THE EXPANDING RIGHT TO AN EFFECTIVE REMEDY:
COMMON DEVELOPMENTS AT THE HUMAN RIGHTS
COMMITTEE AND THE INTER-AMERICAN COURT

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ABSTRACT
The right to an effective remedy –crystallised in numerous treaties– has evolved to comprise individual rights and States obligations of a complex nature. This article discusses the procedural and substantive implications of an expansive interpretation of this right by the Human Rights Committee (HRC) and Inter-American Court of Human Rights (IACtHR). The HRC’s case law has significantly influenced the way the IACtHR has conceived of a set of rights belonging to victims of gross human rights violations, including a right to access justice and to demand investigation, prosecution, punishment and truth. Notwithstanding the greater protection and participation this construction of the right offers to victims, its difficulties warrant a critical appraisal. Some of these difficulties are related to how the IACtHR endorsed the HRC’s jurisprudence despite the differences between the norms and practices of both organs. From another perspective, the right to an effective remedy within the HRC jurisprudence also covers the award of reparations. In this area the article discusses the possible influence of the IACtHR’s jurisprudence upon the HRC.

CONTENTS

I. INTRODUCTION ................................................................. 260

II. REMEDIES AND THE RIGHT TO AN EFFECTIVE REMEDY UNDER THE ICCPR ........................................... 263

III. THE EXPANSION OF A RIGHT TO A PROCEDURAL REMEDY IN THE HRC’S CASE LAW ........................... 264

   A. THE STATE DUTY TO INVESTIGATE, PROSECUTE AND PUNISH ................................................................. 265

   B. THE RIGHT TO TRUTH .................................................. 268

IV. THE INFLUENCE OF THE HRC’S EXPANSIVE INTERPRETATION OF THE RIGHT TO AN EFFECTIVE REMEDY IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT ................................................................. 270
A. THE RIGHT TO AN EFFECTIVE REMEDY UNDER THE ACHR .................................................. 270
B. THE STATE DUTY TO INVESTIGATE, PROSECUTE AND PUNISH ........................................ 273
C. THE RIGHT TO TRUTH .............................................................................................................. 277

A. REPARATIONS AT THE HRC .................................................................................................... 280
B. THE IACTHR’S REPARATIONS AS A SOURCE OF INSPIRATION .................................................. 283

VI. CONCLUSIONS .......................................................................................................................... 284

I. INTRODUCTION

The right to an effective remedy is considered to be one of the most fundamental guarantees for the protection of human rights,¹ and a cornerstone in achieving justice for victims.² Pursuant to this right, States have an obligation to provide an effective remedy to all persons in their jurisdiction who assert an arguable claim that their rights, which the State has the primary responsibility to guarantee, have been violated.³ In other words, an effective remedy implies the possibility to make rights

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The Expanding Right to an Effective Remedy

The right to an effective remedy is enshrined in global and regional human rights instruments, and its importance has led to it being recognized as non-derogable in character, particularly in relation to remedies for violations of those rights that cannot be suspended in a state of emergency. Moreover, through the interpretation and application of this right by certain international bodies for the protection of human rights, the content of the right to an effective remedy has expanded significantly. Under the International Covenant on Civil and Political Rights (hereinafter ICCPR) the right to an effective remedy has been broadly understood both from a procedural and a substantive point of view. The expansion of the scope of this right is related to the international recognition of a so-called duty to investigate, to prosecute, to punish, and the right to know the truth of gross human rights violations. The Human Rights Committee (hereinafter HRC), as the interpreter of rights with universal applicability, has played a key role in shaping this right and its multiple corresponding obligations beyond the United Nations system. At the regional level, the experience of the Inter-American Court of Human Rights (hereinafter IAtCHR) constitutes an interesting example of the complexities that result from importing the expansive HRC construction of the right to an effective remedy despite the distinctive features that explain such an expansive construction.

This article argues firstly, that the right to an effective remedy has been developed extensively by the HRC in its case law, particularly in relation to grave human rights violations, and that this process has not been entirely consistent or free of difficulties. Secondly, the interpretation of the right by the HRC has significantly influenced the jurisprudence of the IAtCHR, which changed its previous understanding of the right to an effective remedy, with some problematic results. Thirdly, the HRC’s expansion of the right to an effective remedy is not limited to its procedural dimension; it has also extended its substantive dimension. The right has been used by the HRC as a legal basis upon which to request States to make reparation for the rights violated, in the absence of an express

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4 MANFRED NOWAK, Eight Reasons Why We Need a World Court of Human Rights, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MOLLER 697, (Gudmundur Alfredsson et al. ed. 2009); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 8 (2 ed. 2005).


clause allowing the HRC to request so. This paper also submits that, in terms of the substantive dimension of the right to an effective remedy, it is interesting to inquire about the converse influence. The jurisprudence of the IACtHR may have impacted on the remedial approach taken by the HRC. Alternatively, and in any case, it should serve as inspiration for the HRC for the development of the reparations.

Consequently, this paper considers the following questions: how has the right to an effective remedy become the normative source of other rights and obligations of a complex nature in the framework of the HRC case law? To what extent has this influenced the IACtHR’s jurisprudence? What place does the right to an effective remedy hold in the jurisprudence of the HRC and the IACtHR? And what are the normative and practical consequences of extending the content and scope of such a right for both systems?

This article, therefore, adopts a comparative approach, focused on the HRC’s views on individual communications and on the IACtHR’s judgments. It is not the object of this paper to exhaustively analyze each of the rights and obligations identified as deriving from the right to an effective remedy, but rather to outline the development of the latter in the framework of both aforementioned systems. Therefore, the duty to carry out an investigation, to prosecute, to punish and to provide truth and reparation will not be addressed in an extensive manner, as each of these issues attract debates which exceed the limits of this paper. The present analysis will also concentrate on a specific type of human rights violation, namely, those violations that can be qualified as grave or gross. The specific focus is justified, given that the process of broadening the right to an effective remedy has been directly related to attempts to address those kinds of violations.

The discussion proceeds as follows: Part I provides clarification regarding the concept of remedies and the scope of the right to an effective remedy within the ICCPR. Part II examines the HRC’s expansive interpretation of what can be considered, in principle, the procedural dimension of the right to an effective remedy. The duty to investigate, prosecute and punish, as well as the so-called right to truth, developed under the HRC’s case law, are analyzed in this section. Part III addresses the influence of the HRC’s interpretation upon the IACtHR’s jurisprudence. In order to demonstrate this, the content and origin of the right to an effective remedy within the American Convention on Human Rights (ACHR) must first be explained. Subsequently, the duty to investigate, prosecute and punish, as well as the right to truth are again considered, this time within the framework of the IACtHR. Part IV discusses the substantive dimension of the right to an effective remedy, which has also been expanded by the HRC. This necessitates a consideration of the evolution of the requests for reparations which have progressively been made by the HRC, which in turn requires reference to be made to the IACtHR’s jurisprudence. Accordingly, the possible influence of the IACtHR’s case law on the HRC’s practice on reparations is discussed. Finally, the last part of this paper proposes some conclusions, analysing the
main consequences which have flowed from the significant expansion of the right to an effective remedy and from the actual and potential mutual impacts of the HRC's and the IACtHR's jurisprudence.

II. REMEDIES AND THE RIGHT TO AN EFFECTIVE REMEDY UNDER THE ICCPR

The concept of remedy as a right has two dimensions: a procedural dimension and a substantive dimension.\(^7\) The first consists of ensuring individuals’ access to independent and competent authorities that are capable of fairly deciding upon a claim of violation of their rights.\(^8\) The second, on the other hand, refers to the relief or redress afforded to a person who has been found to be a victim of a rights violation.\(^9\) In international human rights law, the latter notion of remedy is also known as reparation, and is normally the outcome of proceedings in which the State is found to be responsible for the violation of human rights.

The ACHR and the European Convention on Human Rights (ECHR) contain separate provisions for the right to an effective remedy (articles 25 and 13 respectively) and the right to reparation (articles 63.1 of the ACHR and 41 of the ECHR). However, the ICCPR does not reflect this distinction; article 2(3) of that Covenant embraces both meanings, according to the HRC’s interpretation of that article.\(^10\) As a result, it will be seen that within the case law of the HRC it is difficult to delineate the procedural and the substantive dimensions of the right to an effective remedy. Very often both aspects appear to overlap and work together as a procedural tool for both the enforcement of rights and as a reparation measure. Article 2(3) of the ICCPR provides:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

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\(^7\) Shelton, supra note 4, at 7, 114; Thomas Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, in 46 Colum. J. of Transnat’l L., 353, 356 (2008).

\(^8\) Id.

\(^9\) Id.

(c) To ensure that the competent authorities shall enforce such remedies when granted.

This provision is based on article 13 of the ECHR, although its scope is broader than the latter in paragraphs (b) and (c). In turn, article 2(3) of the ICCPR was incorporated into article 25 of the ACHR, though its introduction was not really consistent with the text of the ACHR, as will be explained below. The wording of article 2(3) of the ICCPR as well as the travaux préparatoires of this provision indicate that the institutions entrusted with the power to declare whether a violation has taken place and to offer redress may be of a judicial, administrative or political nature. These procedures involving ‘competent authorities’ have been understood broadly as encompassing different kinds of mechanisms, including administrative courts, inquiries by parliamentary commissions, inspectors and ombudsmen, informal preventive measures and judicial proceedings.

The variety of possibilities for ensuring an adequate remedy is a consequence of the requirement of effectiveness. The appropriate form of procedural remedy may depend upon what will be ‘effective’ in the particular circumstances of the case. An effective remedy will be one which in practice brings the violation to an end and/or provides redress for a particular violation.

III. THE EXPANSION OF THE RIGHT TO A PROCEDURAL REMEDY IN THE HRC’S CASE LAW

Notwithstanding the above, judicial remedies are considered the ideal, as is evident from the explicit agreement between the States to “develop the possibilities of judicial remedy.” Moreover, the obligation to provide a judicial remedy is categorical when it comes to serious human rights violations such as executions, torture, enforced disappearances or human trafficking. In such cases, purely disciplinary and administrative remedies cannot replace judicial proceedings and cannot constitute an effective remedy.

As a result of this interpretation, the right set out in article 2(3) of the ICCPR has undergone expansion. In fact, this provision has been

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11 See infra Section III.A.
12 During the discussion of the draft, the U.K. proposal to establish a right to a judicial remedy was finally abandoned and instead decisions made by administrative and political organs were also accepted as effective remedies. Although this proposal- made by continental European and Latin American countries- prevailed, it was agreed to set forth a progressive obligation to develop judicial remedies. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 32-4, 63-4 (2d ed. 2005).
13 Id. at 64-5.
linked with a right of victims to access justice and more precisely, with the States' duty to investigate, prosecute and punish grave human rights violations as well as with the so-called right to truth. These two significant offshoots of the right to an effective remedy are analyzed below.

A. THE STATE DUTY TO INVESTIGATE, PROSECUTE AND PUNISH

In cases of serious human rights violations, the HRC has derived from the right to an effective remedy a State obligation to conduct a prompt, thorough, impartial, and independent investigation in order to determine the factual circumstances of the violation, and to identify those deemed responsible. This duty has also been expressly recognized in specific human rights instruments in relation to grave violations.

It is noteworthy to observe the way in which the HRC's case law has evolved in this respect. In a first stage, the HRC had already established the aforementioned obligation to investigate based on the duty to protect or ensure the right to life and the right not to be subjected to torture or inhuman treatment. Thus, it declared that such rights were violated by States which did not carry out a proper investigation of a killing or an enforced disappearance. This approach recalls article 2(1) general obligation “to ensure” the rights recognized in the ICCPR, but this provision was hardly invoked in the HRC's views. In some of the first cases, the HRC limited itself to finding a violation of the right to life or to integrity, and did not order the State to conduct an investigation in


17 U.N. HUMAN RIGHTS COMM., General Comment No. 6, The Right to Life (art. 6), UN Doc. 30/04/82, ¶ 4 (Apr. 30, 1982).

compliance with its obligation to provide an effective remedy under article 2(3).\textsuperscript{19} However, the HRC started to do the latter in subsequent cases, mainly by the end of the 1980s.\textsuperscript{20} The possibility for this lay in the framework of the early decision of the HRC not to confine itself to just declare its findings in relation to a particular case, but to also require States to provide appropriate redress for the violations established. But the fulfilment of the obligation to investigate was not only required by the HRC as a measure of redress for the violation committed.\textsuperscript{21} Additionally and in parallel, the duty to investigate serious violations of human rights began to be addressed mainly under the scope of the right to an effective remedy, read in conjunction with the substantive right in question.\textsuperscript{22}

As a corollary of the above obligation to conduct investigations and to discover the facts and the perpetrators of grave violations, the right to an effective remedy was considered incompatible with amnesty laws.\textsuperscript{23} If they exclude the possibility of initiating investigations into serious human rights violations and clarifying what happened to victims, States parties to the ICCPR must avoid or invalidate amnesties and analogous legal

\textsuperscript{19} See Edgardo Santullo v. Uruguay, supra note 18, at ¶ 13; Grille Motta v. Uruguay, supra note 18, at ¶ 18.
\textsuperscript{20} See Joaquín Herrera et al. v. Colombia, supra note 18, at ¶ 12; Basilio Atachahua v. Peru, supra note 118, at ¶ 10.
\textsuperscript{21} See the last paragraphs of most of the cases cited in this paper. In the vast majority of them, the HRC uses a similar formula, such as “the Committee therefore urges the State party ... to conduct a thorough and effective investigation into the disappearance and death of [the victim].”
The Expanding Right to an Effective Remedy

arrangements. This position has been upheld in the HRC’s most recent views.24

Nevertheless, the scope of the right to an effective remedy does not end there. Since the case of Bautista v. Colombia, the HRC has argued that article 2(3) of the ICCPR gives rise to a State obligation to prosecute and punish the perpetrators of serious violations of human rights.25 The adoption of this position is not insignificant if one takes into account that at the time of drafting, a proposal to expressly recognize criminal prosecution as an example of an effective remedy was not approved.26 Further, one could ask whether prosecution and punishment is necessary for the enforcement of the right, or is a necessary means of redress. The HRC seems to have answered both questions in the positive. It has affirmed that the mechanism providing for the substantiation of alleged gross violations should be a judicial criminal prosecution, while it has also determined that this step should be taken as a way to provide relief. Thereby, in the opinion of the HRC, the duty to investigate, prosecute and punish is grounded either in article 2(3) taken together with a substantive right, or in article 2(3)(a) alone. The first line of reasoning is used by the HRC when it addresses those duties as part of the procedural dimension of the right to an effective remedy in conjunction with the right to life or the prohibition on torture and ill treatment. The second line of argument implies that article 2(3)(a) alone would authorize the HRC to request investigation, prosecution and punishment as a means of reparation.27

The State obligation to investigate and prosecute, however, does not have a correlative individual right. The HRC has clarified that “the Covenant does not provide a right for an individual to require that the State

25 See Bautista de Arellano v. Colombia supra note 14, ¶ 8.6.
26 The proposal suggesting the introduction of a new paragraph saying ‘violators shall be swiftly brought to the law, especially when they are public officials’ was rejected by 6 votes to 3, with 4 abstentions. See MARC BOSSUYT, GUIDE TO THE ‘TRAVAUX PREPARATOIRES’ OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 65 (1987).
party criminally prosecute another person.” But at the same time, the HRC has stressed that it “nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and violations of the right to life, but also to prosecute, try and punish the culprits. Thus, the State party is also under an obligation to prosecute, try and punish those held responsible for such violations.”

Certainly, the simultaneous acceptance of both arguments might be difficult to reconcile, although it is not impossible. In this regard, one has to bear in mind that the Covenant in fact includes State obligations that do not necessarily match with a corresponding individual right, such as the duty to submit reports. Yet, the HRC decision to found the State duty (without a correlative right) to prosecute and punish on the right to an effective remedy raises questions of consistency, insofar as the latter is indeed an individual right allowing persons to complain before a competent body and to be granted reparation. In that sense, a more persuasive basis for the duty to prosecute and punish could be found in the general obligations contained in article 2 paragraphs 1 and 2: the obligations to ensure and to adopt measures to give effect to the rights set forth in the ICCPR. However, this has not been the position adopted by the HRC.

B. THE RIGHT TO TRUTH

There is yet another aspect of the right to an effective remedy that shows how far the interpretation of such a right has developed. This is the recognition of the so-called right to truth. Originally rooted in international humanitarian laws, this right has increasingly evolved through the activities of different international human rights bodies. Despite the fact that this right has not been named and identified as such by the HRC, it is submitted that the decision in the case of Almeida de Quinteros v. Uruguay, concerning an enforced disappearance, constitutes the

30 See ICCPR supra note 5, art. 40.
31 In the same vein, ANJA SEIBERT-FORTH, The Fight against Impunity under the International Covenant on Civil and Political Rights, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 323-4 (2002).
33 See INTERNATIONAL COMMISSION OF JURISTS, supra note 1, at 81-89.
The Expanding Right to an Effective Remedy

HRC’s first precedent acknowledging a right of victims of gross violations to know the truth.\(^{34}\)

In that case the HRC held that “[t]he Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter.”\(^{35}\) As a result, the HRC required Uruguay to “establish what has happened to Elena Quinteros.” In that case, the State’s failure to provide information about the fate and whereabouts of the victim was addressed as a form of inhuman and cruel treatment suffered by her mother; an approach maintained in subsequent cases.\(^{36}\)

Likewise, the right to know the facts surrounding an enforced disappearance or an extra-judicial execution has also been considered by the HRC to be part of the effective remedies required to be provided by the responsible State. On the one hand, the HRC has referred to the States’ duty to establish the facts of a grave violation as well as to identify its perpetrators in the context of the analysis of the obligation to investigate grave violations and to combat impunity.\(^{37}\) On the other hand, after declaring a breach of those obligations, the HRC usually demands from States the adoption of measures aimed at providing information about the violation, the burial site or location of the remains of a disappeared victim.\(^{38}\) These actions are usually required from States as part of their obligation to provide a substantive effective remedy, as will be illustrated when discussing the practice of the HRC on reparations below. In this regard, the verification of the facts and full and public disclosure of the truth have been characterised as a form of redress, namely, satisfaction.\(^{39}\)

Even though the HRC has not explicitly acknowledged the existence of an autonomous right to truth under the ICCPR, its jurisprudence on this matter has served as a fundamental basis for the further conceptualization of this right that has taken place in international human rights

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\(^{34}\) Id., at 84.


\(^{37}\) See, inter alia, Hugo Rodriguez v. Uruguay, supra note 23, at ¶¶ 12.2-12.4; Amirov v. Russian Federation, supra note 22, at ¶¶ 11.3-11.4.


Within the United Nations system the right to truth is deemed an inalienable and autonomous right linked to various other rights, including the right to an effective remedy. Here, and at the regional level, the right to truth is presented with a double character: as an individual and a collective right. The first involves the duty to provide specific information to the victims and/or relatives about the concrete circumstances of a gross violation, the place of burial or the fate of the victim, the causes of the victimization, the progress of any investigation and even the identity of the perpetrators. The collective dimension of the right to truth entails a State duty to disclose to the whole society information about the reasons why gross violations occurred, and the circumstances in which they took place.

It will be seen below that this development and, especially, the interpretation of the right to an effective remedy as a legal basis for a right to truth, has also influenced the Inter-American System. Over many years the Inter-American Commission of Human Rights worked to foster the recognition of a right to truth by the IACtHR, until the latter finally acceded. In this respect, it is important to highlight that one of the first findings of a violation of the right to know the truth by the Inter-American Commission was partially founded on a precedent set by the HRC. In fact, in the case of Ellacuría v. El Salvador, the Inter-American Commission invoked the Almeida Quinteros v. Uruguay case in support of its position. The impact that the HRC's position on both this issue and the duty to investigate and prosecute has had on the IACtHR's jurisprudence is the focus of the following section.

IV. THE INFLUENCE OF THE HRC'S EXPANSIVE INTERPRETATION OF THE RIGHT TO AN EFFECTIVE REMEDY ON THE JURISPRUDENCE OF THE INTER-AMERICAN COURT

A. THE RIGHT TO AN EFFECTIVE REMEDY UNDER THE ACHR

As previously stated, the ACHR also contains an effective remedy provision, which is different from that governing reparations. The right to an effective remedy is enshrined in article 25 of the ACHR, the word-
The Expanding Right to an Effective Remedy

...ing of which was mostly copied from article 2(3) of the ICCPR. The provision reads:

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
   b. to develop the possibilities of judicial remedy; and
   c. to ensure that the competent authorities shall enforce such remedies when granted.

A first glance shows the similarity between this provision and article 2(3) of the ICCPR, but also an important difference: unlike the latter, the former establishes a right to a “judicial” remedy. Therefore, the ACHR affords stronger protection by limiting the possibilities of remedies than can be considered appropriate for addressing a violation of human rights to those of a judicial nature. However, how can this be reconciled with the wording of article 25(2)(b), which places an obligation on the States to develop the possibilities of a judicial remedy? As seen above, such a statement was understandable in the context of the discussion about the ICCPR where the agreement reached was to give States a wide margin as to what kind of remedies they should provide. The idea to insert article 2(3) of the ICCPR into the text of article 25 of the ACHR emerged when drafters realized that the American provision did not mention the rights in the Convention amongst those protected by an effective remedy.\(^4\)\(^5\) But instead of just copying the entire provision from the ICCPR, or only incorporating a mention of the rights in the Convention, the drafters added the wording of article 2(3), when the right to a “judicial remedy” was already agreed and established.\(^4\)\(^6\) The result was a provision which lacks internal coherence, although its purpose was clearly to reinforce the State obligation to give effect to the rights recognised domestically and in the ACHR.


\(^{46}\) Id., at 261-63; CECILIA MEDINA, LA CONVENCIÓN AMERICANA DE DERECHOS HUMANOS: VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL 368 (2003).
In reality, article 25 of the ACHR was created to set out a judicial remedy of a particular nature: the so-called *amparo*, "which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention". This is a procedural mechanism of Latin-American origin, initially designed to protect constitutional rights. Therefore, unlike article 2(3) of the ICCPR, its American counterpart only enshrined this specific form of judicial remedy to protect the rights recognized in domestic law and the Convention. Of course, this does not mean that States do not have a duty to provide other kinds of remedies which may require a longer or more complex process but simply that such obligation would not be grounded in article 25.50

The introduction of article 2(3) of the ICCPR into article 25 of the ACHR provides the first significant reason to consider the interpretation of the right to an effective remedy adopted by the HRC. The IACtHR has repeatedly referred to the HRC's case law to support its reasoning and decisions on a variety of issues, and the examination of the right to

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49 The admissibility rule of exhaustion of domestic remedies and the right to fair trial reflect that States are obligated to provide an ample spectrum of mechanisms for bringing complaints of alleged violations of human rights; MEDINA, supra note 46, at 359-360.

The Expanding Right to an Effective Remedy

an effective remedy has been no exception. Accordingly, it is important to be aware of the limitations of the approaches adopted by both bodies, and of the different scopes of article 25 of the ACHR and article 2(3) of the ICCPR. These factors help explain some of the problems that have arisen in the jurisprudence of the IACtHR as a result of trying to accommodate a similar notion of effective remedy to that developed in the HRC’s case law.

B. THE STATE DUTY TO INVESTIGATE, PROSECUTE AND PUNISH

The initial consideration by the IACtHR of a State duty to seriously investigate grave violations of human rights took place in its landmark case of Velásquez Rodríguez. However, the legal justification for such an obligation was not built upon the right to an effective remedy, but on the obligation to guarantee or ensure the rights provided for in article 1(1) of the ACHR. As in the first cases decided by the HRC, the IACtHR found that the obligation to protect the right to life and to personal integrity required States to initiate diligent and prompt investigations if it was alleged that those rights had been violated. Moreover, in that case, the Court derived from article 1(1) not only a duty to investigate, but also to prosecute and punish those found responsible for the enforced disappearance of Manfredo Velásquez. Consequently, the Court concluded that the lack of an adequate and thorough investigation, prosecution and punishment constituted a breach of the substantive right to life, read together with article 1(1).

In later cases, the Court rejected the arguments of the Inter-American Commission to develop a duty to investigate, prosecute and punish on the basis of article 25, reaffirming that this provision concerned a simple and prompt recourse such as an habeas corpus. However, in some of these cases the IACtHR founded the obligation to invest-

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52 Id. at ¶¶ 166, 174, 177.

53 Id. at ¶¶ 174, 180, 188.

54 Id. at ¶¶ 188, 194.4.

tigate, prosecute and punish grave violations of human rights in article 8(1) (right to a fair trial) and not in the obligation to ensure the rights to life or to personal integrity. This interpretation was held in two cases where the IACtHR determined that it lacked jurisdiction to rule on the legal implications of the main victims’ death, given that their murder took place prior to the State acceptance of the IACtHR’s jurisdiction. As a consequence, the Court did not address the obligation to ensure the right to life of the deceased victims but instead focused on their relatives’ right to a fair hearing. Interestingly, this argumentation was further extended to other cases where such a jurisdictional problem was not at stake and subsequently was complemented with the right to an effective remedy. Thus, the Court finally shifted its position and founded the obligation to investigate, prosecute and punish in the right to a fair hearing and the right to an effective remedy taken together.

In fact, in the case of Durand and Ugarte v. Peru, the IACtHR addressed the deficiencies of the criminal investigation and prosecution in that case under both the right to judicial protection (or effective remedy) and the right to a fair trial (article 8). In the opinion of the Court, “article 8(1) of the American Convention, in connection with Article 25(1) thereof, confers to victims’ relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.” It is interesting to note that in support of this new approach, the Court referred to the case law of the HRC, according to which States parties have a duty to investigate, to prosecute and to punish those deemed responsible for grave violations, because “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3 [of the ICCPR].” However, it should be pointed out as well that the IACtHR has gone further than the HRC, because unlike the latter, the former has recognized that

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58 Id. at ¶¶ 130-31.
there is a right of victims to require a criminal investigation and prosecution of those involved in the violation from States.\(^6\)

It is clear from the *Durand and Ugarte v. Peru* judgment that the IACtHR understood the right to an effective remedy under the ACHR as embracing much more than simply the *amparo* recourse, as it was originally conceived. The Court seemed to identify article 25 of the ACHR as the legal source of a range of recourses which States should provide, including criminal proceedings.\(^6\) This led the Court to declare that a “right to access to justice” was contained in the right to judicial protection contained in article 25.\(^6\) Therefore, the Court departed from the primary notion of article 25 as a “simple and prompt recourse” and moved closer to the understanding of an effective remedy elaborated by the HRC within the framework of the ICCPR.

The position taken in the *Durand and Ugarte* case has been maintained in subsequent judgments of the IACtHR, although in some cases concerning murders or executions the IACtHR has acknowledged the obligation to guarantee the right to life as the main source of the State obligation to investigate, prosecute and punish.\(^6\) Still in most cases, particularly when it comes to the rights of the victims’ next of kin, the investigation, prosecution and punishment of grave violations of human rights are analyzed under a section devoted to article 8 and 25, taken together. This combined assessment of the obligations under those rights makes it very difficult to distinguish the scope and the role of each. The IACtHR early recognized that article 25 and 8 are interconnected, as they are too with article 1(1).\(^6\) A precondition of any effective remedy is its substantiation according to the due process of law.\(^6\) However, the IACtHR’s jurisprudence has made of these rights a “conceptually organic whole.”\(^6\)

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\(^6\) This understanding was subsequently more explicitly confirmed in *The Moiwana Community v. Surinam*, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R., (ser. C) No. 124, ¶ 148 (June 15, 2005).


\(^6\) *Id.* at ¶¶ 24, 27.

\(^6\) ANTONIO CANCADO, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 66 (2011). This former president of the IACtHR is one of the main proponents of a joint analysis of arts. 25 and 8 of the ACHR. He also advanced the right to access to justice as a right grounded in both provisions.
Leaving aside the controversial issue of a right of victims to State prosecution and punishment, in the current reasoning of the Court the limits of article 25 and 8 of the ACHR seem to be blurred.\(^67\) Moreover, this suggests that such a victim right can be based on two procedural provisions that basically provide guarantees for the enforcement of rights but give scarce indication about the substantive content of any right.\(^68\) From another point of view, the stronger condemnation which flows from a finding by the HRC of a violation of a substantive right (such as to life or integrity), read together with article 2(3) of the ICCPR, as compared to that which flows from a determination there has been a violation of article 25 and 8 of the ACHR, cannot be overlooked.

In line with the assertion of the duties to investigate, prosecute and punish grave violations of human rights, the IACtHR has also affirmed the incompatibility of amnesty laws with the ACHR. Since the Court adopted its broad understanding of article 25 and its examination of that article in conjunction with article 8, the proscription of amnesties—similarly to the approach taken by the HRC—has been justified based on the right to an effective remedy, though in conjunction with the right to a fair trial and in light of articles 1(1) and 2 of the ACHR.\(^69\)

A 2010 judgment clearly demonstrates this trend. In the case of *Gomes-Lund v. Brazil*,\(^70\) in the section of the judgment addressing article 25 together with article 8, the Court stated:

> The obligation to investigate, and where applicable, punish the serious violations of human rights have been affirmed by all of the international systems for the protection of human rights. In the universal system, the United Nations Human Rights Committee [...] considered in its constant jurisprudence that the criminal investigation and the ensuing prosecution are corrective measures that are necessary for violations of human rights [...] [and] concluded that States must establish what has oc-

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curred to the disappeared victims and bring justice to those responsible.71

A few paragraphs later, the Court continues: “Likewise, [...] in the case of Hugo Rodríguez v. Uruguay, it [the HRC] noted that it cannot accept the posture of a State of not being obligated to investigate human rights violations committed during a prior regime given an amnesty law, and it reaffirmed that amnesties in regards to serious human rights violations are incompatible with the International Covenant on Civil and Political Rights”.72 The Court concludes by adopting the same position as the HRC in that case, and declaring a violation of articles 8 and 25 of the ACHR because the Brazilian amnesty law breached the State obligation to investigate and punish.73 The same arguments were reiterated in the case of Gelman v. Uruguay.74

C. THE RIGHT TO TRUTH

Although the IACtHR initially rejected the Inter-American Commission’s position that the ACHR protected a right to truth,75 it finally recognized such a right through its joint interpretation of the rights to an effective remedy and to a fair trial.76 Thus, the other side of the State duty to thoroughly investigate grave violations of human rights was a right to truth. Notwithstanding that the Inter-American Commission’s arguments related to the right to truth took into account the case law of the HRC, the IACtHR’s recognition of the right went much further than the HRC’s interpretation. Unlike the HRC, the IACtHR has explicitly acknowledged a right of victims of serious violations (and their relatives) to know the truth and, moreover, it has developed this concept in remarkable detail. According to the IACtHR, the right to truth is not an autonomous right in the ACHR, but it is subsumed within the right to access to justice contained in articles 25 and 8, read together, which allows victims and relatives to require the State to investigate and prosecute.77 The right to truth is, in the

71 Id. at ¶ 141.
72 Id. at ¶ 157.
73 Id. at ¶¶ 172, 180.
opinion of the Court, also related to the State obligation to ensure the rights and repair their violation, as well as the right to seek and receive information. Further, it is conceptualized as a twofold right. The right to truth encompasses an individual and a collective right belonging to the victims and their relatives on the one hand, and to society as a whole on the other. Both elements of the right are realized through conducting diligent criminal investigations and by public dissemination of the results obtained from that and other investigative procedures.

By merging article 25 and 8 of the ACHR, the IACtHR has combined multiple, interconnecting rights and duties—the duty to investigate, prosecute, punish and repair and the right to truth under the umbrella of “access to justice”. A 2011 judgment concerning an enforced disappearance clearly demonstrates this type of reasoning. In the case of Conterras et al. v. El Salvador, the Court explained that “[...] the long periods of procedural inactivity, the refusal to provide information on the military operations, and the lack of diligence and exhaustiveness in the investigations by the authorities in charge of them, permit the Court to conclude that all the domestic proceedings have not constituted effective remedies to determine the fate or to discover the whereabouts of the victims, or to guarantee the rights of access to justice and to know the truth, through the investigation and eventual punishment of those responsible, and full reparation of the consequences of the violations.”

The arguments developed by the IACtHR in this matter illustrate a broad interpretation of article 25, close in many aspects to the evolution of the right to an effective remedy within the HRC’s case law. Nevertheless, it should be recalled that in the latter’s context, the wide meaning of the right to an effective remedy is the result of various factors. Among them, 1) the

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In Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, Preliminary Objections, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R., (ser. C) No. 219, ¶ 201 (Nov. 24, 2010), the Court noted that because of the facts involved, the right to know the truth was related to an action brought by relatives to access certain information, as well as related to access to justice and the right to seek and receive information as enshrined in art. 13 of the Convention. Accordingly, the Court analyzed the right to truth under art. 13 ‘Freedom of Thought and Expression.’


acceptance of an ample range of procedural avenues as effective remedies in terms of article 2(3) of the ICCPR; 2) the need for the HRC to ground its reparation requests in that same provision and 3) the lack of jurisprudential development of the obligation to ensure the rights in article 2 (1) of the ICCPR.

In its jurisprudence the IACtHR continues to mention article 1(1) – the obligation to ensure the rights – in addition to articles 25 and 8 in support of a right to require investigation, prosecution and punishment as well as a right to truth. This development has brought with it definition, with remarkable detail, of the States’ obligation to investigate. It has also underscored that States are bound to ensure much more than formal access to their justice system. However, the IACtHR’s joint approach to these three provisions offers an overlapping interpretation of the content of each that raises some problematic issues. First, that approach tends to merge the legal standards applicable to the due process of law and those governing the right to an effective remedy. This could have not only theoretical/technical consequences, but also practical. Second, if this trend continues, one may ask whether the possibility exists that the obligation to ensure in article 1 could progressively lose the meaningful content that it has had.

V. THE EXPANSION OF THE SUBSTANTIATIVE NOTION OF A REMEDY: REPARATIONS IN THE HRC AND THE POSSIBLE IMPACT OF THE IACtHR’S JURISPRUDENCE

As indicated at the outset of this analysis the substantive component of the right to an effective remedy consists in providing redress when a human rights violation has been established. This form of remedy has a crucial place in international law, in that it reflects the general principle of international law that “any breach of an engagement involves an obligation to make reparation.” The reparation has to be provided with a view to rectifying the consequences of the wrongdoing, and in order to re-establish the situation that existed prior to the commission of the illegal act. This is what is known as restitution in integrum or the “full remedy

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82 CANÇADO, supra note 66 at 71.
83 Medina, supra note 46, at 365, 371. An example provided by her is very illustrative. She suggests that if the “reasonable time” criterion from article 8 is applied to the judicial remedy in article 25, the time of substantiation of the latter will be measured against the duration of civil and criminal procedure which, by nature, are far from being as “prompt and simple” as the remedy in article 25 was meant to be.
rule”, which is also applicable in the context of violations of human rights obligations. However, in this latter sphere, such realization is extremely difficult to achieve.

A. Reparations at the HRC

The best example of a broad reading of the right to an effective remedy so as to include the State obligation to provide and the corresponding right of the victim to receive reparation is contained in the practice of the HRC. The reason for this is simple: the ICCPR, unlike the ACHR and the ECHR, does not contain a provision concerning reparation for violations of the rights set forth in that covenant. There is no equivalent to article 63 of the ACHR or article 41 of the ECHR in the ICCPR or its First Optional Protocol (hereinafter OP). This asymmetry is probably due to the different nature of the HRC, as compared to the IACtHR and the European Court of Human Rights. The HRC is not a tribunal and, therefore, it does not issue binding judgments as regional human rights courts do, and nor, in principle, would it have the power to order reparations. However, the HRC clearly performs an adjudicative function when considering individual communications, which as such requires a pronouncement on the remedies to be afforded to victims. Moreover, the HRC has gone through a process of increasing judicialization, whereby its decisions have become very similar to binding judgments in form and substance.

Thus, despite the silence of the ICCPR and its OP, the HRC has interpreted article 2(3), the right to an effective remedy, as the normative source for requesting States parties to repair the violations established in its views on individual communications. The HRC adopted this position very early in its practice, although it was not self-evident that the HRC’s mandate could go beyond finding violations and extend to recommending reparations. However, the position taken by the HRC on this issue must be

86 Nowak, supra note 4, at 75.
89 While at the beginning it was not specified on which grounds the HRC was requiring States to remedy the violations found, this was subsequently defined as art. 2(3) and later, more precisely, art. 2(3)(a). The latter is the current practice.
91 In fact, it was even argued that such a possibility would be in violation of article 2(7) of the UN Charter, as it would constitute intervention in the domestic affairs of State parties. See Jakob Th. Møller and Alfred De Zayas, United Nations Human Rights Committee, Case Law 1977-2008, A Handbook 456 (2009).
viewed in light of the type of violations that it examined during its first period of activity, that is, gross human rights violation committed in the context of dictatorships.\(^9\)

As a result of its interpretation of article 2(3), the HRC has required the implementation of different sorts of reparation measures. Although initially the HRC mainly focused on granting compensation (which is still the most common measure), it has progressively demanded other forms of redress, such as the adjustment of domestic legislation\(^9\)\(^3\) and the release of a detainee.\(^9\)\(^4\) The type of reparation demanded depends on the nature of the right involved and the features of the violation. To date a considerable variety of measures have been recommended by the HRC, and over time they have become more specific. Among the measures which have been required by the HRC as "effective remedies" for violations are: the nullification of a conviction and refund of a fine paid by the victim;\(^9\)\(^5\) restraint from enforcement and revocation of an expulsion order;\(^9\)\(^6\) a public apology;\(^9\)\(^7\) commutation of a death sentence;\(^9\)\(^8\) early consideration for parole;\(^9\)\(^9\) retrial under due judicial guarantees;\(^9\)\(^10\) protection from threats;\(^9\)\(^11\)

\(^9\) Most of them against Uruguay.
information on the fate of a disappeared person and prosecution, trial and punishment of those deemed responsible;\textsuperscript{102} restitution of a victim's property;\textsuperscript{103} grant of permission to leave the country;\textsuperscript{104} issuance of a passport;\textsuperscript{105} providing the victim with medical care;\textsuperscript{106} and a guarantee that similar violations will not occur in the future.\textsuperscript{107}

The remedial practice of the HRC has been consolidated and is formally accepted by the majority of States parties. However, there are still some important challenges to be addressed by the HRC. Firstly, the HRC's practice on reparations has not been entirely coherent and systematic. Moreover, the ambiguity in the formulation of reparations and the underdevelopment of guarantees of non-repetition are problematic aspects that need to be rectified. Lastly, the HRC's development as described above has not been accompanied by the adoption of an adequate system to monitor the implementation of its requests for reparations.

Yet, against this background, two significant aspects should be singled out. First, it is notable how far the HRC's elaboration of reparation measures has developed in the absence of an explicit provision allowing it to consider reparations. This is also interesting in light of the difference between the terms “remedy” and “recours” in the ICCPR. In the English version, “remedy” is meant to embrace a procedural and a substantial meaning, while in French “recours” only has a procedural connotation.\textsuperscript{108}

\textsuperscript{107} This general formulation of guarantees of non-repetition can be seen in practically all communications where the HRC has found violations.
\textsuperscript{108} ECKART KLEIN, Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee, in \textit{STATE
One might question, for instance, whether the customary rule that prescribes reparation for the breach of an obligation would, in reality, be sufficient legal basis for the HRC to require reparation measures. However, the HRC has decided that it is article 2(3) (a) of the ICCPR that provides the legal basis upon which it can require States to remedy violations. Around 1983 the HRC rejected the idea that it was entitled to enforce its views, but stated that it could “nevertheless do something to bring [about] redress.” According to the HRC, the preamble of the OP and article 2(3) of the ICCPR demonstrate that States parties intended the Covenant to be implemented, and therefore the HRC should indicate the remedies that a victim might benefit from.

Second, the development of the HRC’s case law in this regard is particularly remarkable when compared to the practice of the European Court of Human Rights, which, despite the terms of article 41 of the ECHR, has decided to refrain from ordering any reparation measure other than compensation. The difference in the positions taken by the HRC and the European Court highlights that the option taken by the HRC can be commendable and that the HRC has come closer to the IACtHR’s approach. Nonetheless, the IACtHR justifies its reparation requests on the basis of article 63(1) of the ACHR, while the HRC does so by relying upon the right to an effective remedy under the ICCPR.

B. THE ACTHR’S REPARATIONS AS A SOURCE OF INSPIRATION

The jurisprudence of the IACtHR on reparation is characterized by an innovative approach, based on an ample range of measures to provide a complete and detailed scheme of reparations, which often extend beyond the individual victim of a given case. In fact, the IACtHR has identified different measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Among the diverse reparations granted by the IACtHR it is possible to find, for instance, requirements for the renaming of street, the building of monuments and other symbolic measures to the victims’ memory; the protection of human rights defend-
ers and personnel of the judicial system; the removal of waste from and reforestation of indigenous lands; the training of police, armed forces and other officials; and the re-opening of a criminal investigation.

The jurisprudence of the HRC has progressively – though still modestly – evolved in a similar direction. It began by formulating general requests for States to undertake steps to provide victims with an effective remedy. It soon added a requirement to provide compensation, and subsequently it has also incorporated measures of restitution, rehabilitation, satisfaction, and a general suggestion of guarantees of non-repetition. Even though the HRC’s reparations still lack the precision and breadth of those granted by the IACtHR, there has been important progress, which should continue.

The previous sections discussed the significant influence exerted by the HRC’s expansive interpretation of the right to an effective remedy on the IACtHR’s jurisprudence regarding article 25 of the ACHR. Nevertheless, in terms of reparations, the influence might appear as flowing the other way. It is true that the HRC has not referred to the IACtHR’s case law, but the potential influence of the regional court in this area cannot be underestimated. The broad understanding of the right to an effective remedy by the HRC has certainly had a considerable impact on the IACtHR’s jurisprudence. But it is interesting to inquire as well whether, conversely, the IACtHR’s decisions on reparations may influence the HRC to extend the scope of the right to an effective remedy even further. Whatever the impact that the IACtHR’s jurisprudence on reparations may have had on the progress of the HRC in regards to the provision of redress, this influence should be increased. Looking at the practice of the IACtHR could help the HRC to articulate more comprehensive and detailed forms of reparations.

VI. CONCLUSIONS

The content and scope of the right to an effective remedy enshrined in article 2(3) of the ICCPR have experienced a significant expansion over time in the HRC’s case law. This development seems understandable in light of the object and purpose of that provision, which was designed to provide an ample variety of mechanisms for the protection of the rights in the Covenant. Furthermore, article 2(3) had to serve too as a basis to request reparations that were not regulated elsewhere. Also, that expansive trend was built upon the initial decisions of the HRC in cases concerning

The Expanding Right to an Effective Remedy

gross human rights violations, characterised by impunity. The interpretation of article 2(3) has evolved with such far-reaching consequences that this provision has practically become the source of all positive obligations of State parties. In this regard, it is worth noting that article 2(1) – which establishes the obligation to ensure the rights in the ICCPR – seems to have only a minimal impact in the resolution of individual communications. Almost every infringement of a positive obligation in relation to a substantive right is decided by declaring the violation of that right in conjunction with article 2(3) of the ICCPR.

The HRC has asserted that investigation, prosecution and punishment are, on the one hand, the effective procedural remedies to address grave violations of human rights. On the other, they constitute substantial remedies, that is, reparation measures. The HRC has outlined, however, that there is no right to demand that States prosecute and punish, with its support for a State duty to do so based on the broad individual right to an effective remedy. Nonetheless, it might be more consistent to justify an obligation without a corresponding right to prosecute and punish based on the aforementioned obligation to ensure the rights. Indeed, this idea according to which the duty to investigate, prosecute and punish derives from the obligation to ensure the right to life or to integrity was the previous position of the IACtHR, until it started referring to the HRC’s case law and stretching the contours of the right to judicial protection in article 25.

It is in fact more difficult to understand the purposes and advantages of the shift made by the IACtHR in its interpretation of article 25 of the ACHR. The expansive interpretation of the right to an effective remedy by the IACtHR is related to the influence exerted by the HRC’s jurisprudence. But in the Inter-American System the reasons and aims which gave rise to article 25 of the ACHR were different from those that resulted in article 2(3) of the ICCPR. Furthermore, unlike the ICCPR, the ACHR always had a separate provision for reparations. And the IACtHR, since the beginning of its work, developed a robust jurisprudence around the obligation to “ensure” the convention rights. Thus, the expansion of the right to an effective remedy has not only gone beyond the original ideas upon which article 25 was based and produced an amalgam of two different provisions of the ACHR (articles 25 and 8), but it has also given rise to further complexities, as seen above.

Notwithstanding how positive the recognition of a right to access to justice and to investigation, prosecution and punishment has been for the victims in the Inter-American system, the legal question of whether all that falls within the scope of the right to an effective remedy, would need to be re-examined. To improve the legal reasoning and argumentation of the IACtHR as well as to foresee counterproductive effects in this respect is also to reinforce the protection of human rights and the legitimacy of the Court.

Finally, an analysis of the development of the right to an effective remedy by the HRC cannot omit the fact that article 2(3) of the ICCPR has also been interpreted as providing the legal basis for the HRC’s requests for reparations. Therefore, it is clear that this article fulfils multiple objec-
tives beyond those previously mentioned. By giving a substantive meaning to the right to an effective remedy, the HRC has extended the general request for compensation to include diverse forms of reparations such as restitution, rehabilitation, satisfaction and guarantees of non-repetition. Although the measures of redress provided by the HRC may not always be consistent and precise, the general evolution of the HRC’s practice in this regard is remarkable. This practice shows that the path followed by the IACtHR can be a valuable source of inspiration for the HRC. Moreover, it is hoped that the way in which remedies are crafted and their domestic implementation could be improved in the near future. Perhaps in that way the broad reading of article 2(3) could eventually complete the development it has undergone with a view to fostering the realisation of human rights at the global level.