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Rethinking Subsidiarity in International Human Rights Adjudication

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I. Introduction

The principle of subsidiarity has been one of the foundational organizing elements of the international human rights system since its inception. In its simplest form, the principle of subsidiarity holds that international human rights standards are best implemented at the lowest level of government that can effectuate those standards.[1] Thus, before a supranational or multinational body renders a decision on a matter of international human rights, it must first be assured that the domestic government at issue has been given an opportunity to remedy the situation. Moreover, even once a human rights matter has been considered or adjudicated by the supranational body, the principle of subsidiarity is thought to generally require that the decision as to remedial measures is best left to the domestic government.[2]

The principle of subsidiarity arises out of both pragmatic and normative concerns. Pragmatically, the principle of subsidiarity recognizes that international bodies concerned with human rights cannot compel compliance with their decisions. Ultimately, enforcement of international human rights law depends on voluntary compliance by domestic governments and the use of those domestic governments' police powers to enforce international human rights law, since the international system lacks such

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[1] *See* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994).

[2] *Id.* at 452.

powers.[3] Moreover, it is generally believed that since domestic authorities have greater expertise regarding the situations in their own countries than do international functionaries, the domestic authorities are better positioned to reach the "best" result with regard to the content and implementation of international human rights within their own countries.[4]

As a normative matter, the principle of subsidiarity reflects respect for national sovereignty by recognizing that, despite the purported universality of international human rights law, each nation retains ultimate sovereignty over matters occurring within its own territory. Additionally, the principle of subsidiarity is thought to promote democratic governance and transparency because domestic authorities, unlike international bodies, are presumed to be directly accountable to the citizenry of their country.[5] When citizens disagree with the content given to international human rights law, they presumably are better able to influence the development of that body of law if its definition and enforcement rest primarily in the hands of representatives who are accountable to the people.[6]

This article suggests that a re-evaluation of the principle of subsidiarity is in order. While I make no sweeping claims that the

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[3]While Chapter VII of the United Nations Charter does provide for a variety of coercive measures to maintain international peace and security, those measures are highly unlikely to be invoked except in the gravest of cases. *See* U.N. Charter, Chapter VII, Art. 41 and 42 (authorizing the Security Council to enforce its decisions by the use of armed force or other coercive measures, but only to maintain international peace and security).

[4] *See, e.g.,* Tara J. Melish, *From Paradox to Subsidiarity: the United States and Human Rights Treaty Bodies,* in THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 80, note 230 (Cambridge Univ. Press, forthcoming 2008) (stating that international bodies give governments a "margin of appreciation" or substantial discretion in resolving human rights matters, "given local actors' greater appreciation of the facts on the ground" and the need to "take[] account of domestic conflicting duties, burdens, and resource constraints.").

[5] *See* Bermann *supra* note 1, at 340.

[6] *See* Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT'L L.J. 1, 9 (2003).

principle of subsidiarity is always preferable or always undesirable, I do suggest that a close look at the myriad ways in which subsidiarity applies reveals that it may sometimes impede, rather than advance, the cause it purports to serve: namely, achieving universality of human rights. This article identifies situations where subsidiarity is more likely to diminish human rights protections that it is to advance them and suggests that subsidiarity should be abandoned or minimized in such areas.

Part II of this article reviews the history of the principle of subsidiarity, surveys the areas of international human rights law in which the principle is applied, and focuses on those situations where uncritical acceptance of subsidiarity may lead to results that undermine the universality of international human rights. Part III concludes by suggesting that a preference for supranational adjudication would be beneficial with regard to the content of international human rights law and remedies for violations of human rights.

II. Background of Subsidiarity and Current Application to International Human Rights

A. The Origins of Subsidiarity

The principle of subsidiarity is generally traced to the Catholic Church in the late nineteenth century, although the concept's roots predate the Church's articulation thereof.[7] The Church argued that it was "an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies."[8] As European nations began to

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[7] *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. OF INT'L L. 38, 40 (2003) ("Even though the word 'subsidiarity' entered our political lexicon only in the twentieth century, the idea has an intellectual history as old as European political thought.").

[8] Quadragesimo Anno, Encyclical of Pope Pius May 15, 1931, ¶ 79 (St. Paul ed., Boston), *available at*

integrate socially and economically, culminating in the formation of multinational organizations, such as the European Union, they incorporated the principle of subsidiarity into the newly formed organizations. For example, Article 3b of the Rome Treaty establishing the European Community provides:

> In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The view of the relationship between supranational and national governance as expressed in the principle of subsidiarity therefore recognizes that a supranational organization may have been delegated areas of "exclusive competence," but that, outside of such expressly delegated areas, a presumption exists in favor of national authority versus supranational authority.

The principle of subsidiarity has spread beyond its European Community roots and is incorporated into the law and practices of various organizations concerned with international human rights.[9] It has only occasionally been explicitly invoked in treaties concerning human rights;[10] most often, the principle of subsidiarity finds expression implicitly in the practices and doctrines of supranational human rights bodies.

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http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

[9] *See* Carozza, *supra* note 7, at 38-39.

[10] *See id.* at 39 (noting that Article 51 of the Charter of Fundamental Rights of the European Union states that it is "addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity.").

B. Subsidiarity in Practice in Human Rights Adjudication

Treaty bodies concerned with international human rights have attempted to reconcile the goal of universality of human rights with respect for national sovereignty in a variety of ways. These can be broadly characterized as falling into the following areas: (1) the content of international human rights (the "content stage"); (2) access to supranational adjudicatory bodies (the "jurisdictional stage"); and (3) remedial measures (the "enforcement stage"). The principle of subsidiarity is applied in all these stages. After providing examples of subsidiarity in operation in all three stages, this Article suggests that there are cogent reasons for subsidiarity in the jurisdictional stage, but that uncritical deference to national authorities in the content and enforcement stages undermines the goals of international human rights law.

The content of international human rights law is determined both by positive lawmaking and by common law interpretation. The positivist content of international human rights is that written in the text of human rights treaties and declarations such as the Universal Declaration of Human Rights ("Universal Declaration"),[11] the International Covenant on Civil and Political Rights ("ICCPR"),[12] the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention"),[13] etc. All reference respect for national sovereignty in various provisions relating to the content definition, jurisdictional, or enforcement stages. Examples from the above listed treaties include:

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[11] G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).
[12] G.A. Res. 2200A (XXI), (Dec. 16, 1966).
[13] 660 U.N.T.S. 195 (1966).

(1) Article 29 (2) of the Universal Declaration provides an example of subsidiarity in the content stage, by providing that domestic governments may limit rights when they determine doing so is necessary to meet "the just requirements of morality, public order and the general welfare in a democratic society."

(2) ICCPR Article 41 (1)(c) is an example of subsidiarity in the jurisdictional stage. Article 41 described the procedures of the Human Rights Committee, which monitors compliance with the ICCPR. Article 41(1)(c) provides that the Committee "shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted."[14]

(3) The Race Convention provides an example of subsidiarity in the remedy stage. Articles 8-14 describe the procedures of the Committee on the Elimination of Racial Discrimination ("CERD"), the treaty body established to enforce the Race Convention. CERD's powers and procedures evidence subsidiarity in the enforcement stage. In contrast to the Universal Declaration (which, because it is a declaration rather than a treaty, lacks an enforcement body altogether) and the Human Rights Committee (which was not established as an adjudicatory body *per se*),[15] CERD has significantly greater enforcement powers. In addition to its monitoring function, which is fulfilled through its receipt and consideration of member states' (or "States Parties") periodic reports on their progress in achieving compliance with the Race Convention,[16] CERD is also empowered to adjudicate complaints from member states[17] as well as to accept individual petitions alleging violations of the Race Convention.[18] Upon

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[14] However, that same Article also provides an exception where the domestic procedures are "unreasonably prolonged." *Id.*

[15] LOUIS HENKIN ET AL., HUMAN RIGHTS 499 (Foundation Press 1999) ("Although the [Human Rights] Committee acts in a quasi-judicial fashion when it considers individual communications, the Optional Protocol [to the ICCPR] does not explicitly vest the Committee with the power to render legally binding decisions."). *Id.*

[16] Race Convention, Art. 9.

[17] *Id.* Art. 11.

[18] *Id.* Art. 14.

finding a violation of the Race Convention, however, CERD's remedial powers are limited in a way that demonstrates that the preferred enforcement body is the domestic government alleged to have violated the treaty. In the case of complaints by a State Party, CERD's goal is to reach an "amicable solution,"[19] rather than, for example, to issue a "judgment." If such a solution cannot be reached by negotiation between the States Parties, CERD is to prepare a report on the dispute and to make such recommendations "as it may think proper for the amicable solution of the dispute."[20] The States Parties, however, may reject these recommendations, and the Race Convention provides CERD with no explicit enforcement mechanism if a State Party does so.[21] With regard to individual petitions, subsidiarity is evidenced by the confidentiality of the procedures and, as with inter-state complaints, the fact that CERD's enforcement powers are limited to making "suggestions and recommendations" to the complained-of State Party.[22]

The common law interpretation of international human rights treaties also incorporates subsidiarity in the content, jurisdictional, and enforcement stages. The European Court of Human Rights' ("ECHR") doctrine of the "margin of appreciation" is perhaps the most striking example of subsidiarity in the content stage. The margin of appreciation is essentially a doctrine of deference to domestic authorities. It is "based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[23]

Buckley v. United Kingdom[24] provides an extreme example of the margin of appreciation leading to near total deference to national authorities. In *Buckley*, a British citizen of Roma or

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[19] *Id.* Art. 12(1)(a)
[20] *Id.* Art. 13(1).
[21] *Id.* Art. 13.
[22] *Id.* Art. 14.
[23] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999).
[24] 23 Eur. Ct. H. R. 101 (1996).

"gypsy" background applied for governmental permission to live in a traditional Roma caravan style on land she owned. The government denied the request on the grounds that the local area had already "reached 'saturation point' for Gypsy accommodation" and that the petitioner's planned use of her land "would detract from the rural and open quality of the landscape." When her request was denied, she filed a petition with the ECHR alleging various violations of the European Convention, primarily relying upon Article 8. That Article provides that the States Parties shall not infringe the right to respect private and family life and the home. Article 8(2), however, provides that the government may infringe this right when doing so is "necessary in a democratic society" in the pursuit of certain articulated aims, including public safety and economic well being, and the rights and freedoms of others.

The ECHR, applying the margin of appreciation, found that the government's actions did not violate the European Convention. Under the margin of appreciation, "it is for the national authorities to make the initial assessment of the 'necessity' for an interference [with human rights]."[25] The ECHR also noted, however, that while the national authorities have great discretion under the margin of appreciation, their decisions are ultimately subject to review by the ECHR. The ECHR also noted that the scope of the discretion accorded to national authorities will vary depending on the facts of each case. Applying the margin of appreciation in *Buckley*, the ECHR found that the judgment of local planning authorities in denying petitioner's application to live in a traditional Roma caravan on her land was within the discretion of national authorities to determine when a limitation on international human rights is "necessary."

The margin of appreciation, as illustrated by *Buckley*, shows supranational bodies' willingness to delegate the initial definition of the content of international human rights to national authorities. In according deference to the national government's

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[25] *Id.* at 102.

assessment of the necessity for restricting an international human right, the margin of appreciation essentially allows the national government to define the content of that right.

Supranational bodies' interpretations of the requirement of exhaustion of domestic remedies also evidence subsidiarity. International adjudicatory bodies limit access to the international system by requiring that the petitioner must have tried to invoke any available domestic remedies. In so doing, however, these bodies have developed a series of exceptions to the exhaustion requirement and, as such, generally place lesser emphasis on subsidiarity in the jurisdictional stage than one might expect given the language of the relevant treaties. A prominent example is *Velasquez-Rodriguez v. Honduras*.[26] In that case, the Inter-American Court of Human Rights considered a petition on behalf of a person who had allegedly been subject to extra-judicial detention and disappearance. The Court began by considering whether the petitioner had, as required by the American Convention on Human Rights ("American Convention"),[27] exhausted his domestic remedies before proceeding to the international tribunal. While Honduras had laws providing habeas corpus proceedings to challenge an unlawful detention, the Court held that the ineffectiveness of the habeas procedure meant that the habeas procedure need not have been fully exhausted in order for the petition to be admissible.

The American Convention provides that the exhaustion requirement is not applicable when (a) domestic legislation does not provide due process of law for the protection of the rights allegedly violated, (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them or (c) there has been unwarranted

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[26] Velasquez-Rodriguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4 (July 29, 1988), reprinted at 28 I.L.M. 291 (1989).

[27] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

delay in rendering a final judgment under the domestic remedies.[28] The Court went beyond these textual exceptions, however, and ruled that the exhaustion requirement may be excused whenever the petitioner can prove, on the facts of his case, that the available domestic remedies are unlikely to be adequate or effective.[29] While the mere fact that available domestic remedies have not led to the result the petitioner wants is not in itself an excuse for failing to exhaust them, the Court emphasized that it will not require exhaustion when invoking the available domestic remedies would be a "senseless formality."[30] The Court found that the past practice of the Honduran government in cases of disappearances revealed that the available domestic remedy of habeas corpus would not be adequate or effective to remedy the violation, and therefore excused the petitioner from needing to fully exhaust it.

International adjudicatory bodies also operate under a model of subsidiarity with regard to enforcement of international human rights treaties. In the *Case Concerning Avena and Other Mexican Nationals* ("*Avena*"),[31] Mexico sued the United States in the International Court of Justice ("ICJ"). Mexico alleged that the United States had violated the Vienna Convention on Consular Relations by Texas officials' failure to inform Mexican nationals upon their arrest in the U.S. of their Vienna Convention rights to consular notification and access. The ICJ ruled in favor of Mexico, holding that the United States had indeed violated the treaty. Having found a treaty violation, however, the ICJ did not order a specific remedy for the breach (e.g., that the resulting convictions and sentencing were void and that the prisoners be released). Rather, the ICJ held that the U.S. was required to provide review and reconsideration of the cases in order to determine whether the treaty violations had materially affected

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[28] *Id.* at Article 46(2).
[29] Velasquez-Rodriguez, 28 I.L.M. at 305-07.
[30] *Id.* at 306.
[31] *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Judgment of Mar. 31).

those cases and, if so, what further steps might be necessary to remedy the violations.[32]

III. Resolving the Tension Between Subsidiarity and Human Rights

In order to evaluate the desirability of the principle of subsidiarity in the content, jurisdictional, and enforcement stages of human rights adjudication, it is first necessary to consider briefly the goals of the modern international human rights movement. The primary objective of the modern international human rights movement is to protect individual human rights by supplementing domestic rights protections.[33] Thus, the international human rights ideal is to provide a supranational body of rights that is not dependent on the grace of individual nations for their enforcement and to make this body of rights universal.

Subsidiary in the jurisdictional stage of human rights adjudication, e.g., the doctrine of exhaustion of domestic remedies, is compatible with the goals of international human rights law. By requiring an individual to exhaust his or her domestic remedies before proceeding to an international body, the exhaustion requirement ensures that the government will have the opportunity to correct the violation on its own initiative; requires the government to engage in a self-reflective process of examining its own human rights record; and preserves scarce international resources for those situations that the domestic government is unable or unwilling to resolve on its own. Moreover, the exceptions to the exhaustion requirement discussed in Part II.B.,

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[32] *Id.* at 60. The U.S. sought to comply with the ICJ ruling in *Avena* by directing the Texas courts to provide review and reconsideration of the death sentences at issue. The Texas courts refused and the matter was ultimately appealed to the U.S. Supreme Court, which held that the treaties making ICJ judgments binding upon the United States were non-self-executing and that the President could not direct the Texas courts to comply with *Avena*. Medellin v. Texas, 128 S. Ct. 1346 (2008).

[33] HENKIN ET AL., *supra* note 15, at 275.

supra, are designed to ensure that governmental delay, obstruction, or ineffectiveness under the guise of exhaustion of domestic remedies will not be allowed to prevent the petitioner from proceeding to an international tribunal.

Subsidiarity as to the content of international human rights, however, undermines the goal of universality. According each nation deference with regard to the meaning of international human rights ultimately leads to a variety of substantive human rights standards rather than a single universal standard. Even if an offending nation ultimately disagrees with the content an international body gives to an international human right and therefore refuses to enforce it, the offending nation is still deemed to have deviated from a common standard and must therefore defend its actions. This Article therefore suggests that subsidiarity should not be the rule with regard to the content of international human rights. Rather, international bodies should define the content of international human rights and the burden should be placed on states to either conform their conduct to the international standard or explicitly defend their decision not to do so.

I acknowledge that one of the benefits of subsidiarity in the content definition stage is respect for pluralism. Subsidiarity "rejects the notion that respect for universal human rights is synonymous with singular or absolutist outcomes or interpretations, which only an international body is competent to define."[34] I suggest, however, that on balance, the benefits of a single supranational legal standard regarding the content of international human rights outweighs its costs. Ultimately, according substantial latitude to domestic authorities with regard to the content of international human rights risks the perception that international human rights law is less a body of law than a series of fluid standards subject to negotiation and renegotiation as it suits the needs of a given state.[35] While "respect for state sovereignty"

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[34] Melish, *supra* note 4, at 14.

[35] *See generally* William M. Carter Jr., *The Mote in thy Brother's Eye: A Review of HUMAN RIGHTS AS POLITICS AND IDOLATRY by Michael Ignatieff*, 20 BERKELEY J. INT'L L. 496 (2002).

may be important, it should not be seen in itself as a goal of international human rights law nor should it be allowed to impede the goal of advancing and protecting human dignity.[36]

A closer question is presented with regard to subsidiarity of international institutions in the choice of remedial measures. In contrast with the content stage -- where it must be determined what the human right at stake is -- the enforcement stage deals with what measures are best suited to remedy the violation of the right. There is a reasonable argument that, at least in some circumstances, the question of remedies is better left to local government officials who have greater familiarity than international tribunals with local conditions that may be relevant to the nature of an appropriate and effective remedy.

A rough comparison in U.S. domestic law can be found in the history school desegregation litigation. In *Brown v. Board. of Education* ("*Brown I*"),[37] the Supreme Court held that racial segregation in public schools violated the Equal Protection Clause. In *Brown I*, the Court took cognizance of the "great variety of local conditions"[38] prevailing in public school districts around the country. In *Brown II*,[39] the Court's subsequent opinion focusing on remedial measures, the Court again emphasized its view that "varied local school problems" required that "[local] [s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems . . . ."[40] Thus, while the constitutional violation required implementation of a remedy "with all deliberate speed,"[41] the specific remedy was to be devised by

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[36] *See* Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 528 (2001) (arguing that "any assertion that . . . political entities also merit tolerance and respect for their autonomy is necessarily derivative, not independent, of the rationale for respecting individual autonomy.").

[37] 347 U.S. 483 (1954).

[38] *Id.* at 495.

[39] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[40] *Id.* at 299.

[41] *Id.* at 300.

local authorities, with the federal courts serving a supervisory function to ensure that such remedies were designed in good faith.

The post-*Brown* experience reveals, however, that the Court's deference to local authorities did not produce the results for which it hoped. Rather than devising in good faith those local remedies best suited to local conditions, many local authorities saw the Court's deference as an invitation to ignore or subvert *Brown*.[42] The Court eventually confronted this creative defiance ten years after Brown. In *Griffin v. County School Board of Prince Edward County*,[43] the Court was faced with a school board's decision to close all of its public schools rather than integrate them in compliance with *Brown*. The Court, referring to the "all deliberate speed" formulation it had adopted in Brown *II*, held that "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights we held in Brown."[44] Accordingly, the Court ordered the reopening of the public schools and held that the courts themselves should order relief that would be "quick and effective" in integrating the nation's schools pursuant to the *Brown* decisions.[45]

To be sure, one should not infer too much regarding subsidiarity in international law from the example of the *Brown* litigation. But it is illustrative of the dangers of relying on the good faith of local officials to devise remedies for human rights violations. On balance, it is better for international tribunals to take the lead in defining remedies for violations of treaties within their purview. To the extent that designing an effective remedy truly requires intimate knowledge of local conditions beyond the ready competence of international tribunals, those tribunals presumably can be fully informed of such conditions by the domestic government. Moreover, human rights country reports by

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[42] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 694-95 (Aspen Law & Business 2d ed. 2005) (describing the variety of measures local governments used to undermine *Brown*).

[43] 377 U.S. 218 (1964).

[44] *Id.* at 229.

[45] *Id.* at 232.

non-governmental organizations and fact-finding by special rapporteurs can supply the international adjudicator with additional information.

IV. Conclusion

The principle of subsidiarity is a valuable aspect of the international legal system. Nonetheless, the principle should not be followed blindly under the assumption that subsidiarity always serves the goals of international human rights law. Where it fails to serve such purposes, subsidiarity can only be justified if it has intrinsic normative value, and only where such normative value outweighs its costs. Subsidiarity of international institutions with regard to the content and enforcement of international human rights law is unlikely to advance the cause of human dignity. International adjudicatory bodies should therefore adopt the primary role in defining the content of international human rights treaties within their mandates and in designing remedies for violations.