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IV. 1

UNIVERSAL JURISDICTION OVER INTERNATIONAL CRIMES AND GROSS HUMAN RIGHTS VIOLATIONS

The Role of the Principle of Subsidiarity

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Abstract
The international law of jurisdiction sets out the circumstances under which states can apply their laws, offering a number of "permissive" jurisdictional principles, including the universality principle. To prevent normative conflict as a result of overlapping jurisdictional claims, the international community should agree on procedures that circumscribe single states' unilateralist instincts. Subsidiarity is a procedural tool for this. Subsidiarity requires that bystander states defer to efforts made by other states that have a stronger link to the situation, while allowing them to protect global goods or values which states having a stronger regulatory link fail to address. This contribution explores how subsidiarity has been applied by domestic courts in human rights cases arising under the universality principle. A distinction is made between universal criminal jurisdiction, where state prosecutors bring criminal proceedings before domestic courts, and universal civil jurisdiction, where foreign plaintiffs bring transnational tort claims in a domestic forum.

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I. INTRODUCTION

The international law of jurisdiction sets out the circumstances under which states can apply their laws to situations and persons, possibly even beyond their own territory. It offers a number of "permissive" jurisdictional principles to this effect, notably, territoriality, nationality, security, and universality. These principles are not hierarchically structured: legally speaking, no principle enjoys priority over another. Admittedly, the territorial principle is generally considered to be the cornerstone of global jurisdictional order, with other principles—of extraterritorial jurisdiction—being in need of specific justification.[1] However, once these other principles have come to be accepted, they are not subordinate to the territoriality principle.

At first sight, this state of affairs is not entirely satisfactory, as it allows bystander states to impose their laws on other nations that may possess a much stronger—in particular *territorial*—connection to the situation. At the same time, the existence of a variety of principles of jurisdiction tends to ensure that at least *one* state's regulation will apply. Especially in the case of territorial under-regulation in respect of "global problems", such as violations of international human rights law, the availability of a plurality of jurisdictions that recast these problems in local terms[2] may appear to be a blessing. However, to bring some order, and in particular to prevent normative conflict from coming to a head, it is advisable for the international community to agree on procedures that circumscribe single states' unilateralist instincts. The principle of subsidiarity has been suggested in this respect as a procedural tool of "reconciling competing norms" and of "encourag[ing] dialogue among multiple jurisdictions", which nevertheless does not cast doubt on the legitimate desire of such jurisdictions to apply *their* norms to a given act or actor.[3]

Subsidiarity may have two functions in the law of jurisdiction. It can be understood as a *shield* that qualifies the exercise of state jurisdiction by requiring a particular connection to the forum,[4] or by requiring deference to good faith efforts made by other states that arguably have a stronger link to the situation. This "negative" understanding of subsidiarity is rooted in the classic Westphalian worldview of states as actors endowed with quasi-exclusive sovereignty within their own territory, and lacking competence to strongly project power beyond their frontiers. This understanding mitigates the interventionist excesses to which the liberal exercise of multiple state jurisdiction may give rise.

Subsidiarity may also be understood, however, as a *sword* that allows bystander states to jurisdictionally protect global public goods or values which states having a stronger

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[1] Andrea Bianchi, *Jurisdictional Rules in Customary International Law*, in Extraterritorial Jurisdiction in Theory and Practice 87 (Karl M. Meessen ed., 1996).

[2] *See* Hannah Buxbaum, *National Jurisdiction and Global Business Networks*, 17 Indiana J. Global Legal Stud. 165, 167 (2010) (arguing that "a global problem can be recast in local terms, in order to take advantage of local political or social resources" and suggesting use of the concept of scale to understand this analytically).

[3] Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l L. 301, 321, 328 (2007) (adding that "although people may never reach agreement on *norms,* they may at least acquiesce in *procedures* that take pluralism seriously").

[4] Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum*, 107 Am. J. Int'l L. 601, 619 (2013) (defining subsidiarity in the context of universal civil jurisdiction, *per* Justice Breyer's opinion appended to the US Supreme Court's *Kiobel* judgment—discussed in Section III in the context of universal civil jurisdiction—as a "requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant's residence there").

regulatory (territorial) link, or the international community at large, fail to address.[5] This "positive" understanding of subsidiarity acknowledges that sovereignty, as the defining characteristic of global public order, may impede rather than encourage the realization of community values pertaining to human rights, as sovereigns may have an interest in regulatory failure. In this understanding, where the primary jurisdictional state is not able or willing to take adequate measures to protect human rights, it arguably loses its natural jurisdictional priority, and other states, as representatives of a decentralized international community, may assume a responsibility to protect by taking unilateral stopgap measures to bring perpetrators of human rights violations to account. What informs such unilateral action may be the conviction that international human rights are endowed with an *erga omnes* character.[6] This implies that every single state has an interest in protecting the integrity of basic human rights norms, which arguably it cannot only vindicate by *in abstracto* invoking the responsibility of the state violating such norms,[7] but also by *in concreto* taking jurisdictional action against the actual violators of the norms as a trustee of mankind. From a positivist perspective, a substantial number of (criminal law) treaties explicitly allow bystander states to assume this role.[8] Bystander states do not and should not take this sort of subsidiary unilateral action to vindicate their own national interest-based sovereign rights, but rather to urgently protect inherent community values.[9] In so doing, state authorities, in effect, become international authorities in accordance with Scelle's *dédoublement fonctionnel* theory.[10] Due to this international mandate which states fulfil, and the common values and concerns of mankind they thus further, it is arguable that state sovereignty, as the hallmark of the inter-state based system of international law, should be "relativized".[11] Subsidiarity may be a helpful procedural tool in striking a new balance between the traditional pull towards respecting state sovereignty and consent, and the more recent pull toward realizing common goals, possibly through nonconsensual, unilateral mechanisms.

The aim of this note is not to develop a grand normative theory on the advisability of subsidiary jurisdiction by bystander states. My ambition, in terms of research method and scope, is much more modest: in these pages, I explore how the principle of subsidiarity has recently been applied or promoted *in practice* by domestic courts in human rights cases arising under the universality principle. I distinguish between the exercise of *universal criminal jurisdiction*,

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[5] *See also* Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 Am. J. Int'l L. 1 (2014).

[6] *See* on *erga omnes* obligations in general: Judgment on Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), [1970] I.C.J. 3, paras. 33–34, available at <http://www.icj-cij.org/docket/files/50/5387.pdf>.

[7] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Article 41.

[8] *E.g.,* Article 5(2) UN Torture Convention; Article 49 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Article 50 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Article 129 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; and Article 146 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

[9] Compare M. Gavouneli, Functional Jurisdiction in the Law of the Sea 82 (2007).

[10] *See* Georges Scelle, *Le phénomène juridique du dédoublement fonctionnel*, in Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag 324, 356 (Walter Schätzel & Hans Jürgen Schlochauer eds., 1956) ("the constitutional authorities become, through functional splitting, international authorities").

[11] *See* Hans Aufricht, *On Relative Sovereignty*, 30 Cornell L. Rev. 137 (1944).

where state prosecutors bring criminal proceedings before domestic courts (section II), and *universal civil jurisdiction*, where foreign plaintiffs bring transnational tort claims in a domestic forum (section III). Section III is somewhat more extensive than section II, as I have discussed the application of the subsidiarity principle to universal criminal jurisdiction in an earlier publication and prefer not to repeat myself too often.[12] Methodologically speaking, I *map* the relevant cases of domestic courts applying some version of the subsidiarity principle, and *label* the decisions as instantiations of either the shield function of subsidiarity (bystander state courts using subsidiarity to ground dismissal of cases brought before them), or its sword function (bystander state courts invoking subsidiarity to exercise jurisdiction over cases brought before them). I then go on to *evaluate* whether these decisions are defensible, and how a balance between the shield and sword functions can be struck (Section IV). Section V concludes.

II. SUBSIDIARITY AND UNIVERSAL CRIMINAL JURISDICTION

With respect to accountability for gross human rights violations provided by bystander states, the principle of subsidiarity has probably gained most traction in the context of prosecutions of international crimes under the universality principle. In international criminal law, subsidiarity means that bystanders should defer to a state which has a stronger connection with an atrocity case—normally the territorial, or less frequently, national state—provided that the latter state is able and willing to investigate or prosecute the case. *Vice versa*, it means that bystanders may, or perhaps should, exercise jurisdiction where directly affected states do *not* prove able and willing to pursue the case. This understanding of subsidiarity, which integrates its positive and negative dimensions, is most famously enunciated in Article 17 of the Rome Statute of the International Criminal Court (ICC), which allows the Court to exercise *complementary* jurisdiction in case of state inability or unwillingness to prosecute. Complementarity is *vertical* subsidiarity as it speaks to the relationship between a supranational institution and a state. What we are concerned with here is substantively the same principle, but applied in a *horizontal* context, between states, with a bystander state willing to exercise universal jurisdiction over crimes committed elsewhere.

Reference to such subsidiarity was first made in a separate opinion authored by three judges of the International Court of Justice in the *Arrest Warrant* decision,[13] which may have intended to counter Judge Guillaume's concern that the exercise of universal jurisdiction would lead to "total judicial chaos".[14] Arguably the first doctrinal contribution to the subject was Professor Cassese's statement, in a 2003 article, that "it would seem that at least at the level of customary international law, universal jurisdiction may only be exercised to substitute for other countries that would be in a better position to prosecute the offender, but for some reason do not,"[15] a statement that was seconded by the *Institut de droit international*

[12] Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*, 19 Crim. L.F. 153 (2008).

[13] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal on Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2002] I.C.J. 3, para. 59.

[14] Separate opinion of President Guillaume on Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 15.

[15] Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589, 593 (2003), adding that "[t]hese countries are the territorial state or the state of active nationality: they may stake out a sort of 'primary claim' to jurisdiction, on account of their strong link with the offence or the offender. In other words, under customary international law universal jurisdiction may only be triggered if those other states fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality only operates, then, as a *default* jurisdiction."

in a 2005 resolution.[16] Later scholarship has cast doubt on the customary status of this subsidiarity principle,[17] but most scholars writing on universality are in agreement that the application of the principle to bystander states' international crimes prosecutions at least makes sense from a practical and policy perspective.[18] Subsidiarity indeed makes for sensible policy in that it is respectful of the sovereignty of other nations, where the evidence is also located for that matter, ensures that scarce prosecutorial and judicial resources are not wasted, while enabling the exercise of bystander state jurisdiction in case the state with the stronger connection is not able and willing to investigate and prosecute an atrocity case.[19]

States, when applying the "horizontal" subsidiarity principle can draw inspiration from how the ICC applies its (vertical) complementarity principle.[20] At the same time, however, a higher level of deference on the part of the bystander state, as compared to the ICC, may be called for, given the former's lack of expertise and legitimacy to pass judgment on the territorial/personal state's judicial system and prosecutorial willingness.[21] In some quarters, the idea has been advanced to give the ICC a say in whether a bystander could move forward with a case,[22] although it appears to be rather fanciful to assume that the ICC could take up this additional role. One author is of the view that the principles of extradition law, which apply in a state-to-state context, rather than the ICC's complementarity principle, should govern the subsidiarity principle,[23] although it remains somewhat elusive how extradition law can address the problem of a requesting state seeking a person's extradition while not genuinely desiring to prosecute him, i.e., the unwillingness prong of subsidiarity.[24]

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[16] Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Justitia et Pace Institute of Int'l Law, 17th Session (Aug. 26, 2005), at 2, para. 3(c) ("Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so").

[17] Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle*, 19 Crim. L.F. 153 (2008).

[18] Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 Mich. J. Int'l L. 881, 900 (2008–2009); Harmen van der Wilt, *Universal Jurisdiction Under Attack—an Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States*, 9 J. Int'l Crim. Just. 1043, 1050 (2011). *See also* AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, para. 14 and R9, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208672%202009%20REV%201> (observing that while "[p]ositive international law recognizes no hierarchy among the various bases of jurisdiction that it permits", "states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction").

[19] Colangelo, *supra* note 18, at 900–901.

[20] Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 Geo. Wash. Int'l L. Rev. 419, 463 (2011).

[21] Ryngaert, *supra* note 17; *see also* Jo Stigen, The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity 157 (2008) (referring to the potential for international friction). Compare also Fanny Lafontaine, *Universal Jurisdiction—The Realistic Utopia*, 10 J. Int'l Crim. Just. 1277, 1299 (2012) (calling it "dangerous to allow states to stand in judgment of each other").

[22] *See, e.g.*, Claus Kress, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. Int'l Crim. Just. 561, 584–585 (2006), approved by Ariel Zemach, *Reconciling Universal Jurisdiction with Equality Before the Law*, 47 Texas Int'l L.J. 143, 185 (2011).

[23] Lafontaine, *supra* note 21, at 1293 *et seq.*

[24] In all fairness, extradition law may allow the requested (bystander) state to ensure that the requesting (territorial/national) state live up to its international human rights obligations, which could be said to be part of the "ability" prong of the subsidiarity principle. The limitations of the extradition law approach are

Irrespective of the theoretical debates, in legal practice, there seems to be considerable support for a horizontal subsidiarity principle, although this practice may not be conclusive of the status of the principle under international law. The prosecutorial application of subsidiarity is required by law in Belgium,[25] Spain,[26] and Switzerland[27]. Subsidiarity is applied as a prudential doctrine by courts in Austria,[28] and as guiding the exercise of prosecutorial discretion in Germany,[29] the United Kingdom,[30] Denmark,[31] Norway,[32] and

in fact admitted by Lafontaine, *supra* note 21, at 1298 (submitting that "it is true that it perhaps offers less leeway to a state to refuse extradition based on the 'unwillingness' part of the subsidiarity equation, for fear that the trial will be made for the purpose of shielding the person concerned from criminal responsibility, for instance", while nevertheless holding that "it remains possible on the grounds of a risk of a discriminatory or 'political' prosecution, for instance").

[25] Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure (PTCCP) requires, *inter alia*, that the Belgian federal prosecutor inquire in the quality of the proceedings that could be brought in an alternative jurisdiction.

[26] Article 23(4) of the Fundamental Law of the Judiciary (requiring that Spanish prosecutors inquire whether no proceedings have been initiated in another competent country, leading to an investigation and effective prosecution of the offence). *See* for applications: A.N. Madrid, Sala de lo Penal, Apelacion 31/2009, Auto, No. 1/09, July 9, 2009 (dismissing a case brought against seven Israeli officials allegedly involved in the killing of Hamas commander Shehadeh); J.C.I. No. 6, A.N. Madrid, Diligencias previas 134/2009, Auto, May 4, 2009 (judge deciding to send an international rogatory commission to the United States in a case brought against six former Bush administration officials in respect of abuses committed in Guantánamo, with a view to informing his application of the subsidiarity principle). *See* on the former case also Sharon Weill, *The Targeted Killing of Salah Shehadeh from Gaza to Madrid*, 7 J. Int'l Crim. Just. 617 (2009), and on the latter case Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the 'Torture Memos' Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 Case Western Res. J. Int'l L. 405 (2009).

[27] Amended Criminal Code, Article 264m (2)(a) (providing that a case can be dismissed where an authority of another state is investigating and/or prosecuting the alleged crime(s) and where the suspect can be extradited to such authority).

[28] Oberster Gerichtshof [OGH] [Supreme Court] July 13, 1994, No. 150s99/94, affirmed; Landesgericht Salzburg [LG Salzburg] [trial court] May 31, 1995, No. 150s99/94.

[29] Decision of the Federal Prosecutor of Germany, Oct. 2, 2005, JZ 311.

[30] It has been reported by the Crown Prosecution Service (CPS) "that there is a clear preference within the CPS for prosecutions in the territorial state", *e.g.*, with respect to Rwandan genocide suspects, and that "[a]ccordingly, the CPS seeks to ensure the extradition to Rwanda of genocide suspects currently residing in the UK, despite jurisdiction over the genocide". Crown Prosecution Service, Response to FIDH/REDRESS questionnaire; REDRESS/FIDH, *Extraterritorial Jurisdiction in the European Union—A Study of the Laws and Practice in the 27 Member States of the European Union* (December 2010), 262, footnote 1307, referring to correspondence on file with REDRESS. In a note submitted to the United Nations, the United Kingdom acknowledged that restraints may be called for in the view of competing jurisdictional claims with respect to atrocity cases. *See* United Kingdom of Great Britain and Northern Ireland, *Scope and application of the principle of universal jurisdiction*, Note submitted to the Office of Legal Affairs pursuant to General Assembly Resolution 65/33 of 6 December 2010, 15 April 2011.

[31] REDRESS/FIDH, *supra* note 30 (December 2010) (Danish Ministry of Justice stating that "[i]n cases of concurrent jurisdiction, the legitimate interest of Denmark in exercising jurisdiction may be balanced against the interest of other states in retaining (exclusive) jurisdiction on the basis of Section 12 of the Criminal Code").

[32] Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, 7 May 2009, at 5, available at <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_

Sweden[33]. Subsidiarity is at times applied quite strictly, e.g., in Belgium, which allows the federal prosecutor to pass judgment on the quality of the foreign judiciary,[34] and conditions deference to the foreign jurisdiction on the effective submission of a case to a court there.[35] Other states are more lenient, and do not require investigation or prosecution of the specific case, but rather of the entire "factual complex";[36] or, when deciding whether or not to exercise their jurisdiction, only take into consideration information that proceedings have been or will be instituted in the territorial state[37] without necessarily examining the genuine ability or willingness of that state. Yet others are willing to just defer to an extradition request from another state[38] (although when acceding to this request they will have to take human rights considerations—part of the ability prong of subsidiarity—into account)[39].

III. SUBSIDIARITY AND UNIVERSAL TORT JURISDICTION

The principle of subsidiarity has played an equally prominent role in the field of transnational tort litigation, especially where courts have been called on to exercise some form of (quasi-) universal jurisdiction over gross human rights violations committed elsewhere. Over the last few decades, courts have heard an increasing number of such cases, as victims of violations, or their relatives, have filed a steady stream of complaints, notably against multinational corporations in respect of the latter's overseas activities. One of the key legal questions here is under what circumstances forum states could, or should exercise any jurisdiction they might have over such cases. In particular, should the forum defer its jurisdiction to a "primary jurisdiction state", which has a stronger connection to the case and is (somehow) able and willing to investigate and provide a forum; or *vice versa*, can the forum exercise its jurisdiction on the ground that another state with a stronger connection to the case does not prove able or willing to hear the case? While some of the human rights violations triggering transnational tort litigation duly qualify as international crimes, domestic courts and regulators have not drawn much inspiration from how subsidiarity has been developed and applied in criminal cases brought under the universality principle (discussed in section II). Rather, subsidiarity has very much followed its own trajectory, piggybacking on domestic techniques familiar to transnational tort litigation, such as (a) the exhaustion

StatesComments/Norway.pdf> (stating that a Norwegian prosecutor, when exercising universal jurisdiction, is required to assess whether the alternative jurisdiction has a "*properly functioning legal system*").

[33] REDRESS/FIDH, *supra* note 30, 246, footnote 1225, referring to FIDH/REDRESS, MoJ/MFA Questionnaire ("The ability or willingness of the state where the alleged crimes were committed to investigate and prosecute the crimes is taken into account in the practical handling of a case").

[34] Article 12*bis* 4° Preliminary Title of the Belgian Code of Criminal Procedure (PTCCP).

[35] REDRESS/FIDH, *supra* note 30, 80, footnote 481, referring to Response to MoJ questionnaire.

[36] *See* notably the Decision of the Federal Prosecutor of Germany, Oct. 2, 2005, JZ 311 (dismissing complaints against former US Defense Minister Donald Rumsfeld on the ground that the abuses committed by the United States in the Iraqi prison of Abu Ghraib were being addressed by the United States).

[37] Article 480 Bulgarian Code of Criminal Procedure.

[38] Article 689-11 French CCP.

[39] *See, e.g.*, REDRESS/FIDH, *supra* note 30, 123, footnote 678, referring to questionnaire response.

requirement, (b) the doctrine of *forum non conveniens*, (c) the doctrine of *forum of necessity*, and (d) the application of foreign law.

A. Exhaustion Requirement

The legal technique used in transnational tort litigation that most resembles the use of the subsidiarity principle in the criminal law is the *requirement of exhaustion of domestic remedies*. According to the European Commission, "exhaustion of 'local' remedies requires a demonstration by the claimant that those states with a traditional jurisdictional nexus to the conduct are unwilling or unable to proceed." [40] According to the Commission, the exercise of universal civil jurisdiction is, just like the exercise of universal criminal jurisdiction, conditioned by the exhaustion of local and international remedies,[41] as it applies to the same category of crimes which trigger universal criminal jurisdiction,[42] conditioned its exercise on In a similar vein, Germany has argued that "litigants suing corporations should use forums with a greater nexus to the dispute and should refrain from using [bystander state courts] until local remedies have been exhausted", deriving this requirement from the principle of international comity.[43] In the United States, the comity-based exhaustion requirement has been cited in some earlier case-law arising under the US Alien Tort Statute (ATS),[44] notably in *Sarei v. Rio Tinto*.[45] It also features explicitly in the US Torture Victim Protection Act.[46] However, after *Kiobel*, which decided the reach of the ATS by applying the presumption against extraterritoriality rather than the principle of subsidiarity,[47] it will have a more limited role to play.[48] Nonetheless, to the extent that future ATS claims "touch and

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[40] Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 30, fn.77.

[41] *Id.*, at 30–31.

[42] *Id.*, at 4–5 ("the United States' exercise of universal [civil] jurisdiction [with no U.S. nexus of the parties or conduct] under the ATS is consistent with international law in accordance with these well-established constraints").

[43] Supplemental Brief of Germany as *Amicus Curiae, Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 2, 14, available at <http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Amicus_Curiae/supplemental_brief_of_amici_curiae_german_institute_for_human_rights_and_int_law_experts_in_support_of_petitioners.pdf>.

[44] 28 U.S.C. para. 1350. The ATS confers jurisdiction on US federal courts to hear tort cases alleging violations of the law of nations.

[45] *Sarei v. Rio Tinto*, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 133 S.Ct. 1995 (2013); *Sarei v. Rio Tinto*, PLC, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc).

[46] Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992) § 2(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred").

[47] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). The Court limited the role of bystander state protection to victims of human rights violations committed abroad by requiring that claims under the ATS "touch and concern" the United States. Applying this test, the Court held that "it would reach too far to say that mere corporate presence [of the defendant] suffices" (*Kiobel*, 133 S.Ct. at 1669). Note that the Court only ruled that the ATS does not provide for universal civil jurisdiction, not that the exercise of such jurisdiction violates international law.

[48] Note that in *Sosa*, the US Supreme Court refused to take position on the exhaustion requirement, explicitly leaving open issues of deference and exhaustion. Sosa v. Alvarez-Machain, 542 U.S. at 724–25, 733 n.21 (2004).

concern" the United States, the exhaustion of local remedies may be taken into account by courts when deciding on the exercise of jurisdiction.[49]

B. *Forum Non Conveniens*

In practice, the relevance of the requirement of exhaustion as an instantiation of the principle of subsidiarity in transnational tort litigation should not be exaggerated. At any rate, it is applied less frequently than another doctrine operationalizing subsidiarity: *forum non conveniens*. This prudential doctrine, based on procedural economy rather than on comity,[50] gives effect to the negative dimension of subsidiarity insofar as it may result in the dismissal of cases that have a stronger connection to another, reasonably available forum. Under *forum non conveniens*, which has common law origins, courts can stay proceedings where another available foreign court is more appropriate, provided that it is not unjust to require the claimant to sue in that court.[51] This doctrine prevents claimants from shopping for the most convenient forum, even if the claim concerns international law-based claims.[52]

Conceptually, *forum non conveniens*, like other prudential doctrines, only applies after courts have established jurisdiction; the successful application of the doctrine then leads to courts not exercising such jurisdiction on the grounds that there are no good reasons for the exercise of "subsidiary" forum jurisdiction. This is in line with our previous observation that subsidiarity is a procedural technique aimed to reconcile competing normative orders, which does not detract from the principled legitimacy of the exercise of pre-existing jurisdiction. At times, however, the jurisdictional and *forum non conveniens* analysis have collapsed in judicial reasoning. The High Court of England, for instance, decided in a tort case filed by South African miners against a South African corporation that "the English court is not obliged to assume jurisdiction over claims that have little if anything to do with this country", and hence that the miners should bring their claims before a South African court.[53] This case, like *Kiobel*, seems to be based on the principled absence of jurisdiction rather than on the criteria for the *exercise of subsidiary jurisdiction* not having been met: the *ratio decidendi* was not the availability of an alternative forum, but the absence of a jurisdictional (territory-, personality-, or interest-based) link with the forum.

In spite of being rooted in the negative concept of subsidiarity as a shield to prevent foreign cases from reaching domestic courts, *forum non conveniens* need not be seen as a blunt tool for a court to easily rid its desk of unwelcome cases. Indeed, it does not suffice

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[49] Ralph Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 Am. J. Int'l L. 841, 843 (2013).

[50] *But see* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1659, 1674 (Breyer, J., concurring) (suggesting reliance, not only on the principles of exhaustion and comity, but also *forum non conveniens*, to "minimize international friction").

[51] *See* Spiliada Maritime Corp v. Cansulex Ltd., [1987] A.C. 460 (H.L.); Connelly v. RTZ Corp., [1998] 1 A.C. 854 (H.L.); Lubbe v. Cape PLC, [2000] 4 All E.R. 268 (H.L.).

[52] *See* Bil'in (Village Council) v. Green Park Int'l Inc., No. 500-17-044030-0, paras. 326–327 (Can. Montreal Sup. Ct. July 7, 2008) (holding that the plaintiffs engaged in "inappropriate forum" shopping and chose a Québec forum to "avoid[] the necessity … of proving [their case in Israel] … thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Québec."); Bil'in (Village Council) v. Green Park Int'l Inc., [2010] C.A. 1455, para. 86 (Can. Que.) (observing that "[i]t requires a great deal of imagination to claim that the action has a serious connection with Quebec").

[53] Vava v. Anglo American South Africa Ltd., [2013] EWHC2131 (QB), para. 76 (concluding statement in decision by Justice Andrew Smith).

that a claimant has theoretical access to a foreign court; he should also have *practical* access to this court.[54] Such an approach may have particular salience for international law-based claims, which often concern violations committed in states with weak institutions where a forum may not be readily available. Whether a relaxed or strict version of *forum non conveniens* may apply to such claims, may, however, matter less in the United States after *Kiobel*. As argued above, *per Kiobel*, most cases arising under the ATS will be dismissed on the basis of the presumption against extraterritoriality, thus obviating the need for an application of a subsidiarity requirement, e.g., pursuant to *forum non conveniens*.

On a comparative note, in the European Union, with respect to intra-EU cases, *forum non conveniens* has even disappeared entirely since the adoption of the Brussels Regulation.[55] This regulation sets out a self-contained, strict jurisdictional regime in which courts hearing civil or commercial disputes are obliged to exercise their jurisdiction (mainly the courts of the defendant's domicile or the place of the wrongful act), without having the option to dismiss on the basis of *forum non conveniens* upon establishing their jurisdiction.[56] However, the Brussels Regulation does not apply to civil cases straddling an EU member state (in practice the United Kingdom or Ireland, as civil law countries do not normally apply *forum non conveniens*) and a third country, thus leaving the application of *forum non conveniens* analysis to these cases intact.

C. Forum of Necessity

The techniques of *forum non conveniens*, exhaustion and comity discussed so far are mostly used to operationalize the negative function of subsidiarity. They are used as a shield to fend off unwelcome jurisdictional assertions, mainly with a view to paying deference to the interests of other (territorial) states. Subsidiarity could, however, also have a *positive* function in transnational tort litigation. This function has notably been emphasized by the United Nations, whose Guiding Principles on Business and Human Rights, while stopping short of endorsing universal civil jurisdiction, require corporations' home states to provide access to judicial remedies for human rights violations if such violations have occurred abroad, where the claimants "cannot access [their] home State courts regardless of the merits of the claim".[57] This suggests that subsidiarity can also be used as a sword to extend a bystander state's jurisdiction in case the primary jurisdiction state fails to assume its responsibility.

In civil litigation, one specific technique could operationalize such "sword subsidiarity": *forum necessitatis*, a doctrine pursuant to which states can exercise quasi-universal civil jurisdiction on a necessity basis, when no traditional ground confers jurisdiction.[58]

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[54] If the plaintiff is not entitled to court assistance in another jurisdiction, he may practically speaking have no access to court. *See, e.g.*, Lubbe v. Cape PLC, [2000] 4 All E.R. 268 (H.L.), para. 24.

[55] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J.* L 012 (2001).

[56] Case C-281/02 Andrew Owusu v. N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd., Mammee Bay Club Ltd., The Enchanted Garden Resorts & Spa Ltd., Consulting Services Ltd., Town & Country Resorts Ltd., E.C.R. I-01383 [2005].

[57] Office of the High Commissioner on Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04, princ. 26, commentary (2011).

[58] The European Commission's *amicus* brief in *Kiobel* indicates that at least ten EU member states can exercise such jurisdiction. Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) (No. 10-1491) 24, footnote 66.

Application of this doctrine may in particular be called for when the victim does not have reasonable access to another (territorial) forum, and the alleged violations are of sufficient gravity. On this ground, the District Court of The Hague established its jurisdiction over a torture claim filed by a Palestinian doctor against unnamed Libyan agents (2012), and subsequently awarded damages to the claimant.[59] Plaintiffs may, however, face a high bar in convincing the court to exercise necessity-based jurisdiction. A court in Québec recently held that the fact that a lawyer in the alternative forum is not willing to pursue the case may not suffice to trigger application of the principle of *forum necessitatis*, even in cases of gross human rights violations.[60] In the United States, the principle is not well known, although courts may give effect to it as part of a multifactor test when deciding on whether or not to exercise jurisdiction, also in human rights tort cases brought after *Kiobel*.[61]

D. Applying Foreign Law

In respect of "positive" applications of jurisdictional subsidiarity, a forum court's exercise of jurisdiction need not imply that this court will, of necessity, also apply forum law. Under conflict of laws rules, the forum state may still want, or have to defer to, the law of the place of commission of the wrongful act (*lex causae*),[62] unless this law runs counter to the public policy of the forum. This could also been seen as an application of the principle of subsidiarity: the law of the state with the strongest connection to the case will be respected and applied in the ordinary course of events, and only in exceptional circumstances will the forum apply its own law, on a subsidiary basis, when foreign law does not satisfy minimum standards. Use of this applicable law mechanism soothes the sovereignty concerns with which the exercise of extraterritorial jurisdiction is often associated, since it prevents the forum state from imposing its own laws and values on "foreign-cubed" cases.[63]

IV. BALANCING THE SWORD AND SHIELD FUNCTIONS OF SUBSIDIARITY

It appears that, in various jurisdictions, the legal policy consideration that the territorial forum should have first right of way when it comes to exercising jurisdiction over violations of international law and human rights,[64] and that another forum steps in only on a

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[59] El-Hojouj v. Unnamed Libyan Officials, Arrondissementsrechtbank Den Haag [District Court of The Hague], Mar. 21, 2012, Case No. 400882/HAZA11-2252 (ECLI:NL:RBSGR:2012:BV9748) (Neth.) (applicant claimed to have suffered damages following unlawful imprisonment in Libya for allegedly infecting children with HIV/AIDS).

[60] Anvil Mining Ltd. v. Canadian Ass'n Against Impunity, [2012] Que. C.A. 117, paras. 96–103. The case was brought by an NGO against a mining company accused of complicity in human rights violations committed in the Democratic Republic of the Congo.

[61] *Supra* note 49.

[62] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *O.J.* L 199/40 (2007). Note that in ATS litigation, the applicable law is *public international law*; as a result, the *lex causae* is normally not applied.

[63] *See, e.g.,* Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 Am. J. Int'l L. 846, 847 (2013).

[64] Justine Nolan, Michael Posner & Sarah Labowitz, *Beyond Kiobel: Alternative Remedies for Sustained Human Rights Protection*, Am. J. Int'l L. Unbound e-48, e-50 (2014) ("Logically, recourse to local law and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights").

subsidiary basis, is crystallizing as sound legal policy. This occurs through a variety of legal techniques, such as the requirement of the exhaustion of domestic remedies, *forum non conveniens, forum necessitates*,[65] or simple prosecutorial discretion in criminal proceedings. These techniques allow for the dismissal of cases brought in a non-territorial forum, e.g., in a corporation's home state or even in a bystander state exercising universal jurisdiction, insofar as the territorial forum is able and willing to hear the case. At the same time, they may allow for the exercise of *subsidiary* non-territorial jurisdiction where the territorial forum fails to provide redress, in particular with respect to human rights violations.

In some jurisdictions, courts appear to have shut the door for such subsidiary protection, by requiring a strong jurisdictional connection of the case with the forum in the first place, thereby effectively excluding "foreign-cubed" cases which do not "touch and concern" the forum. The much-discussed US Supreme Court's decision in *Kiobel*, which pertained to the exercise of universal tort jurisdiction, is a case in point. As Ralph Steinhardt has insightfully observed, this decision regrettably stands for "international law in its ancient 'negative' form of jurisdictional line drawing and abstention, instead of its contemporary 'affirmative' forms of substantive law for resolving communal problems, like environmental degradation and egregious human rights violations."[66] This is exactly the transformative power of the positive dimension of the principle of subsidiarity in the law of jurisdiction: it may encourage rather than limit the exercise of unilateral jurisdiction over violations of international values or interests, while calling for deference to territorial fora that are able and willing to grant redress. Especially in the field of corporate social responsibility, in the absence of stringent host state regulation, multilateral regulation and monitoring, workable transnational private regulatory initiatives, or an International Civil Court, such positive subsidiary jurisdiction may be necessary to provide accountability and raise standards.[67]

It is tempting to endorse the positive or sword function of subsidiarity, as it allows accountability for international crimes to be provided at least *somewhere*, in a bystander state forum if need be. One should not overlook, however, that application of the expansive version of subsidiarity may risk upsetting the "fair balance between sovereignty interests and international justice interests"[68] which is inherent in subsidiarity. Subsidiarity should arguably not be used to allow bystander states to displace directly affected, or more connected states that are genuinely able and willing to prosecute. Such displacement would not only violate the latter states' sovereignty; it would even be unwelcome from the perspective of "positive subsidiarity", as it may fail to exert sufficient pressure on the territorial state to put in place the legal reforms that may ultimately make bystander state intervention redundant. Ultimately, universal jurisdiction should be seen as a merely temporary measure that plugs territorial regulatory failures, while encouraging local legal reform and strengthening

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[65] *See also* Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum*, 107 Am. J. Int'l L. 601, 619 (2013) ("The favorable reference to [comity, exhaustion, and *forum non-conveniens* doctrines] could similarly accord preference to forums with a strong connection to the defendant or to the conduct at issue in the lawsuit, also consistent with universal jurisdiction tempered by *subsidiarity*.") (emphasis added), citing the *Kiobel* decision, and Justice Breyer's opinion in particular.

[66] *Supra* note 49, at 845.

[67] *Contra*: Austen L. Parrish, *Kiobel's Broader Significance: Implications for International Legal Theory*, Am. J. Int'l L. Unbound e-19, e-23 (2014) ("The hope after *Kiobel* is that the human rights community will turn away from unilateral enforcement and focus its attention on rebuilding international law and its institutions").

[68] Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction—A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 7 J. Int'l Crim. Just. 945, 958 (2009).

a responsible approach to territorial sovereignty,[69] much in the same way as the ICC's complementarity approach is "positively" conceived of.[70]

Seen in this light, the shield function of subsidiarity suddenly becomes more attractive. While negative subsidiarity should not disingenuously be used to get rid of unwelcome cases, bystander courts could, after a careful analysis of the case context, legitimately defer to a territorial forum that has taken, or is taking measures to come to terms with past atrocities. As Steven Ratner has observed in his acclaimed *Thin Justice of International Law*, for the exercise of universal jurisdiction to be just, "the right of the state where the crimes took place to exercise jurisdiction first" is essential.[71] It is essential to secure that right as rash bystander state prosecutions may threaten inter-state peace,[72] especially where leading foreign state officials are targeted. Along with human rights, peace is, after all (in Ratner's defensible scheme of global justice), one of the pillars on which the justice of international law is built.[73]

The importance of peace requires that we take sovereignty seriously when conducting a subsidiarity analysis.[74] Admittedly, subsidiarity should not be resorted to shield repressive governments from accountability, since, as indicated in the Introduction, sovereignty is no longer an absolute defense against foreign intervention. However, deference to good faith efforts on the part of the territorial state is called for; and given the salience of stable inter-state relations, a higher degree of deference than the one required by the International Criminal Court under the complementarity principle is advisable. This may mean that bystander states may want to defer to good faith transitional justice mechanisms short of

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[69] Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 33 (submitting that "exhaustion encourages the development of meaningful remedies in countries with a nexus to the tortious conduct, while also preserving the judicial resources of those States that lack such a nexus from unnecessary intervention").

[70] In practice, for instance, in order to empower territorial states, the bystander States may after concluding the investigation send the results of the investigation to the territorial state and request it to take over the case with a view to possible prosecution. *Supra* note 44; AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, R10, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208672%202009%20REV%201>.

[71] Steven Ratner, The Thin Justice of International Law (Oxford University Press 2015), at 412.

[72] *Id.*, at 284–285.

[73] *Id.*, at 64 ("International law rules will be deemed just if and only if they (a) advance international and interstate peace, and (b) respect, in the sense of not interfering with, basic human rights"), citing Rawls' characterization of "peace" as the first virtue of justice.

[74] In their subsidiarity analysis, bystander states already take foreign nations' sovereignty interests in to account. For instance, the desire not to upset foreign nations may require that states limit the possibilities for private parties to initiate criminal proceedings (*see, e.g.*, Article 12*bis* Preliminary Title of the Belgian Code of Criminal Procedure, excluding civil party petition in respect of international crimes prosecuted under the universality principle; and Section 25(2) of the Prosecution of Offences Act 1985, as amended, requiring that the Director of Public Prosecutions consent to the issuance of an arrest warrant based on the universality principle when a private prosecutor applies for such an issuance). When initiating criminal proceedings, private parties, unlike public prosecutors, typically do not conduct a subsidiarity analysis or take foreign nations' interests into account. *See* Sarah Williams, *Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions*, 75 Mod. L. Rev. 368, 384 (2012), submitting that "the DPP (and the Attorney General) may consider this possibility [application of subsidiarity] as part of the public interest test, recognising that over-extensive or premature assertions of jurisdiction may be denied by other states and may harm the UK's international standing".

prosecution being put in place by the territorial state,[75] especially where these mechanisms nevertheless assign blame for past transgressions, establish the truth, and provide for reparations to be offered to victims, bystander state deference to the territorial state may arguably be warranted. Bystander states are equally advised to give the territorial state sufficient time to put in place accountability mechanisms. It is surely understandable that in the midst of, or right after a conflict, normal state structures may not (yet) function adequately, and need time to be rebuilt. Sensitivity to context on the part of bystander state courts is crucial in this respect, and a case-by-case application of the subsidiarity principle, guided by relatively rough yardsticks, will be of the essence.

V. CONCLUDING OBSERVATIONS

International law allows bystander states to exercise universal criminal jurisdiction over international crimes and gross human rights violations. It is arguable that such authorization also applies to the exercise of universal jurisdiction in tort matters.[76] The exercise of universal jurisdiction nevertheless appears to be conditioned by at least an expectation if not an international requirement of subsidiarity.[77] "Subsidiarity" is not always expressly used in cases arising under the universality principle. In fact, the term itself has only acquired a jurisdictional foothold as regards the prosecution of international crimes. There is no denying, however, that also in tort proceedings arising under the universality principle some version of subsidiarity is applied. A variety of techniques have been deployed to convey the message that bystander states should only exercise universal jurisdiction where the primary jurisdiction state—the state where the impugned acts occurred or where the allegedly responsible person is registered—is unable or unwilling to intervene.

These techniques have essentially been developed to limit jurisdictional overreach and to prevent one state from imposing its own regulatory solutions on another state. Seen from this perspective, they embody the negative, sovereignty-based dimension of subsidiarity, rooted in the sovereign equality of states. Techniques such as *forum non conveniens*, the presumption against extraterritoriality, "factual complex" approaches to foreign prosecutorial willingness, and the acceptance of foreign prosecutorial assurances fit this mold at face value. Other techniques embody a more positive, international community-driven dimension of subsidiarity, to be used with a view of upholding the integrity of international norms regarding human rights. They include mandates for prosecutors to inquire in-depth whether foreign states have genuinely been able and willing to prosecute international crimes, and the *ad hoc* creation of a broader jurisdictional base to allow redress for global injustices where normal jurisdictional rules fall short (*forum necessitatis*).

When it comes to the protection of such basic norms as human rights norms, a rather liberal approach to subsidiary jurisdiction may at first sight deserve support, given the current state of under-enforcement of human rights law. Too liberal an approach, however,

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[75] In contrast, under the ICC's complementarity principle, cases that have been addressed by mechanisms such as truth-telling commissions or even amnesties, will be admissible before the Court, as Article 17 of the ICC Statute requires evidence of domestic criminal prosecutions and investigations to mount an admissibility challenge.

[76] Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 4–5.

[77] Ratner, *supra* note 71, at 282 (terming application of the subsidiarity principle a strong expectation, though probably not a rule).

may give an incentive to states to impose their own value conceptions on foreign nations, and to interfere in good faith, home-grown transitional justice and reconciliation processes. For subsidiarity to remain a viable procedural tool of "reconciling competing norms" and "encourag[ing] dialogue among multiple jurisdictions",[78] jurisdictional applications of subsidiarity should find a middle ground between "apology" and "utopia".[79] Bystander states should not shirk from their responsibilities to strive for the realization of global justice by applying judicial or regulatory avoidance techniques, but neither should they foist their own interpretations of global justice on to others who may have legitimate reasons to follow rival interpretations.

[78] *Supra* note 3.

[79] I obviously borrow these terms from Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005). Note that Koskenniemi has not directly addressed subsidiarity and universal jurisdiction in his work. Accordingly, I do not claim that he would characterize the tension between the shield and sword functions of subsidiarity in terms of apology and utopia.