refrains from exercising its judicial function when the political body is 'better placed and equipped' to address the judgement execution.[251] In contrast, the ACHR itself does not determine which organ of the Inter-American system has jurisdiction to monitor compliance with IACtHR binding judgements (Article 68(1) of the ACHR). Although Article 65 of the ACHR stipulates the report procedure for judgement compliance, there has been little discussion on this topic in the General Assembly of the Organization of American States because States Parties are reluctant to have their own human rights situations brought to light.[252] In other words, there has certainly been an 'institutional gap' between the political and judicial treaty organs for the supervising mechanism of judgement compliance.[253]

(ii) Granting Margin of Appreciation to Domestic Courts

Judicial control by international courts has a significant influence on the legislative, administrative and judicial acts of domestic authorities. It is unlikely that States Parties intend to transfer to international courts the authority to decide issues as closely related to state sovereignty such as criminal justice, and thus lose their power of self-government.[254] As long as the function beyond dispute settlement exercised by international courts wields significant influence over domestic legal orders, other legitimacy sources need to be explored to complement state consent and international

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tion of Judgments of the European Court of Human Rights' (2012) 5 *European Human Rights Law Review* 528–537.

251 For example, *Burdov v Russia (No.2)*, ECtHR, App No. 33509/504, Judgment on Merits and Just Satisfaction of 15 January 2009, para 137.

252 Cecilia M Baillet, 'Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' (2013) 31 *Nordic Journal of Human Rights* 31 (2013) 477–495, 478–480.

253 Magnus Jesko Langer and Elise Hansbury, 'Monitoring Compliance with the Decisions of Human Rights Courts: The Inter-American Particularism' in Laurence Boisson de Chazournes, Marcelo Gustavo Kohen, Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff 2013) 213–245, 230–236.

254 Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter- American Court of Human Rights' (2012) 12 *International Criminal Law Review* 665–695, 685.

legality as the bases of the judicial function of international courts.[255] As a matter of fact, the ICJ decisions in consular assistance cases left to the national discretion to choose measures, has been respected in granting remedies.[256] In the *LaGrand* judgement, the Hague judges clarified that the remedial obligation incumbent upon the Respondent 'can be carried out in various ways' and that '[t]he choice of means must be left to the United State'.[257] In a later ruling in *Avena*, the World Court reiterated that 'the concrete modalities for such review and reconsideration should be primarily left to the United States'.[258]

To legitimise the judicial control of national acts by human rights courts, the margin of appreciation doctrine has been developed as a corollary of the subsidiarity principle. Margin of appreciation refers to 'a degree of flexibility in the operation of the law' and calls for 'a certain deference towards the principal actors of society'.[259] In relation to international adjudication, the margin of appreciation doctrine, like the standard of review, functions as a means for determining the degree of deference to states in the performance of international obligations.[260] The ECtHR is the principal contributor to the margin of appreciation doctrine, by which it is defined as 'the breadth of deference the Strasbourg organs will allow to national legislative, executive and judicial bodies before they will disallow a national derogation from the Convention, or before they will find a restriction of a substantive Convention right incompatible with a State Party's obligations under the Convention'.[261] As this definition shows, the ECtHR has finessed the doctrine mainly with respect to Articles 8–11

255 Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) *Leiden Journal of International Law* 49–72, 50.

256 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907–940, 935–936.

257 *LaCrand (Germany v United States of America)*, Judgment of 27 June 2001, ICJ Reports 2001, 466, para 125.

258 *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004, 12, para 131.

259 Jean-Pierre Cot, 'Margin of Appreciation' in Wolfrum (n 225) updated in 2007, para 1.

260 See in general Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press 2014).

261 Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 *Connecticut Journal of International Law* 111–159, 118.

(personal sphere rights), Article 1 of the First Protocol (right to property), Article 14 (the prohibition of discrimination), and Article 15 (derogation) under the ECHR.[262] The European *consensus*, as discussed in the previous chapter, has been pursued by the Strasbourg Court to determine 'the wider the margins the court is prepared to grant to the national institutions'.[263]

In contrast, the IACtHR has approached the margin of appreciation doctrine in a limited number of cases. Behind the IACtHR's static jurisprudence on this doctrine, there has been frontal opposition, as represented by former president Cançado Trindade, who stated that no domestic discretion should be allowed with regard to traditional types of grave violations in the Americas, such as forced disappearances, extrajudicial killings or torture.[264] As we already confirmed in the previous chapter, the same logic may be applied to the Court's reluctance to search for regional *consensus* as the criterion for determining the degree of national discretion.[265]

Legitimacy sources from subsidiarity and the margin of appreciation doctrine can be elucidated through the constitutional principle of *separation of powers beyond the State*.[266] According to the characterisation by Mattias Kumm, the principle of subsidiarity provides the *jurisdictional* legitimacy that compensates international legality as the formal legitimacy of international law.[267] As a jurisdictional legitimacy factor, subsidiarity serves in two opposite directions: *negatively* working 'to assess, guide and constrain transnational legal practice', and *positively* working to 'strengthen rather than weaken the comparative legitimacy of international law over national law'.[268] As its corollary, the margin of appreciation doctrine is also described as a 'natural product' of the separation of powers between

262 Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2002) 5–8.

263 Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York Journal of International Law and Policy* 834–854, 851.

264 Pablo Contreras, 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11 *Northwestern Journal of International Human Rights* 28–82, 61–67.

265 Neuman (n 112)107.

266 Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2015) Chap 4.

267 Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907–931, 920–924.

268 Ibid.

States Parties and human rights courts.[269] In terms of the separation of powers, the subsidiarity principle and the margin of appreciation doctrine are based on an argument from *institutional competence*, which emphasises 'a *chronological* or *procedural* priority of domestic control over international control'.[270] The institutional aspect emphasises the criteria of relative *efficiency* and *effectiveness* to determine 'which can better maximize results while minimizing costs in the pursuit of a given shared objective'.[271]

Another source that legitimatises subsidiarity-based conventionality control is the constitutional principle of *democracy*, which is described as one of the central cornerstones in the ACHR and ECHR preambles and provisions. Even within domestic legal systems, judicial review might undermine democratic values because unelected judges performed the task (the counter-majoritarian difficulty).[272] This problem can be more worrisome when decision-making is left to international tribunals which are beyond national control.[273] Although there is no necessary correlation among decentralisation, democracy and respect for human rights, any decentralisation permits greater community and individual participation in self-government, favouring small political units with substantial autonomy.[274] Thus, by allocating authority for the benefit of States Parties as the lower entities, the principle of subsidiarity also functions in 'setting out the conditions under which and the manner in which international courts should decide a case, following the purpose to protect, safeguard and promote individual and collective self-determination'.[275]

In terms of democratic legitimacy, subsidiarity involves not only the institutional aspect but also another aspect that 'requires an assessment of

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269 Herbert Petzold, 'The Convention and the Principle of Subsidiarity' in Ronald St J MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 41–62, 49.

270 Goerge Letsas, 'Two Concepts of the Margin of Appreciation' (2006) *Oxford Journal of Legal Studies* 705–732, 721 (emphasis in the original text).

271 Andreas von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *International Journal of Constittuional Law* 1023–1049, 1034–1038.

272 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (Yale University Press 1986) 16.

273 Ulfstein (n 26) 147.

274 Dinah Shelton, 'Subsidiarity and Human Rights Law' (2006) 27 *Human Rights Law Journal* 4–11, 7–11.

275 Simon Hentrei, 'Generalising the Principle of Complementarity: Framing International Judicial Authority' (2013) 4 *Transnational Legal Theory* 419–435, 426 (carefully distinguishing complementarity and subsidiarity).

the *relative normative appropriateness* of taking decisions at the lower or the higher level of political organization'.[276] To borrow the words of Letsas, 'national authorities are not only the first ones to deal with complaints regarding the Convention rights and provide remedies, but also the ones who have either *more legitimacy* or are *better placed* than an international body to decide on human rights issues'.[277] Based on the normative concept, the application of a national margin of appreciation suggests that a human rights court 'lacks democratic accountability so that it ought to defer to national or local legitimacy' in light of negative subsidiarity.[278] Conversely, conventionality control by human rights courts may be legitimised under positive subsidiarity to the extent that States Parties are no longer *better placed* to decide the human rights issues at stake.[279]

B. Distributing Powers to Regional Courts

(i) Positive Subsidiarity for Allocating Powers to Regional Courts

The positive aspect of subsidiarity, in contrast to its negative one, is defined as 'the *possibility* or even the *obligation* of interventions from the higher organization'.[280] Put differently, 'should the Member States not successfully guarantee minimum protection – harming human rights and human dignity – then an appeal could be made on positive subsidiarity'.[281] The positive concept of subsidiarity may be found in other fields of international law. A literal example is the ICC's *positive complementarity*, which could help 'the Court regulate a "margin of appreciation" afforded to national governments in determining which accountability mechanisms

276 Von Staden (n 271) 1034–1038 (emphasis in the original text).
277 Letsas (n 270), 720–721 (emphasis added).
278 Yutaka Arai-Takahashi, 'Disharmony in the Process of Harmonisation? – The Analytical Account of the Strasbourg Court's Variable Geometry of Decision-Making Policy Based on the Margin of Appreciation Doctrine' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonization* (Edward Elgar 2011) 95–114, 104–106.
279 Regarding the 'better placed' arguments, Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journa*l 80–120, 110–111.
280 Endo (n 227) 2054–2053 (emphasis in original text).
281 Didier Fouarge, *Poverty and Subsidiarity in Europe: Minimum Protection from an Economic Perspective* (Edward Elgar 2004) 30.

are most appropriate within their particular context'.[282] In a broader context, the *responsibility to protect* doctrine similarly includes the positive aspect of 'the subsidiary responsibility of the international community for guaranteeing human security when the territorial state fails in its duty to protect'.[283]

The positive aspect in the margin of appreciation can also be observed in ICJ jurisprudence. In the previously mentioned consular cases *LaGrand* and *Avena*, the Hague judges underlined that 'freedom in the choice of means for such review and reconsideration is not without qualification [but] has to be carried out "by taking account of the violations of the rights set forth in the Convention"'.[284] The World Court caught another opportunity to elaborate this point in the third consular conflict between India and Pakistan in the *Jadhav* ruling: 'a special emphasis must be placed on the need for the review and reconsideration to be effective' by 'ensur[ing] that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined'.[285]

Apart from the context of remedial obligation, the margin of appreciation doctrine for judicial review was implicitly developed in the *Whaling* case.[286] The ICJ acknowledged that Article VIII of the Whaling Convention 'gives discretion to a State party to the International Convention for the Regulation of Whaling to reject the request for a special permit or to specify the conditions under which a permit will be granted'.[287] The Court established conditions, however, that the question of whether the killing, taking and treating of whales 'for purposes of' scientific research under Article VIII 'cannot depend simply on that State's perception', and therefore, shall be assessed by 'examining whether, in the use of lethal

282 William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal 53–108, 75.

283 Peters (n 48) 536–537.

284 LaGrand (n 17) para 125; Avena (n 17) para 131.

285 *Jadhav (India v Pakistan)*, Judgment, ICJ Reports 2019, 418, para 139. See also, Victor Kattan, 'Jadhav Case (India v. Pakistan)' (2020) 114 *American Journal of International Law* 281–287.

286 Enzo Cannizzaro, 'Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?' (2017) 27 *European Journal of International Law* 1061–1069.

287 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, para 61.

methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives'.[288]

(ii) Restricting Margin of Appreciation by Regional Courts

The principle of subsidiarity turns to the positive side to combat systemic human rights violations caused by domestic legal deficiencies. Traditionally, the ECtHR has maintained the declaratory nature of judgements and allowed States Parties broad discretion in choosing appropriate means for judgements execution. In comparison with the IACtHR activism, the Strasbourg Court's approach has been evaluated as *delegative* compliance.[289] However, the situation has recently changed because human rights violations have occurred repeatedly and under similar circumstances due to malfunctions within domestic legal systems, mainly within the new member states of the CoE from Central and Eastern Europe.[290] In some instances, the Strasbourg Court has concretely specified the remedial measures if, by its very nature, the violation did not leave any real choice as to the measures required to remedy it.[291]

The epoch-making decision is *Kudła v. Poland*, in which the ECtHR revised its own case law judgement concerning the excessive length of proceedings so that Article 13 of the ECHR could be viewed independently of the examination of Article 6. In this context, the Strasbourg Court emphasised that '[t]he growing frequency with which violations in this regard are being found has recently led the Court to draw attention to "the important

288 Ibid para 67.

289 Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law & International Relations* 35–85, 43–55.

290 Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 485–486.

291 Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases' (2007) 7 *Human Rights Law Review* 396–411, 408–410; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 *Human Rights Law Review* 451–478; Veronika FikFak, 'Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim: It's All about the State' (2020) 33 *Leiden Journal of International Law* 335–369.

danger" that exists for the rule of law within national legal orders'.[292] Subsequently, based on the principle of subsidiarity embedded in Articles 1, 13 and 35, the Court issued a warning that individual complaints 'in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system'.[293] As a conclusion, it found that the means available to the applicant in Polish law did not meet the standard of effectiveness for the purpose of Article 13.[294]

As regards the admissibility test, new criteria were introduced under Article 35(3)(b) of the ECHR with the entry into force of its Protocol No 14 on 1 June 2010, which allows the Court to declare inadmissible any individual application, according to this new provision, if it is considered that 'the applicant has not suffered a significant disadvantage'. The significance-focused criteria were 'necessary in view of the ever-increasing caseload of the Court' against the background of repeated human rights violations.[295] Additionally, the protocol also inserted a safeguard clause that an individual application may be admissible if 'respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'. The 'respect for human rights' safeguard can be invoked, according to the Strasbourg jurisprudence, 'where a case raises questions of a *general* character affecting the observance of the Convention, for instance whether there is a need to clarify the States' obligation under the Convention or to induce the respondent State to resolve a *structural deficiency*'.[296] To the extent that neither 'significant disadvantage' nor 'respect for human rights' is clearly defined, the new mechanism of admissibility will allow the ECtHR to 'be free to use wide discretion in application of this criterion so that it might be relaxed in order to do justice' beyond individual cases.[297]

These judgements and institutions imply that subsidiarity nowadays works for both directions to the restriction of and to the enforcement of

292 *Kudła v Poland* (n 234) paras 146–149.
293 Ibid paras 154–155.
294 Ibid paras 150–160.
295 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, para 78.
296 *Savelyev v Russia*, ECtHR, App No 42982, Decision of 21 May 2019, para 33 [emphasis added].
297 Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Macmillan International Higher Education, 2018) 61–62.

the control by the human rights court, as a function of the evaluation of the effectiveness of national remedial systems concerning the Convention rights.[298] In the latter *positive* enforcement, the ECHR provisions reflecting subsidiarity are exploited 'to reshape national legal systems to the likelihood that state officials will remedy human rights violations at home'.[299] In this process, *positive* subsidiarity can justify the Court's becoming 'more prescriptive in defining remedial measures' when States Parties fail to fully secure Convention rights at the national level.[300]

In comparison to the European practice, the IACtHR has more dramatically developed its case law on *reparaciones transformadoras* to great effect in order to reconstruct domestic legal measures that are in line with the ACHR.[301] Because the San José Court specifies concrete remedial courses of action against the respondent States, its approach has been described as *checklist* compliance, as if saying: 'Complete this list of remedies, and tell us when it's finished. We will then check what you have done'.[302] These reparations are also characterised as *dissuasive* measures in the sense that '[s]uch rulings are oriented toward the future and are not strictly concerned with injured party'.[303]

In the 1997 merits judgement of *Castillo-Páez v. Peru*, as a pre-emptive example, the IACtHR decided for the first time the violation of Article 25 of the ACHR, in relation to Article 1(1), to the detriment of both the vic-

298 Kaoru Obata, 'The Emerging Principle of Functional Complementarity for Coordination Among National and International Jurisdictions: Intellectual Hegemony And Heterogeneous World' in Takao Suami, Anne Peters, Mattias Kumm and Dimitri Vanoverbeke (eds.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018) 451–469, 455.

299 Laurence R 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, 146.

300 Philip Leach, 'No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies' in Føllesdal and Others (n 149) 142–180, 178.

301 Rodrigo Uprimny Yepes y María Paula Saffon, 'Reparaciones transformadoras, justicia distributiva y profundización democrática' in Catalina Díaz Gómez, Nelson Camilo Sánchez, Rodrigo Uprimny Yepes (eds), *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusión* (Centro Internacional para la Justicia Transicional y Centro de Estudios de Derecho, Justicia y Sociedad 2009) 31–70.

302 Hawkins and Jacob (n 289) 43–55.

303 Judith Schönsteiner, 'Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights' (2007) 23 *American University International Lwe Review* 127–164, 139–159.

tim and his next of kin due to the ineffectiveness of the remedy of *habeas corpus*.[304] In the 1998 reparation judgement, the Court combined Articles 25 and Article 8 (the right to a fair trial), the close link of which imposes on the respondent state 'a duty to investigate the human rights violations and prosecute those responsible and thus avoid impunity'.[305] In conclusion, noting the special nature of the violation of the right to judicial protection, the Court decided to integrate the obligations of investigation and punishment of those responsible into reparation measures.[306] As Judge Ferrer MacGregor characterised it, the rights to judicial protection and a fair trial possess 'an integrative dimension of the sources of law (domestic and of the Convention) that serve as the basis for guaranteeing' domestic remedies.[307] It thus follows that these provisions function not only to provide effective relief to victims but also to control the compatibility of domestic legal systems with Convention standards.[308]

The effectiveness of domestic remedies has been increasingly significant in examining the way they have been exhausted as a criterion of admissibility. Historically, dictatorship remained endemic in the political life of Latin American States, and violence continued to be the principal vehicle for the attainment of political power in many States.[309] Against the background of these chaotic environments, Latin American States abused the admissibility criteria under Article 46(1) to escape from international jurisdiction that might be unfavourable to them, by claiming the formal existence of domestic remedies for the victims.[310] This situation had already been anticipated, however, even in the drafting stage of the Convention, as Article 46(2) thereof stipulates a number of exceptions to the requirement of exhaustion of domestic remedies. Inter-American jurisprudence has also consolidated the view that the remedies to be exhausted at the domestic level by victims must be *adecuados y efectivos*.[311]

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304 *Castillo-Páez v Peru*, IACtHR, Series C, No. 34, Judgment on Merits of 3 November 1997, para 43.
305 Ibid paras 69–70.
306 Ibid.
307 Concurring Opinion of Judge Eduardo Ferrer MacGregor Poisot, *Liakat Ali Alibux v Surinam*, IACtHR, Series C No 276, Judgment on Preliminary Objections, Merits, Reparations and Costs of 30 January 2014, para 73.
308 Ibid paras 69–94.
309 Cabranes (n 6) 1175–1176.
310 Burgorgue-Larsen (n 8) 138.
311 Ibid 138–143; Liliana Tojo y Pilar Elizalde, 'Artículos 44–47: Competencia de la Comisión Interamericana de Derechos Humanos' in Christian Steiner and

In a nutshell, it may be argued that the *negative* aspect of 'subsidiarity play[s] a fairly small role in the IACtHR's remedial practice'.[312] Instead, its *positive* aspect restricts the national margin of appreciation for choosing appropriate remedial means. In practice, the Competence Judgement of *Baena-Ricardo* elucidated that Article 63(1) of the ACHR 'grants the Inter-American Court a wide margin of judicial discretion to determine the measures that all the consequences of the violation to be repaired'.[313] Given this broad remedial power, as the Inter-American judges themselves admit, '[i]f [national] mechanisms do not satisfy criteria of *objectivity*, *reasonableness* and *effectiveness* to make adequate reparation for the violations of rights recognized in the Convention that have been declared by this Court, it is for the Court, in exercise of its subsidiary and complementary competence, to order the pertinent reparations'.[314]

2. International Centralisation and Decentralisation of Conventionality Control Powers

A. Centralising Conventionality Control Powers to Regional Courts

(i) Prescribing Remedies for Systemic Violations

Against the background of systemic human rights violations, especially in Central and Eastern Europe, the ECtHR has increasingly engaged in supervising compliance with its own judgements under Article 46 of the European Convention.[315] In the 2004 *Broniowsk v Poland* ruling, the European Court further departed from its moderate stance and elaborated the so-called *pilot-judgement procedure* to prescribe general measures.[316] In the application of Article 46 of the ECHR, the Strasbourg Court observed

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Patricia Uribe (eds), *Convención Americana sobre Derechos Humanos: Comentarios* (Konrad Adenauer Stiftung 2014) 765–784, 778–781.

312 *Neuman* (n 1) 373.

313 *Baena-Ricardo and Others* (n 152) para 64.

314 *Cepeda Vargas* (n 234) para 246 (emphasis added).

315 Lize R Glas, 'The European Court of Human Rights supervising the execution of its judgments' (2019) 37 *Netherlands Quarterly of Human Rights* 228–244.

316 Lech Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments' in Lucius Caflisch, Johan Callewaert, Roderick Liddell, Paul Mahoney and Mark Villiger (eds), *Liber Amicorum Luzius Wildhaber: Human Rights: Strasbourg Views* (N P Engel 2007) 177–192, 182–186.

a widespread problem resulting from a malfunction in Polish legislation and administrative practice affecting, and remaining capable of affecting, a large number of persons.[317] Based on Articles 1 and 13 of the ECHR incorporating the principle of subsidiarity, the Court finally expressed that general measures at a national level were undoubtedly called for in execution of the present judgement.[318]

The pilot-judgement procedure of *Burdov v Russia (No 2)* is also worth noting, in which the ECtHR clearly demanded legislative reform of the respondent state. With regard to the violation of Article 6 of the ECHR, the Court noted that the implementation of necessary measures 'raises a number of complex legal and practical issues which go, in principle, beyond the Court's judicial function'.[319] However, the Court differentiated the violation of Article 13 from that of Article 6 and asserted that '[i]t appears highly unlikely in the light of the Court's conclusions that such an effective remedy can be set up without changing the domestic legislation on certain specific points'.[320]

It is notable in this context that the ECtHR has become aggressive in effectively implementing its own judgements. The new mechanism of infringement proceedings introduced under Article 46(4) was introduced through Protocol No 14, based on which the Court is required to make a definitive legal assessment of the question of compliance by taking into consideration all aspects of the procedure before the Committee of Ministers. The only opportunity for mobilising this tool thus far is the *Ilgar Mammadov v Azerbaijan* case, in which the failure of compliance with the 2014 principal judgement was determined in the 2019 infringement procedure judgement.[321] Another occasion in which the Strasbourg Court substantively intervened in the execution of its own judgements through the pilot-judgement procedure was the 2014 judgement on just satisfaction in *Cyprus v Turkey*. To deal with systemic human rights violations caused by the dysfunction of domestic legal systems, the ruling was 'the first time in the Court's history that the Court has made a specific judicial statement as to the import and effect of one of its judgments in the

317 *Broniowski v Poland*, ECtHR (Grand Chamber), App No 31443/96, Judgment on Merits of 22 June 2004, para 189.
318 Ibid paras 191–192.
319 *Burdov (No.2)* (n 251) para 137.
320 Ibid paras 138–139.
321 *Ilgar Mammadov v Azerbaijan*, ECtHR (Grand Chamber), App No 15172/13, Judgment on Article 46(4) of 29 May 2019.

context of execution'.[322] Facing the non-execution of the 2001 principal judgement by the Respondent state under the CoM's political supervision, the Court emphasised that Turkey is still formally bound by the relevant terms of the principal judgement and reaffirmed that the 2005 *Demopoulos* inadmissibility decision did not intend to dispose of the question of Turkey's compliance with the principal judgement.[323] According to the concurring opinion of nine judges, '[t]he present judgment heralds a new era in the enforcement of human rights upheld by the Court and marks an important step in ensuring respect for the rule of law in Europe'.[324]

As the Strasbourg Court invokes Articles 1, 13, 35 and 46 of the ECHR, all of which reflect the principle of subsidiarity, the pilot-judgement procedure involving changes in national legislation fit with the idea of positive subsidiarity.[325] Laurence Helfer has developed the doctrine of *embeddedness*, according to which '[s]trategically embedding the ECtHR in national legal systems provides such solutions where the justifications for [negative] subsidiarity are lacking'.[326] The embeddedness doctrine, in his view, 'authorizes the ECtHR to adopt a more interventionist stance' or 'a more assertive (but hopefully temporary) supervisory role' in order to 'enhance the ability of domestic actors to prevent or remedy violations of international rules "at home"'.[327] Essentially, 'embeddedness is a deep structural principle of the European Convention, one that provides an essential counterpoint to the deep structural principle of subsidiarity'.[328]

Inter-American jurisprudence on transformative reparations has furthermore been radicalised to intervene into domestic spheres. A representative example is the reparation judgement of *Bámaca-Velásquez v. Guatemala*, in which the IACtHR proceeded to order guaranteeing of non-repetition to *la sociedad como un todo* (the society as a whole). Remarkably, the Court developed the *right to the truth*, which stems from the combination of Arti-

322 Ibid, Joint Concurring Opinion of Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto de Albuquerque, para 1.
323 *Cyprus v Turkey*, Judgment on Just Satisfaction (n 116) para 63.
324 Ibid Joint Concurring Opinion of Judges Zupančič, Gyulumyan, Davíd Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto de Albuquerque, para 1.
325 Eva Brems, 'Positive Subsidiarity and Its Implications for the Margin of Appreciation Doctrine' (2019) 37 *Netherlands Quarterly of Human Rights* 210–227.
326 Helfer (n 299) 130.
327 Ibid 149 (parenthesis in the original text).
328 Ibid 130.

cles 8 and 25 of the ACHR.[329] According to its reasoning, the opportunity for the victim's next of kin to know the truth was a means of reparation and therefore an expectation by the state to satisfy the victim's next of kin and the society as a whole.[330] Based on the collective aspect of the right to the truth, the Court explained that the reparations that had to be made by Guatemala necessarily included not only effective investigation of the facts and punishment of all those responsible but also dissemination of their results to the *society as a whole*.[331] In accordance with Article 1(1) of the ACHR, the respondent state was mandated to take all necessary steps to 'ensure that these grave violations do not occur'.[332]

As previously explained in the Introduction to the monograph, the doctrine of conventionality control emerged from the essential connection between primary (obligation to *harmonise*) and secondary norms (future-oriented, preventative *restoration*). In the major *Almonacid-Arellano v. Chile* ruling, concerning the amnesty law under the Pinochet regime, the IACtHR expressed for the first time in its jurisprudence the necessity of conventionality control of legislative actions. During the merits stage, the Court concluded that Article 2 of the ACHR had been violated because the amnesty law was 'manifestly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect[ed] rights embodied in such Convention'. Subsequently, the Court ordered the state to 'ensure that [the amnesty law] does not continue to hinder the investigation, prosecution and, as appropriate, punishment of those responsible for similar violations perpetrated in Chile'.[333] The Court's aim becomes apparent when looking at its explanation in the judgement compliance procedure that 'the most appropriate way to [correct the root causes of violations] is through a legislative amendment'.[334]

Positive subsidiarity in the Inter-American jurispurdence is well explicated in Ariel Dulitzky's *integration principle.* As the case law analysed above demonstrates, the San José Court 'seeks to embed the American Convention in national legal systems in order to provide solutions where justi-

329 *Bámaca-Velásquez v Guatemala*, IACtHR, Series C No 70, Judgment on Merits of 25 November 2000, paras 199–202.
330 *Bámaca-Velásquez v Guatemala*, IACtHR, Series C No. 91, Judgment on Reparations and Costs of 22 February 2002, paras 76–77.
331 Ibid para 73.
332 Ibid para 77.
333 *Almonacid-Arellano and Others*, Judgment (n 21) paras 144–145.
334 *Almonacid-Arellano and Others v Chile*, IACtHR, Monitoring Compliance with Judgment, Order of 18 November 2010, para 20.

fications for [negative] subsidiarity fail'.[335] According to the integration model, '[b]y requiring domestic judges in each of their cases to examine the compatibility of state actions or omissions and the compatibility of the national legal framework with the Convention, the Inter-American instrument becomes an integral part of domestic legal systems at the highest possible level'.[336] At the same time, '[b]y grounding the conventionality control in a partnership between the Court and local tribunals, the integration principle embraces the foundations of the subsidiarity principle'.[337]

The IACtHR's prescription for remedies for systemic violations depends on the use of self-control to comply with its own judgements.[338] In contrast to the CoE framework, as noted above, the ACHR does not determine which organ of the Inter-American system has the jurisdiction to monitor compliance with the IACtHR binding judgements. Against this background, in *Baena-Ricardo et al v Panama*, the IACtHR recognised for the first time its competence in monitoring compliance with its own judgements.[339] However, the San José Court has been plagued with a low compliance rate, especially with regard to judgements demanding legislative and administrative reforms that are addressed to political bodies.[340] In the recent resolution in *Apitz-Barbera*, the IACtHR indeed invoked the concept of *garantía colectiva* to confirm 'the task of the OAS General Assembly, in the case of manifest non-compliance with a judgment delivered by the Inter-American Court by one of the States, is precisely that of protecting the practical effects of the American Convention and preventing inter-American justice from becoming illusory by being at the discretion of the internal decisions of a State'.[341]

As an interim conclusion, the jurisprudence of both human rights courts shows that the *positive* concept of subsidiarity *concentrates* the com-

335 Dulitzky (n 24) 54.
336 Ibid.
337 Ibid 81.
338 Pablo Saavedra Alessandri, 'The Role of the Inter-American Court of Human Rights in Monitoring Compliance with Judgments' (2020) 12 *Journal of Human Rights Practice* 178–184.
339 *Baena-Ricardo and Others* (n 152) paras 84–104.
340 For an excellent empirical analysis on compliance rate of the jugments of human rights courts, see in general Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014).
341 *Apitz-Barbera and Others* ('*First Court of Administrative Cisputes*') *v Venezuela*, IACtHR, Monitoring Compliance with Judgment, Order of 23November 2012, para 47.

petence in favour of human rights courts to prescribe specific reparations. The essential connection between those provisions that embody subsidiarity accordingly enables human rights courts to control the compliance of domestic legal systems against the yardstick of the Conventions.

(ii) Identifying Organs Responsible for Systemic Violations

It should not be underestimated that, when prescribing general remedial measures, human rights courts penetrate into the state to open a line of interaction with state organs. The IACtHR orders requiring investigation and punishment ordered are expected to be implemented by the public ministry and judiciary even though they are formally directed to the state as a whole.[342] In pilot-judgement procedures, the ECtHR similarly considered judgements of domestic courts and created momentum for a productive dialogue with counterparts inside the state.[343] These developments seem to be equivalent to *piercing the State's veil* that has ever decoupled national organs within the state from international actors.

The state has traditionally been regarded as an indivisible entity possessing its own separate personality.[344] This understanding stems from an *external* perspective that has been deeply ingrained in international law, which assumes 'a national constitutional order as a monolithic, undivided and undifferentiated, block of political and legal power, irrespective of the particularities of internal constitutional arrangements and constitutionalism more broadly'.[345] Nevertheless, as Rosalyn Higgins points out, 'compliance with the findings of international tribunals is made the more difficult exactly because while "the state" carries the international obligation to comply, the necessary action to achieve that must internally be performed by organs of state'.[346] Against this difficulty, Higgins then proposed 'the need to look behind the monolithic face of "the state", when dealing

342 Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493–533, 521–525.

343 Lech Garlicki, Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6 *International Journal of Constitutional Law* 509–530, 512–522.

344 Fitzmaurice (n 39) 77.

345 David Haljan, *Separating Powers: International Law before National Courts* (Springer 2013) 14.

346 Rosalyn Higgins, 'The Concept of 'The State': Variable Geometry and Dualist Perceptions' in Laurence Boisson de Chazournes and Vera Gowland-Debbas

with issues of compliance, and the attendant problems of dualist systems (both for those states themselves and for international tribunals)'.[347] In other words, to ensure compliance with their own decisions, international courts should break down their orders within the lines of the separation of powers inside the state.[348]

Given this intricate problem, some international courts have ventured to pierce the veil of the state, which has completely decoupled the relationship between international courts and the national organs within it.[349] As has already been noted above, the ICJ recently addressed the judiciary's role because it has been presented with regard to certain cases concerning the administration of domestic justice.[350] Such a penetration into the state by international courts cannot immediately change the powers of state organs within domestic legal orders.[351] However, such a possible step from *black box theory* to *state organ obligation* can enhance compliance by specifying and urging the state organs to take responsibility for implementing judgements.[352] The potential to pierce the state's veil would be particularly significant for the IACtHR and ECtHR, whose judgement compliance rates have been relatively troubled.

The practice of piercing the state's veil can be found explicitly in the *control de convencionalidad* doctrine, which has been developed by the IACtHR since *Almonacid-Arellano*. In this judgement, the Court found a violation of Article 2 of the ACHR due to 'formally keeping within its legislative *corpus* a Decree Law which is contrary to the wording and the spirit of the Convention' and ordered reparation measures virtually aimed

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(eds), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff 2001) 547–561, 547.

347 Ibid 561.

348 Huneeus (n 342) 521–525.

349 Jean Matringe, 'L'exécution par le juge étatique des décisions judiciares internationales' (2013) 117 *Revue Générale de Droit International Public* 555–578, 561–567.

350 Vladen S Vereshchetin, 'On the Expanding Reach of the Rulings of the International Court of Justice' in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N Shaw and Karl-Peter Sommermann (eds), *Völkerrecht als Wertordnung: für Christian Tomuschat* (N P Engel 2006) 621–633, 624.

351 André Nollkaemper, 'Conversations among Courts: Domestic and International Adjudicators' in Cesare P R Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 523–549, 531.

352 Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003) 29 *Brooklyn Journal of International Law* 45–127, 109–120.

at political sectors.[353] Moreover, the Court also emphasised the original mission of domestic courts under the general obligations under the Convention and ordered corresponding reparations directed at the judiciary.[354] In this context, the Court stated that '*the Judiciary* must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the ACHR. To perform this task, *the Judiciary* has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention'.[355]

The reparation measure addressed to the judiciary was close to (judicial) *restitutio in integrum* in comparison with the above-mentioned reparation measure aimed at the legislature, which was a part of guarantees of non-repetition.[356] Oswald Ruiz-Chiriboga accurately categorised the distinctive roles of the legislature and the judiciary as follows: 1) the State must modify, derogate or otherwise annul or amend the municipal law that breached the Convention, and 2) *in the meantime* it should not apply that law to the case that was brought before the Court and all other similar cases. While the first reparation should be performed by the legislature, the second reparation is in the hands of the judiciary. Consequently, the judiciary must implement a 'narrow conventionality control', where the only discretion it has is to ascertain which cases fall into the same category as the one considered by the IACtHR; the judiciary has no discretion at all in the case decided by the IACtHR.[357]

In the case of 'narrow conventionality control', the judiciary would build a vertical relationship between the San José Court and domestic courts with little appreciation for the latter.[358] As a matter of fact, in the *Dismissed Congressional Employees v Peru*, the IACtHR expressly required domestic courts to 'exercise not only a control of constitutionality, but also of "conventionality" *ex officio* between domestic norms and the American

353 *Almonacid-Arellano and Others*, Judgment (n 21) paras 115–122.
354 Ibid paras 123–125, 145–157.
355 Ibid paras 123–125 (emphasis added).
356 Ibid para 144.
357 Oswaldo Ruiz-Chiriboga, 'The Conventionality Control: Examples of (Un)Successful Experiences in Latin America' (2010) 3 *Inter-American and European Human Rights Journal* 200–219, 205 (emphasis in the original text).
358 Humberto Nogueira Alcalá, 'El control de convencionalidad y el diálogo interjurisdiccional entre tribunales nacionales y Corte Interamericana de Derechos Humanos' (2013) 19 *Revista de Derecho Constitucional Europeo* 221–270, 247.

Convention'.[359] Moreover, in *Cabrera Garcia and Montiel Flores v Mexico*, the Court rejected the respondent state's preliminary objection that 'the national tribunals have exercised an *ex officio* "conventionality control" between the domestic rules and the American Convention', and proceeded to the merits stage to 'determine whether the conventionality control alleged by the State involved a respect for the State's international obligations in the light of this Tribunal's case law and under the applicable international law'.[360] In the same judgement, the Court also imposed conventionality control not simply on the judiciary but also on 'the judges and organs linked to the administration of justice *at all levels*'.[361]

Regarding these proactive interventions into domestic forums, the IACtHR in the *Santo Domingo Massacre* case for the first time expressed the connection between *control de convencionalidad* and subsidiarity (complementarity):

> [A] *dynamic and complementary* control of the States' treaty-based obligations to respect and ensure human rights has been established between the domestic authorities (who have the primary obligation) and the international instance (*complementarily*), so that their decision criteria can be established and harmonized.[362]

It follows then that subsidiarity, specifically its positive aspect, enables the San José Court to designate the particular national organs responsible for controlling the compliance of national legal systems with the ACHR, to the extent that the alleged conventionality control by States Parties falls short of the pertinent criteria.

A similar, but more moderate, practice of piercing the state's veil is demonstrated in the ECtHR case law. Examples include *Dimitrov and Hamanov v Bulgaria* and *Finger v Bulgaria*, which concerned the excessive length of proceedings and the lack of domestic remedy. In applying the pilot-judgement procedure to these cases, the Strasbourg Court differentiated the violation of Article 13 from that of Article 6 under the ECHR, and affirmed that 'the introduction of effective domestic remedies in this domain would be particularly important in view of the subsidiarity princi-

359 *The Dismissed Congressional Employees* (n 49) para 128.
360 *Cabrera Garcia and Montiel Flores* (n 35) para 21.
361 Ibid para 225 (emphasis added).
362 *The Santo Domingo Massacre v Colombia*, IACtHR, Series C No 259, Judgment on Preliminary Objections, Merits and Reparations of 30 November 2012, paras 142–143.

ple'.[363] Consequently, the Court found it appropriate to provide guidance to the respondent state 'in order to assist them in the performance of their duty under Article 46 § 1 of the Convention'.[364] To assist in the provision of redress for past proceedings delays, the Court provided detailed guidance for the Bulgarian judiciary.[365]

The ECtHR's power 'to assist the authorities in finding the appropriate solutions' for the structural violation of Article 13 of the ECHR was further developed in *Ananyev v Russia* regarding inhumane treatment in prisons. Given the logistical and legally complicated problems of violating Article 3 (prohibition of torture), the Court found that any *substantive mandate* in this area would go beyond its judicial function while still voicing its concerns and indicating possible ways to address the existing deficiencies.[366] By way of contrast, it was noted that the need for effective domestic remedies for violations of Article 13 was more pressing because the circumstance of large numbers of people affected by the violations being compelled to seek relief through time-consuming international litigation before the court is at odds with the principle of subsidiarity.[367] Stressing the special character of the violation of Article 13, the Strasbourg Court delivered a substantive mandate requiring 'clear and specific changes in the domestic legal systems that would allow all people in the applicants' position to complain about alleged violations'.[368] To facilitate national authorities in finding appropriate solutions, the Court then considered preventative and compensatory remedies, emphasising the work of the prosecutor's office and the domestic courts.[369] In the later decision of *Shmelev and Others*, the Court declared the individual applications inadmissible, as those applicants had not exhausted domestic remedies through the 2019 Compensation Act, which affords them an opportunity

363 *Dimitrov and Hamanov v Bulgaria*, ECtHR, App. No. 48059/06 and 2708/09, Judgment on Merits and Just Satisfaction of 10 May 2011, para 122.

364 Ibid para. 123. See also, *Neshkov and Other v Bulgaria*, ECtHR, App Nos 36925/10 and Other, Judgment on Just Satisfaction of 27 January 2015, para 280; *Varga and Others v Hungary*, ECtHR, App Nos 14097/12 and Others, Judgment on Merits and Just Satisfaction of 10 March 2015, para 108.

365 *Dimitrov and Hamanov* (n 363) para 128.

366 *Ananyev and Others v Russia*, ECtHR, App No 42525/07 and 60800/08, Judgment on Merits and Just Satisfaction of 10 January 2012, para 212.

367 Ibid para. 211.

368 Ibid paras 212–213.

369 Ibid paras 214–231.

to obtain compensatory redress domestically.[370] Moreover, the ECtHR resolutely retained its centralised power in dictating that 'the Court's ultimate supervisory jurisdiction remains in respect of any complaints lodged by the applicants who, in conformity with the principle of subsidiarity, have exhausted available avenues of redress'.[371]

In essence, another interim conclusion can be derived from the jurisprudence of human rights courts: *positive* subsidiarity *centralises* the competence towards human rights courts to discover underlying structural problems, indicate particular measures for rectifying those problems and, if necessary, pierce the veil of the state to designate the liable state organs. The subsidiarity principle therefore supports 'a revised system of states whose sovereignty is limited and conditional on whether the state actually does respect and promote individuals' well-being – perhaps enjoying a certain margin of appreciation'.[372]

B. Decentralising Conventionality Control Powers to Domestic Courts

(i) Margin of Appreciation in Conventionality Control

In developing the *control de convencionalidad* doctrine, the IACtHR has recognised a certain margin of appreciation for realising conventionality control at the national level. This attitude became apparent when the Court explained in *Liakat Ali Alibux v Surinam* that 'the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention'.[373] According to the IACtHR jurisprudence, States Parties retain the freedom to allocate the authority for conventionality control among national organs. Even at an early stage, the judiciary has been allowed to exercise conventionality control 'evidently in the context of their respective spheres of competence and the corresponding procedural regulations'.[374] In addition, the San José

370 *Shmelev and Others v Russia*, ECtHR, App Nos 41743/17 and Others, Decision of 17 March 2020, para 137.

371 Ibid, para 128. This formula has already appeared in *Demopoulos and Others v Turkey*, ECtHR (Grand Chamber), App Nos 46113/99 and Others, Decision of 1 March 2010, para 128.

372 Andreas Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 *Global Constitutionalism* 37–62, 60.

373 *Liakat Ali Alibux* (n 307) para 124.

374 *The Dismissed Congressional Employees v Peru* (n 49) para 128.

Court has clarified that conventionality control is delegated to '*all bodies of the State*, including its judges and other mechanisms related to the administration of justice at all levels'.[375] Compared with the original simple term *the judiciary*, this statement shed light on the range of organs responsible for conventionality control to include both judicial and political sectors.

As regards the compatibility between conventionality control and margin of appreciation, we can gain inspiration again from Judge MacGregor's opinion in *Cabrera Garcia and Montiel Flores v. Mexico*:

> [The control de convencionalidad doctrine] does not aim to establish which body has the final word, but to encourage creative jurisprudential dialogue, responsible and committed to the effectiveness of fundamental rights. National judges will now become the first Inter-American judges. It is they who bear the greatest responsibility to harmonize national legislation within the Inter-American parameters. The IACtHR should monitor this and be fully aware of the standards that will be constructed through the use of its jurisprudence, considering also the 'national discretion' [*margen de apreciación nacional*] that nation-States have to interpret the Inter-American *corpus juris*.[376]

In making a comment on these passages, Andrew Legg asserts that, while the conventionality control doctrine is supportive of the 'standard-unifying' approach to the role of Tribunals, it is clear that this doctrine is likewise compatible with the doctrine of margin of appreciation.[377]

The more diffused nature of conventionality control may be discovered in ECtHR jurisprudence, even in pilot-judgement procedures in which national discretion is regulated to a great extent. For instance, in *Greens and M T v the United Kingdom*, the ECtHR emphasised the wide margin of appreciation clarified in the *Hirst* judgement with regard to 'organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision'.[378] Therefore, the Court held that 'it is for the Government,

375 *Gelman v Uruguay*, IACtHR, Monitoring Compliance with Judgment, Order of 20 March 2013, para 66 (emphasis added).

376 Eduardo Ferrer Mac-Gregor, 'Interpretación conforme y control difuso de convencionalidad: El nuevo paradigma para el juez mexicano' (2011) 9 *Estudioos Constitucionales* 531–622, 620.

377 Legg (n 212) 112.

378 *Hirst v the United Kingdom (No 2)*, ECtHR (Grand Chamber), App No 74025/01, Judgment on Merits and Just Satisfaction of 6 October 2005, para 61.

following appropriate consultation, to decide in the first instance how to achieve compliance with Article 3 of Protocol No 1 when introducing legislative proposals'.[379]

(ii) Deference to Domestic Margin of Appreciation

Negative subsidiarity restricts an international review by human rights courts if national authorities have already achieved appropriate control in the domestic realm. When the IACtHR clarified for the first time the connection between *control de convencionalidad* and subsidiarity in *The Santo Domingo Massacre v Colombia* case, it also articulated that '[t]he State's responsibility under the Convention can only be required at the international level after the State has had the opportunity to declare the violation and to repair the damage caused by its own means'.[380] If domestic courts award reparations based on 'objective and reasonable' criteria, the Inter-American Court declines to order additional reparations.[381] In *Operation Genesis v Colombia*, concerning a case related to transitional justice in which a massive scale of reparations was required for numerous victims, the IACtHR recognised that 'the principle of complementarity of international law […] has been taken into account by the Court in other cases to acknowledge the compensation granted at the domestic level and to abstain from ordering reparations in this regard, when this is pertinent'.[382]

In recent jurisprudence, the Inter-American judges have remarkably refrained from determining State responsibility, especially when domestic judges appropriately exercised control of conventionality. In *Andrade Salmón v Bolivia*, the IACtHR appreciated that the alleged violation ceased because the State effectively guaranteed the victim's right to personal freedom through the judgements of the Plurinational Constitutional Court, which in turn constituted '*oportuno y adecuado control de convencionalidad*'.[383]The San José Court accepted preliminary objections to admissibility by the State Party in *Amrhein et al v Costa Rica* because the national

379 *Greens and M T v the United Kingdom*, ECtHR, App Nos 60041/08 and 60054/08, Judgment on Merits and Just Satisfaction of 23 November 2010, para 114.
380 *The Santo Domingo Massacre v Colombia* (n 362) para 142.
381 *R0dríguez Vera and others* (n 218) para 595.
382 *The Afro-descendant Communities v Colombia* (n 133) para 474.
383 *Andrade Salmón v Bolivia*, IACtHR, Series C No 330, Judgment on Merits, Reparations and Costs of 1 December 2016, para 100.

authorities, including the Constitutional Chamber of the Supreme Court, provided 'sufficient measures' and 'adequate responses' to the alleged violations.[384] The *Rosadio Villavicencio v Peru* judgement, by referring to the subsidiarity principle, did not find the State Party responsible for the alleged violation of Article 8 of the ACHR due to the decisions of the criminal jurisdiction of the Supreme Court.[385] The negative aspect of subsidiarity in conventionality control was also evident in *Colindres Schonenberg v El Salvador*, in which the San José Court did not find the State Party responsible because the Court appreciated the decisions of the Constitutional Chamber of the Supreme Court.[386]

The national margin of appreciation has also been broadly redistributed when national authorities have realised conventionality control by providing appropriate reparations. The ECtHR pointed out this possibility in *Scordino v Italy (No 1)*, stating that '[w]here a State has taken a significant step by introducing a compensatory remedy, the Court must leave a wider margin of appreciation to the State to allow it to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned'.[387] In the case of *Hiernaux v. Belgium*, the Court found no violation of Article 13 in light of Article 6(1), as the compensatory remedy allowed a complaint about the length of the criminal proceedings, including during the judicial investigation or at the committal stage.[388]

Pilot-judgement procedures for which conventionality control powers are once centralised to regional courts can be closed depending on the degree of compliance by States Parties. A re-decentralising, negative subsidiarity approach has been taken, for example, in the pilot judgements of

384 *Amrhein y otros v Costa Rica*, IACtHR, Serie C No 354, Judgment of Preliminary Objections, Merits, Reparations and Costs of 25 April 2018, paras 97–115.

385 *Rosadio Villavicencio v Peru*, IACtHR, Series C No 388, Judgment of Preliminary Objections, Merits, Reparations and Costs of 14 October 2019, para 167–169.

386 *Colindres Schonenberg v El Salvador*, IACtHR, Series C No. 373, Judgment of Merits, Reparations and Costs of 4 February 2019, paras 75–80.

387 *Scordino v Italy (No 1)*, ECtHR (Grand Chamber), App No 36813/97, Judgment on Merits and Just Satisfaction of 29 March 2006, para 189.

388 *Hiernaux v Bel*gium, ECtHR, App No 28022/15, Judgment on Merits and Just Satisfaction of 24 January 2017, paras 59–62.

Hutten-Czapska v Poland[389] and *Sujagic v Bosnia Herzegovina*.[390] A remarkable success story is the *Kurić and Others v Slovenia* case concerning the so-called erased group of former nationals of the Socialist Federal Republic of Yugoslavia. After holding a pilot-judgement procedure on the merits in 2012, the Strasbourg Court indicated in its judgement on just satisfaction in 2014 that 'according to the principle of *subsidiarity* and the margin of appreciation which goes with it, the amounts of compensation awarded at a national level to other adversely affected persons in the context of general measures under Article 46 of the Convention are at the discretion of the respondent State, provided that they are compatible with the Court's judgment ordering those measures'.[391] In the later decision in *Anastasov and Others*, the Strasbourg judges were satisfied that the system introduced by the respondent government offered to other affected 'erased' persons reasonable prospects of receiving compensation for the damage caused by the systemic violation of their Convention rights.[392] In other words, '[b]y proposing a solution for many individual cases arising from the same structural problem at the domestic level, the respondent State thus gave effect to the *subsidiarity* principle, which underpins the Convention system'.[393] Therefore, the Court decided to close the pilot-judgement procedure initiated in *Kurić et al*, considering it no longer justified.[394]

In the same vein, the ECtHR started declaring the inadmissibility of new applications in accordance with Article 35(1) of the ECHR, reflecting the subsidiarity principle, if national authorities are successful at introducing appropriate general measures in response to pilot-judgement procedures.[395] This approach has been adopted in (semi-)pilot-judgement proce-

389 *Hutten-Czapska v Poland*, ECtHR (Grand Chamber), App No 35014/97, Judgment on Merits and Just Satisfaction of 19 June 2006; *The Assocation of Real Property Owners in Łódź v Poland*, ECtHR, App No 3485/02, Decision of 8 March 2011.

390 *Sujagic v Bosnia Herzegovina*, ECtHR, App No 27912/02, Judgment on Merits and Just Satisfaction of 3 November 2009; *Zadrić v Bosnia and Herzegovina*, ECtHR, App No 18804/04, Decision of 16 November 2010.

391 *Kurić and Others v Slovenia*, ECtHR (Grand Chamber), App No 26828/06, Judgment on Just Satisfaction of 12 March 2014, para 141 [emphasis added].

392 *Anastasov and Others* v *Slovenia*, ECtHR, App No 65020/13, Decision of 10 October 2016, para 88.

393 Ibid, para 99 [emphasis added].

394 Ibid, para 103.

395 As to the judicial role in judgments execution, Giorgio Malinverni, 'La compétence de la Cour pour surveiller l'exécution de ses propres arrêts' in Dean Spielmann, Marialena Tsirti, Panayotis Voyatzis (eds), *La Convention européenne*

dures concerning the structural violations of right to property protection (*Broniowski v Poland* (2004),[396] *Xenides-Arestis v Turkey* (2005),[397] and *Maria Atanasiu and Others v Romania* (2010)[398]); prolonged non-enforcement of court decisions (*Burdov v Russia (No 2)* (2009)[399] and *Olaru and Others v the Republic of Moldova* (2009)[400]); excessive length of proceedings (*Rumpf v Germany* (2010),[401] *Vassilios Athanasiou and Others v Greece* (2010),[402] *Dimitrov and Hamanov v Bulgaria* and *Finger v Bulgaria* (2011),[403] and *Ümmühan Kaplan v Turkey* (2012)[404]); and, inhuman and/or degrading conditions of detention (*Torreggiani and Others v Italy* (2013)[405]).

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des droits de l'homme, un instrument vivant : Mélanges en l'honneur de Chirstos L. Rozakis (Bruylant 2011) 361–375.

396 *Broniowski v Poland* (n 317); *Wolkenberg and Others v Poland*, ECtHR, App No 50003/99, Decision of 4 December 2007.

397 *Xenides-Arestis v Turkey*, ECtHR, App No 46347/99, Judgment on Merits of 22 December 2005; *Demopoulos and Others v Turkey* (n 371).

398 *Maria Atanasiu and Others v Romania*, ECtHR, App Nos 30767/05 33800/06, Judgment on Merits and Just Satisfaction of 12 October 2010; *Preda and Others v Romania*, ECtHR, App Nos 9584/0 and Others, Judgment on Merits and Just Satisfaction of 29 April 2014.

399 *Burdov v Russia* (n 251); *Nagovitsyn and Nalgiyev v Russia*, ECtHR, App Nos 27451/09 and 60650/09, Decision of 23 September 2010. In the subsequent judgment, however, the Court found the violation of Art 13 of the ECHR again on the matter. See, for example, *Ilyushkin and Others v Russia*, ECtHR, App. Nos. 5734/08 and Others, Judgment on Merits and Just Satisfaction of 17 April 2012.

400 *Olaru and Others v the Republic of Moldova*, ECtHR, App Nos 476/07, 22539/05, 17911/08 and 13136/07, Judgment on Merits of 28 July 2009; *Balan v the Republic of Moldova*, ECtHR, App No 44746/08, Decision of 24 January 2012.

401 *Rumpf v Germany*, ECtHR, App No 46344/06, Judgment on Merits and Just Satisfaction of 2 September 2010; *Taron v Germany*, ECtHR, App No 53126/07, Decision of 29 May 2012.

402 *Vassilios Athanasiou and Others v Greece*, ECtHR, App No 50973/08, Judgment on Merits and Just Satisfaction of 21 December 2010; *Techniki Olympiaki A E v Greece*, ECtHR, App No 40547/10, Decision of 1 October 2013.

403 *Dimitrov and Hamanov v Bulgaria*, App Nos 48059/06 and 2708/09, Judgment on Merits and Just Satisfaction of 10 May 2011; *Finger v Bulgaria*, App No 37346/05, Judgment on Merits and Just Satisfaction of 10 May 2011; *Valcheva and Abrashev v Bulgaria*, ECtHR, App Nos 6194/11 and 34887/11, Decision of 18 June 2013.

404 *Ümmühan Kaplan v Turkey*, ECtHR, App No 24240/07, Judgment on Merits and Just Satisfaction of 20 March 2012; *Müdür Turgut and Others v Turkey*, ECtHR, App No 4860/09, Decision of 26 March 2013.

405 *Torreggiani and Others v Italy*, ECtHR, App No 43517/09 and Others, Judgment on Merits and Just Satisfaction of 8 January 2013; *Stella and Others v Italy*, ECtHR, App Nos 49169/09 and Others, Decision of 16 September 2014.

Overall, the IACtHR and ECtHR case law proves that the subsidiarity principle not only endorses the centralisation of competences on the side of human rights courts but also illuminates the normative framework in which conventionality control is exercised in a 'pluralistic' manner.[406] *Diffused* conventionality control is supposed to be exercised principally by States Parties and complementarily by human rights courts. It contributes to 'convert[ing] the domestic judges into […] the *first* and *true* guardian of the Convention[s]', thereby enhancing the primary roles of national organs.[407] Eventually, conventionality control by human rights courts must be regulated from the perspective of *negative* subsidiarity 'when domestic decision makers have resumed their *rightful* position as the Convention's *first-line* defenders'.[408] If the ultimate goal of revitalising domestic authorities is attained, the *negative* concept of subsidiarity *decentralises* competences in favour of States Parties, which were once concentrated towards human rights courts, entrusting conventionality control to the primary guardians of human rights.

406 Jonas Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 181–203, 190. See also, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) Chap 4. It is suggestive that Greer and Wildhaber, who had advocated the ECtHR's constitutional justice, altered their position incorporating these pluralists' perspectives. Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 Human Rights Law Rreview 655–687, 684.

407 Mac-Gregor (n 376) 570 (emphasis added).

408 Helfer (n 299) 149 (emphasis added).