

standing for indigenous communities to claim biopiracy or misappropriation, and there are no ways in which to enforce the initiatives that have been created at the international level (CBD, WIPO, Doha, FAO, UNESCO, etc). As opposed to this, however, the HR system has mechanisms to receive indigenous community petitions, although the TK matter has not been explored and could present some problems in the recognition of TK as a right.

Given this context, two basic and fundamental rights have been denied; the right to an effective remedy and the right to repair damages for a violation of a right.

This paper argues that human rights have to take an important role in the protection of TK. Human rights approaches have the advantage of eventual recognition of some collective rights within indigenous peoples' rights. Moreover, at a judicial level HR provides a system of integral reparations of damages in benefit of the community that goes further than the compensatory measures included in the IP system.¹⁴ Therefore, the HR system could provide the indigenous communities with the opportunity to claim an effective protection of TK and also guarantee them access to an effective international remedy and redress.

Finally, this article does not analyze in depth the characteristics of the protection of IPR, domestic protections, or human rights conflicts with collective rights. Rather, it analyzes whether traditional knowledge is effectively protected under international human rights remedies, examining both regional systems as well as universal ones, and judicial and non-judicial remedies.

For this purpose the paper is divided in five sections. First, a background description of the interrelation of TK with IP and HR. Second, a theoretical analysis as to the right to an effective remedy and redress. Third, an analysis of the existing international HR remedies available for the protection of TK. Fourth, TK through an effective remedy and redress. Finally, an analysis of the implications of the lack of protection, based on a critique in light of international protections.

I. Traditional Knowledge: interrelation and conflicts with Intellectual Property and Human Rights. Defining the right

a) Conceptualization of TK

Traditional knowledge has been defined as "the totality of all knowledge and practices, whether

explicit or implicit, used in the management of socio-economic and ecological facets of life. It is usually a collective property of a society".¹⁵ In a different approach, the Convention on Bio Diversity (CBD) refers to TK as innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.¹⁶ The Permanent Forum on Indigenous Issues has further stated that "TK of indigenous peoples is their inalienable cultural heritage and embodies their cultural identity".¹⁷

The discussion about TK also includes other terminologies such as folklore, heritage, community resources, traditional cultural expression (TCE),¹⁸ traditional group knowledge and practice (TGKP).¹⁹ TK is not exclusive of indigenous peoples because it belongs to all ancestral cultural expressions and knowledge that are still maintained in societies.²⁰ This paper refers to TK as the general traditional knowledge, folklore and cultural expressions exercised by indigenous peoples.

The main concerns regarding TK have been identified by WIPO as follows: i) loss of traditional lifestyles; ii) lack of respect for traditional knowledge and holders; iii) misappropriation of TK; iv) use of TK without any benefit sharing or in a derogatory manner; v) no efforts to preserve and promote the use of TK.²¹

TK could be considered an economic, social and cultural right because some parts of its expressions could be necessarily considered as the "right to benefit of the protection of moral and material interest of the author",²² such as handicrafts, folklore, arts or spiritual expressions. Moreover, some other components of TK could be better protected under the idea of the rights to property, especially those linked with land rights and the environment. Nevertheless, both rights could be fulfilled in part for the protection of intellectual property rights, which provide some mechanisms such as trademarks or geographical indicators or patents that could be effective for specific circumstances (defensive and positive protection measures).²³ Other *sui generis* systems could be the solution for the protection of TK.

The focus of this analysis concentrates on the fundamental right of indigenous peoples to the protection of their TK based on the rights established in the UN Declaration on Indigenous Rights mentioned above²⁴, stressing the "right to protect" TK, rather than maintain, promote or develop it.

b) The conflict between IP and TK

IP is a double-edged sword: it has strongly affected the right of indigenous peoples and farmer rights, but it is also presented as one of the main solutions for protecting TK. However, the different nature and characteristics of both present fundamental problems.

TK differs fundamentally from conventional IPR in the following ways: "a) TK is a communal right, often vested in clan, family or other socio-political groups; (b) TK cannot be readily associated with a single, identifiable individual creator, author or producer; (c) TK is managed and owned in accordance with customary rules and codes of practice, and is usually not sold or alienated like conventional intellectual property rights; (d) They include rights to all forms of traditional knowledge such as intangible cultural products and expressions, all of which are not protected under conventional intellectual property laws; (e) Indigenous traditional knowledge is usually transmitted orally and is therefore not subject to the same requirements regarding material forms that pertain to conventional intellectual property systems".²⁵

Professor Farley mentions that "the underlying rationale of intellectual property law privileges individual ownership, economic exploitation, and the dissemination of new expressions of ideas. IPR are driven by the economics of free enterprise and profit."²⁶

IPR have evolved effectively in order to protect and develop innovation. In the legal framework of the WTO, the Trade Related Intellectual Property Rights Agreement (TRIPS) was implemented and negotiated during the Uruguay Round. One of the main conflicts presented with IPR and TK is Article 27.3 (b) of TRIPS, which includes an exception of patentability. It is established that Members may exclude plants, animals and essentially biological processes for the production of plants or animals from patentability. Microorganism and non-biological and microbiological processes may not be excluded. "However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."²⁷

Article 27.3(b) of TRIPS became highly controversial because it meant that any plant or animal that was genetically modified could be considered "processed" and thus could not be excluded from patentability. This was also the first time that life forms were considered patentable under global intellectual property rules. Vandana

Shiva explained it in the following way: "TRIPS has become the major "legal" means by which global corporations have been able to steal and patent the medicinal knowledge and the seeds of indigenous peoples through the world: global bio-piracy".²⁸

During the Doha Ministerial Declaration, the WTO instructed the Council for TRIPS to examine the conflict between TRIPS and TK.²⁹ Developing countries had called for the harmonization of TRIPS and the CBD regarding the use of genetic resources and the protection of TK. Some had argued for the extension to exclude all life forms, and that the principle of informed consent should be incorporated into TRIPS.³⁰ Other proposals are to include provisions of disclosure of origin and evidence of fair and equitable benefit sharing under the national regime of the country of origin.³¹ The review of Article 27.3(b) is still in process.

The World Intellectual Property Organization (WIPO) has made important efforts to harmonize IPR with social conflicts. WIPO has been working on a draft provision for a policy to cover protection of Traditional Cultural Expressions and Folklore.³² The overall goal is to try to protect them from misappropriation, without necessarily creating exclusive property rights over TK. It also recognizes that traditional IP law does not always provide a comprehensive protection of TK.³³

Many academic authors, civil society members, as well as indigenous leaders have concluded that the traditional IPR system is not able to protect traditional knowledge and therefore a *sui generis* system is needed with a more holistic approach that also provides enforceability.³⁴

c) Interrelation and conflicts between IP and HR

In the HR arena, IPR have been controversial. However, IPR have tried to fit into the right to property as well as the right to benefit from the protection of the moral and material interest (ESCR). At the same time, different groups have tried to place HR into the IP sphere and vice versa (For example WIPO).

The Committee on Economic, Social and Cultural Rights established in its *General Comment 17* (2005) an analysis of article 15(1)(c) of the Covenant on ESCR, concerning the right of everyone to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he or she is the author. It mentioned that HR are fundamental (inherent to the human person), inalienable and universal entitlements belonging to individuals

and, under certain circumstances, *groups of individuals and communities*. On the contrary, IPR are means by which States seek to provide incentives for inventiveness and creativity and preserve the integrity of scientific, literary and artistic products. It emphasizes that in contrast to HR, IPR are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. Also, they can be limited in time scope, traded, amended and even forfeited. IPR primarily protects business and corporate interests and investments. It concludes that it is important not to equate IPR with the human right recognized in Article 15.³⁵

Accordingly, it appears that the *General Comment* considered IPR not as a fundamental right inherent to the person, but rather as an eventually effective mechanism to protect the human right to benefit from the protection of the moral and material interest of the author. In other words, IPR could be a tool to protect a fundamental right but the scope of the human right included in Article 15 is broader and contains different characteristics than IPR.

The other link between both areas could be found in the right to property, which is a human right recognized in almost every human rights treaty. Even their social and economic nature has been included in the civil and political rights catalogs for historical reasons. Many arguments exist about whether IPR could be considered property rights. The Inter-American and European Courts of Human Rights have dealt with and recognized specific cases of IPR within the right to property provisions in the *Palamara v. Chile* case and *Anheuser-Bush Inc v. Portugal* case respectively.³⁶

The Sub-Commission on the Promotion and Protection of Human Rights in the United Nations Commission on Human Rights has adopted some resolutions about the conflicts presented between IPR and HR. The Sub-Commission has requested that the UN High Commissioner for HR seeks observer status with the WTO for the review of TRIPS. Moreover, it has called for the protection of traditional knowledge and cultural values of the heritage of indigenous people.³⁷

On the other hand, WIPO has included the relevance to respect international human rights law in its policy provisions for the protection of TK.³⁸

d) Interrelation between HR and TK

From the start, HR has been established based on the conception of individual rights. A conflict that TK could face under the HR umbrella would

be the lack of recognition of collective rights of communities.

For instance, the UDHR was founded upon this idea. Even though ESCR were incorporated in the UNDHR, they originally stemmed from the concept of the interrelation of the individual with these rights.³⁹ The question now will be whether TK is a collective property and generates collective rights. Recently, broader interpretations have been made regarding important HR provisions that have allowed for the protection of collective rights. For example, some of the Articles that have been argued for the protection of collective rights of indigenous peoples are the following:

According to Art 27 (2) of the *Universal Declaration of Human Rights* (UDHR), "everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which one is the author". The same provision is established in Article 15(1)(c) of the *International Covenant on ESCR* (ICESCR) as well as Article 14(1)(c) of the Protocol of San Salvador.

The Committee on ESCR has interpreted Article 15(1)(c) in *General Comment 17*, imposing the following obligations for the state parties: *to protect, respect and fulfill*. The Committee mentions "State parties should adopt measures to ensure the effective protection on the interest of indigenous peoples relating to their products, which are often expressions of their cultural heritage and TK".⁴⁰ Such measures are mentioned as individual or collective protection under the IP regimes. Those measures should respect the principle of free, prior and informed consent of indigenous authors and they should provide for the collective administration by indigenous peoples of the benefits derived from their products.

Within this right, the Committee has established as a *core obligation* (which has immediate effect), the right of equal access for marginalized groups to an appropriate remedy and redress in the case that their moral and material interests have been infringed upon.⁴¹

General Comment 17 clearly recognizes collective rights in the case of indigenous peoples.⁴² Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Even though the word used is “minorities,” this Article has been used to cover indigenous communities.⁴³ In the interpretation of this Article, the meaning of culture has to be understood in a broader sense including some aspects of economic activities. Nevertheless, it must be interpreted case by case.⁴⁴ The UN HR Committee in *General Comment 23* (50), has established that “the enjoyment of this right may require positive legal measures of protection and measures to ensure the effective participation of members of communities in decisions which affect them”.⁴⁵

ILO Convention No. 169, concerning *Indigenous and Tribal Peoples in Independent Countries*, is the only legally binding instrument of international law regarding indigenous peoples.⁴⁶ Although the Convention does not mention TK and folklore, this instrument could be articulated in order to protect TK. Article 23 establishes that “handicrafts, rural and community-based industries, and subsistence economies and traditional activities of the peoples concerned... shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development.” Moreover, Article 13 states that all States “shall respect the special importance of the cultures and spiritual values of the peoples concerned of their relationship with [their lands]...”

The *UN Declaration on Indigenous Peoples Rights*, approved by the HR Council, and recently adopted by the UN General Assembly “is the most comprehensive statement of the rights of Indigenous Peoples to date, establishing collective rights to a greater extent than any other document in international human rights law. It establishes the rights of Indigenous Peoples to the protection of their cultural property and identity as well as the rights to education, employment, health, religion, language and more. It also protects the right of indigenous peoples to own land collectively”.⁴⁷

According to Article 31 “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... Also to maintain their intellectual property over such... (Above mentioned)”⁴⁸. Article 12 recognizes the right to “manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains”, which also include the right to practice and enjoy culture. Article 24 mentions the right to “their traditional medicines and to maintain

their health practices, including the conservation of their medicinal plants, animal and minerals...”. Finally Article 34 establishes the link between indigenous development in accordance with international human rights standards.

The *Proposed American Declaration on the Rights of Indigenous Peoples*⁴⁹ contains collective rights of indigenous peoples. In a different approach to the UN Declaration, the American Declaration in Article XX expressly includes IPR provisions, which includes: “Indigenous peoples have the right to the recognition and the full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property through trademarks, patents, copyright and other such procedures as established under domestic law; as well as to special measures to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations”. They also have the *right to* “control, develop and protect their sciences and technologies, including their human and genetic resources in general, seed, medicine, knowledge of plant and animal life, original designs and procedure”.

The key issue is that indigenous peoples’ rights are necessarily collective rights. It includes the right to land, natural resources, self-determination and culture.⁵⁰ It is under this umbrella that TK has been understood. Following this line, the Inter-American Court of HR has also recognized collective rights for indigenous peoples. In some cases, they have linked this with the right to property and in others they have provided collective reparation measures to benefit the affected community.⁵¹

e) Defining the right

To conclude this section, TK is one of the areas of law that intersects different disciplines and requires the understanding and protection of different laws such as HR, IP, the environment and indigenous rights. Therefore, it is logical that there have been conflicts of law. However, this should not be an excuse for the lack of protection of a fundamental right for indigenous peoples.

The position of this paper is that, first of all, TK is an indigenous peoples’ right based on the recently adopted Declaration on Indigenous Peoples Rights, and supported in other treaties such as, *inter alia* ICCPR, CESC, Convention 169 ILO (Article 23), CBD, the Protocol of San Salvador, and the African Charter on Human and Peoples’ Rights (Article 20). Second, this right, as a human right, has multiple dimensions. Some of these are part of

the sphere of ESCR, protecting moral and material interests, and some others are part of the sphere of the right to property as a human right. Third, TK is not IPR, but IPR, in some cases, can serve as a form of effective protection. Fourth, for the other aspects that cover TK, it is necessary to implement a *sui generi* system of protection of TK, which includes the indigenous rights approach (especially customary law⁵²), as well as HR, environmental rights, and administrative law. Finally, it is fundamental that all of these systems provide effective mechanisms to protect collective rights in the context of indigenous peoples; otherwise, they will never be effective.⁵³

So far, the HR system has more possibilities for approaching the rights of indigenous peoples in a holistic way than does the IP system. Moreover, the HR system offers international mechanisms that could integrate all of these interrelations.

II. The right to an effective remedy and to reparation in international law for the protection of TK

The recognition of a right implies as a consequence the implementation of an effective remedy that provides protection and therefore redress.⁵⁴ In other words, the remedy includes the ways that a violation of a right could be claimed and the reparation that could be granted in cases where such a violation is found. Therefore, in this case, three different independent⁵⁵ but interrelated rights exist: the right to protect TK, the right to an effective remedy, and the right to receive integral reparation of damages.

These rights apply before the violation of a right that is recognized and must be protected. The right to an effective remedy is not necessarily a judicial remedy; hence, this could also be supplied by a non-judicial body.⁵⁶ This paper will refer to remedies from judicial, quasi-judicial, and non-judicial remedies in international law.

a) The right to an effective remedy

It is fundamental to mention, “the right to access to a judicial remedy [including reparation] is widely guaranteed in international human rights treaties and can be considered as part of the corpus of the customary international law of human rights”.⁵⁷

An example of HR treaties that recognize the right to an “effective remedy” are the following: Article 8 of the UDHR (customary international law) provides that “everyone has the right to an

effective remedy by the competent national tribunal for acts violating the fundamental right granted by the constitutions or laws”.

Article 25 of the American Convention on Human Rights disposes that:

Everyone has the rights 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 States or by this Convention...

Other provisions that include this right are: Article 2(3) of the ICCPR; Article 6 of the Convention on the Elimination of Racial Discrimination; Article 2(c) of CEDAW; Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7 and 21 of the African Charter on Human and Peoples Rights⁵⁸ (ACHPR), amongst others.

In the case of TK, the Committee has established in *General Comment 17* regarding the rights protected in Article 15 of the ICESCR (protection of the moral and material interest of authors), that within these rights, the right to equal access for marginalized groups to an appropriate remedy and redress in the case that their moral and material interests have been infringed⁵⁹ constitutes a core obligation, which has immediate effect.

Other specific provisions of the right to effective remedy applied to indigenous peoples are found in the following instruments: (*Table 1*)

The UN Declaration on Indigenous Rights provides the better standard of the right to remedy because it focuses not only in the framework protection of rights, but also in the right to an effective remedy in an individual and collective way.

Regional tribunals have interpreted that the remedy has to be timely, adequate and effective. Adequate domestic remedies are “those which are sustainable to address an infringement of a legal right... If a remedy is not adequate in a specific case, it obviously need not to be exhausted”.⁶⁰ Effective remedies are those “capable of producing the result for which it was designed.”⁶¹

One of the main principles in international law applicable to international tribunals is that they are *subsidiaries* and only activated when the state has failed to afford the required relief.⁶² As a consequence a basic rule consists of the exhaustion of domestic remedies in order to apply to the international system.⁶³ For instance, Article 46(2) of the ACHR establishes the following exception:

ILO 169	UN Declaration on Indigenous Peoples Rights	Propose American Declaration... on Indigenous
<p>Article 8</p> <p>1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.</p> <p>2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.</p>	<p>Article 40</p> <p>Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.</p>	<p>Article XVIII. 4</p> <p>4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.</p>

i) the domestic legislation does not afford due process of law; ii) the parties have been denied access to the remedies under domestic law or have been prevented from exhausting them, or iii) there has been unwarranted delay in regarding a final judgment under the aforementioned remedies.

In order for indigenous rights to be used for the protection of TK, a first step must be that domestic legislation protects it in an adequate and effective manner. For instance, a non-effective protection of TK through some traditional IPR could be a violation of the right to remedy under the bases established above. Furthermore, in the case that such a right is not afforded due process in domestic legislation, for example because it does not allow collective claims or does not recognize indigenous collective rights, this would be an exception for the exhaustion of domestic remedies, opening the door for the activation of the international system of HR protection. A more specific application for TK will be analyzed in section C).

b) The Right to Reparation or Redress

The reparation of damages is an important principle under international law and it is a consequence of the responsibility of the State. In other words, the breach of its international obligations stems from a duty of the State to provide adequate reparation.⁶⁴ Article 31 of the Text of the Responsibility of States for International Wrongful Acts, requires full reparation for the injury caused

by international wrongful acts.⁶⁵ In the HR context, States have C&PR and ESCR obligations stipulated in their treaties. Moreover, the scope of this obligation includes an obligation to *respect, protect and fulfill* such rights.⁶⁶

Under international law, when a State or other actor signs a treaty, convention, declaration or any other instrument (soft law), the State assumes the obligation to achieve the goals of the laws as a consequence of its commitment. Therefore, all these instruments bring obligations upon the States, some are binding instruments, and the others are under the scope of international responsibility of the States to be accomplished under the principle of good faith.⁶⁷ Examples of that are the Universal Declaration on Human Rights (which could be considered customary international law), the ICCPR (without the protocol), the ICESCR or the UN Declaration on the Rights of Indigenous Peoples. Further proof of this is that many of these instruments have implemented special bodies, which declare whether a violation of the instrument has taken place and follows through with recommendations, including reparation measures.⁶⁸

Some of the provisions that offer the obligation to “redress” a violation are *inter alia*: Article 63(1) of the American Convention on Human Rights, which established that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention... if appropriate, that the consequence of the measure or situation that

constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injury party.

Other instruments that include redress are: Article 15(2), 16(4)(5) ILO Convention No. 169; Article 13, 50 (41) ECHR; Article 3 of Protocol 7 of the ECHR; Article 7, 21, 26 of the ACHPR; Article 10, ACHR; Article 2(3), 9(5), 14(6) of the ICCPR; 5 of the First Protocol of the ICCPR⁶⁹; Article 75 (1), 79, 98 of the Statute and Rules of procedures and Evidence of the ICC, and many more.⁷⁰

As was mentioned above, in the case of TK the Committee has established in *General Comment 17*, regarding the right protected in Article 15 of the ICESCR (protection of the moral and material interest of authors), that within these rights includes one of the core obligations, which has immediate effect, corresponding to *the right with equal access for marginalized groups to an appropriate remedy and redress in the case that their moral and material interest have been infringed*.⁷¹

Other specific provisions of the right to reparation in the context of indigenous peoples are found in the following instruments: (Table 2).

In general these provisions focus on the compensation or restitution of indigenous lands. However, the UN Declaration talks about cultural and intellectual property. Article VII.2 of the Proposed American Declaration, disposes this right to “property” in general terms, which when read with the first paragraph could be linked to a broader conception of property. Also, the provisions state that the restitution must be in accordance with international law standards.

1. Reparation Principles

It is necessary to present a brief overview of the concept of reparation of damages in the human rights system based on the following four points:

First, it is extremely relevant to visualize the reparation of damages with a *double dimension*; as a *State obligation* derived from its responsibility and as a *fundamental right* for the victims.⁷² That means that as a *right*, the indigenous communities are entitled to demand integral reparation for the violation of the protection of TK, which also, under the principles of reparation, must be adequate, effective, and fast.⁷³

ILO 169	UN Declaration	Proposed American Declaration...
<p>Article 15 (2)</p> <p>2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands... The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.</p> <p>4. When such return is not possible, as determined by agreement... these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in</p>	<p>Article 28</p> <p>1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.</p> <p>2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress. Article 323. States shall provide effective mechanisms for just and fair</p>	<p>Article VII</p> <p>1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage...</p> <p>2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the standard of international law.</p> <p>Article XVIII</p> <p>7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to</p>

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ILO 169	UN Declaration	Proposed American Declaration...
<p>kind, they shall be so compensated under appropriate guarantees.</p> <p>5. Persons thus relocated shall be fully compensated for any resulting loss or injury.</p>	<p>redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.</p> <p>Article 11</p> <p>2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their culture, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.</p>	<p>compensation on a basis not less favorable than the standard of international law .</p> <p>Article XXI</p> <p>3. Indigenous peoples have the right to restitution or compensation no less favorable than the standards of international law, for any loss which, despite the foregoing precautions, the execution of those plans or proposals may have caused them; and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.</p>

Second, According to international law, there are *direct, indirect and collective victims*.⁷⁴ Violations of indigenous rights could affect direct victims individually or collectively, and also indirect victims, such as the relatives or other members of the community, who also have the right to obtain reparation.⁷⁵ Another interesting conception of victims, which has been litigated internationally, is the notion of “the potential victim”, which also could be used in the protection of collectivities such as indigenous communities.⁷⁶

Third. It is necessary to identify what *kind of damage* the victims suffer from. Here it is important to distinguish between the damages occasioned to the victims and the specific measures to repair these damages. In a medical context, this relationship is similar to the injury and the remedy to alleviate the sickness.

International HR law recognizes the existence of two generic damages: Pecuniary and Non-pecuniary. Furthermore, within these divisions we can find more specific damages,⁷⁷ such as: Material Damage, which is divided into special damages (*daño emergente*) and loss of earnings (*lucro cesante*); Moral Damage is caused as a result of misrecognition of the human dignity of the victim, the pain and suffering as a consequence of a human rights violation.⁷⁸ This particular damage could have important relevance in the context of TK, because of its moral and psychological content; Damages to the Life Plan (*Proyecto de vida*), recognized by the Inter-American Court on Human Rights

(IACHR),⁷⁹ is a kind of damage that affects the personal realization of the individual through the affectation of their freedom to conduct their planned projects.⁸⁰ This kind of damage has also been argued by legal witnesses and indigenous communities in the context of the life plan of the community.⁸¹ Even the life plan damage could be presented in cases that have strong infringements of communal cultural expression.

For instance, in a violation of the protection of TK, such as bio-piracy or misappropriation, economic and moral damages could be incurred by the community.

Fourth: The next step consists of identifying the *measures available to repair the specific damages* at the concrete case level. As an example, the IA Court of HR includes five distinct elements: *restitution in integrum*; fair compensation; rehabilitation; satisfaction and guarantees of non-repetition.⁸² In the case of pecuniary damages caused by bio-piracy of TK, the reparation measures could consist of restitution of the rights over the plant or seed, and compensation for the economic damages and also guarantees of non-repetition through adequate protective legislation. In the case of misappropriation of TK, moral damages could be compensated *inter alia* but satisfactory measures are also granted, such as public apologies or vindicatory measures.

Other forms of reparations could be performed depending on the nature of the specific case.

Professor Theo van Boven described three additional *Special Measures* to take into consideration: (i) *Affirmative Action* regarding people who are racially and ethnically disadvantaged and marginalized; considering that additional resources should also be granted in order to enjoy their ESCR and also through the implementation of development programs. (ii) *The Moral Imperative of Reparation* “requires that the victim’s dignity and worth as a human being be restored,” through the concept of moral reciprocity or integrity with each other. (iii) *Dealing with Historical Wrongs*, special measures should be taken in order to create better conditions and carry out justice, contributing to the realization of economic and social rights for racially and ethnically disadvantaged and deprived groups.⁸³

All these principles analyzed above should be taken into consideration in order to bring a claim before human rights mechanisms for a violation of indigenous peoples’ right to benefit from the protection of TK.

In the context of IPR, the reparation of damage system does not provide real redress for indigenous peoples. First of all, the system has mainly served as a remedy for the cessation of the measure; Second, in cases of damages the assessment is based on the economic harm, which does not work in favor of indigenous expressions, and Third, because it does not provide for collective compensation. Professor Farley considers that the system of damages is the only way to ensure that outsiders will respect the copyrights of indigenous groups. Under some copyright laws, only actual damages are awarded for economic harm caused by infringement. Many indigenous expressions cannot be valued economically. Thus, the real harm done, which lies in the moral, spiritual or social sphere, would go unpunished and would not be redressed.⁸⁴ Given these problems “the copyright law, as it is currently formulated, may not be entirely adequate to protect indigenous peoples... [cultural expressions]”⁸⁵

In order for the IP system to provide adequate compensation, due to the particular characteristics of community and indigenous rights and the characteristics of the damages, it would be necessary to develop an integral reparation catalogue (i.e. WIPO, Article 8 of the Provisions protecting TCE/Folklore), which includes a cultural perspective which would *recognize material pecuniary damages (including IP damages), and moral, social and life plan damages. Reparations must include measures of restitution, compensation, satisfaction, guarantees of non-repetition, and affirmative actions.*

As a consequence, the current human rights approach to the integral reparation of damages is a more adequate mechanism for the kind of damages suffered by indigenous peoples.

c) Implications of the right to remedy and redress in the context of TK

In order to fulfill the right to benefit from the protection of TK for indigenous peoples, it has to be protected in domestic law through effective and adequate remedies, including *sui generis* mechanisms, as well as civil, administrative, criminal and principally *customary law remedies*. But at the same time, these effective remedies must be able to grant individual and collective redress for the collective violations.

The nature of the rights included in TK is that “protection” is needed in order to maintain and promote the expressions as a fundamental part of the culture and survival of indigenous peoples.

Therefore, the mechanism of protection could be different, *inter alia*, establishing IPR, *sui generis* systems, a public domain clause, the management of interest by governmental agencies. The right to include TK does not mention which kind of protection has to be granted, but the idea is that this protection be adequate for the indigenous TK.

The right to an effective remedy is also a fundamental autonomous right, which is necessary for the fulfillment of other rights, in order to claim violations. The effective remedies that could monitor the effectiveness of such protection of TK could be established through criminal, civil or administrative remedies.

The main problem concerning TK is that it is not sufficiently recognized in domestic legislation, and indigenous peoples in most of the cases do not have standing before the “existent local remedies” because collective rights do not apply, impeding the access to remedy for community rights.

In this context, international remedies are indispensable as the last forum to effectively make a legitimate right. The exhaustion rule should be covered, or qualified by some of the exceptions. For instance, in some countries where TK is not effectively protected at the domestic level, the community could challenge the effectiveness and adequacy of these remedies before the international HR system. In the second example where the country does not provide any remedy available for TK or collective rights for indigenous communities, indigenous communities could access the international HR system directly, claiming the protection of a right recognized at the international

level. In this case, the violation would have to be linked with one of the conventional rights monitored by the HR body, for example, through a broader interpretation of the right to property, or the protection of material and moral interest of the authors, cultural rights, freedom of religion or expression.

The same right to access remedies at the domestic level has been covered in the international forum. The international system has to provide for an effective remedy to hear about claims of violations of rights recognized in international instruments. In this context, the international HR system is the only forum that provides this possibility in a more holistic approach to indigenous rights.

In the context of reparation, the HR system may recognize collective damages and therefore could provide collective measures for the communities. An example of integral reparations of damages granted for indigenous communities before the Inter-American system could be found in the *Plan Sanchez* case,⁸⁶ concerning the massacre of an indigenous community in Guatemala by the military police. The abuses presented included the destruction of housing and other methods of daily subsistence, and the displacement of the survivors. The court granted *individual monetary compensation* for the survivors and next of kin of the murdered victims and pointed out that the non-monetary forms of redress ordered would benefit all the members of the community.⁸⁷ Therefore, the court established that due to the victims losing their houses, the government had to implement a housing program, providing adequate housing for people who required it, according to the criteria established by the UN CESCR in *General Comment No. 4*.⁸⁸ Furthermore, the court required the implementation of an *integral development program*, including health, education, production and infrastructure.⁸⁹ The government also had to organize different programs in the region, including: a) teaching and diffusion of the Mayan culture; b) maintenance and improvement of the system of road communication; c) potable water and a sewer drainage system; training of more teachers for the affected communities, and e) building a health center with adequate personnel in order to provide medical and psychological assistance.⁹⁰

This case is a good example of an integral reparation not only for individual damages, but also for damages to the community. It is important to consider that only through these integral measures is it possible to redress these kinds of violations

that have a significant impact in all aspects of life of the community,⁹¹ such as TK.

III. Analysis of the International Remedies available for the Protection of TK

a) Current International Mechanisms available for the protection of TK: NON HR bodies

The current mechanisms available for the protection of TK, do not provide effective mechanisms of enforceability, nor do they provide an effective remedy for local indigenous communities.

Although these mechanisms contain the most requested TK provisions for the international community, they have a different approach to the context of TK; in some cases through environmental rights and in others through the protection of IP rights. For example: the *Rio Declaration on Environment and Development*; the *Convention on Biological Diversity*; *WTO-GATT Art. XX (f)*. the *Durban Declaration*. The *World Bank Operational directive*; the *IADB*; *WIPO*; *FAO*; *CBD*. (see Table 3).

Some of these mechanisms include relevant provisions for the protection of TK, however, none of these mechanisms provide *standing for indigenous communities* in order to enforce the protection provisions. Moreover, in general there are no clear provisions that recognize *collective indigenous rights* and others contain technical problems. Some examples include the following:

On one hand, the CBD does not contain adequate legal obligations to protect any property rights of indigenous peoples in their TK because first of all, it defined this protection as “subject to the national legislation” and referred to it “as far as possible appropriate” (see Table 3), which does not create any international legal obligation. Second, Article 8(j) calls for respect, maintenance, and protection, but does not consider any protection nor guarantees any right in TK.⁹² Finally, this Convention does not provide any standing for indigenous peoples.

On the other hand, WIPO is currently working on *Draft Provisions for the Protection of TCE/ Expression of Folklore: Policy Objectives and core principles*. This provision recognizes the value of TK and the need for its protection through customary law, respect of HR and the promotion

b) International HR Treaty bodies available for the protection of TK

The international human rights system, based on the treaty bodies, provides standing for indigenous peoples for violations of collective rights. Specifically, TK could be better protected through regional systems.

The Inter-American system has extensive jurisprudence recognizing collective property rights for indigenous communities and granting collective measures of reparations.⁹⁹ Article 25 of the American Convention recognizes the right to an effective remedy for violations not only of the rights recognized in the Conventions, but also in countries' constitutions. The African system is broader. In Article 7 of the ACHPR, includes a remedy for "rights recognized and guaranteed by conventions, laws, regulations and customs in force". This provision opens the possibility to claim for an effective remedy that protects indigenous rights, such as TK. The universal systems provided standing for indigenous communities before the UN Human Rights Committee, base on the ICCPR and protocols, which has been ratified by many

nations.¹⁰⁰ These are effective mechanisms for indigenous communities in order to bring an international complaint regarding the protection of TK. However, how this organism would rule depends on the construction of the arguments.

On the other hand, the specific indigenous peoples' rights instruments are extremely important for the interpretation of other treaties. For instance, in the Inter-American Commission on HR, in the case of *Mary Dann v. US*, Convention 169 was used as well as the UN Draft Declaration and American Declaration on Indigenous Rights in order to interpret the American Convention with an indigenous rights' approach.¹⁰¹ The recently adoption of the UN Declaration is a very relevant statement for consensus regarding indigenous rights as well as an important guideline as soft law.

The following table presents an analysis of the remedies available in the HR mechanism (treaty bodies): universal and regional system. It demonstrates that in almost all of them, indigenous communities could find an effective remedy for the protection of TK. However, not all of them provide a reparation system. (Table 4)

Table 4 - International HR Remedies for the protection of TK

International HR Treaty Body	Instruments	Right Protected	Indigenous collective standing	Effective International Remedy	Reparations
ILO	<i>Convention No. 169</i>	- Cultural rights - Collective rights	No. (Art. 26-34 ILO)	No. Recommendations (Art. 33 ILO).	No. Recom.
I/A Court on HR	- <i>ACHR</i> - <i>Protocol of San Salvador. (ESCR)</i>	Rights to private property (Art. 21) Progressing on ESCR (Art. 26). Right to protect moral and material interest of the authors. (Art. 14)	Yes	Yes Article 25 effective remedy for rights recognize in the convention or constitutions. Judicial Decision (jurisprudence) Biding	Yes Collective reparations for indigenous communities. ¹⁰² Article (63.1)
I/A Commission on HR	- <i>ACHR- ADRDM- Protocol of San Salvador. (ESCR)</i>	Id. Benefit of the culture. (Article XIII of the American Declaration) - Eventually, American Declaration on Indigenous Rights.	Yes	Yes. Id.Recommendation (Non binding)	Yes. But Recommendations.
African system. Court and Commission.	<i>African Charter ... (ACHPR)</i>	- Right to Private Property (Art. 14)- Right to self determination (Art. 20)- Collective rights (Art. 21)	Yes	Yes - Protecting right recognize in the Charter, as well constitution, laws and customary law. - Judicial Decisions (bindings) / Commission: Recommendations.	Yes.

(continua)

(conclusão)

International HR Treaty Body	Instruments	Right Protected	Indigenous collective standing	Effective International Remedy	Reparations
European Court of Human Rights	<i>European Convention</i>	- Right to Private Property	No	Partial - Only for violations of the rights recognize in the convention. - Judicial decision (Bindings)	Yes
European Committee of Social Rights. (European Council)	<i>European Social Charter (Protocol 1995)</i>	- No right related	Yes. (Art. 8)	Partial. Reporting Procedure. Recommendations (Art. 21)	Partial. Some recom. (No monetary compensation)
UN Commission on HR	<i>ICCPR</i>	Right for minorities to practice in the culture (Art. 27). <i>General Comment 23.</i> (Interpretation of the UN Declaration on Indigenous).	Yes	Yes. Article 5(4) of the Protocol. (individual Petitions). Resolutions. (Cuasi-jurisdictional)	Yes. Recommendations.
UN Committee on ESCR	<i>ICESCR</i>	- Protection the material and moral interest. (Art. 15). - Protection of TK. <i>General Comment 17.</i>	No. - NGO's have consultant status.	Non standing for victims. System of Resolutions and Interpretation. Country Reports. (Eventually optional Protocol).	No.
UN Organs.- Working Group (WG) on Indig Peop. - Permanent Forum - WG on the Draft Declaration - Special Rapporteur on indig people.	<i>UN Declaration Indigenous Rights.</i> (Art. 42)	Indigenous peoples human rights. The rights in the UN Declaration on indigenous rights.	No direct	Partial - To promote the application and efficacy of the UN Declaration. The different organism do: - Studies - Annual Reports - Experts' advices in indigenous issues. - Meetings - Guidelines and recommendations.	No

IV. Implications of the lack of protection: A critique under the light of the International HR system

The lack of effective domestic remedies has impeded the ability of local communities to complain about abuses of their TK. The same has occurred at the international level, where no cases that specifically deal with TK have been presented.

For a long time, indigenous peoples have seen their TK affected, mainly due to misappropriation or because of the lack of measures to maintain and promote it. In general, indigenous peoples have been marginalized from obtaining legal protection. Lately, however, due to the increase in international

trade, bio-piracy cases around the world have been presented, as well as misappropriation cases, especially due to increments of IPR system. In some of these cases, indigenous communities have suffered serious damages to their economic, social and cultural rights without receiving an integral redress. In many other cases, no compensation for their stolen product has been granted.

For example in the *Ayahuasca case*, where an American citizen, Loren Miller, obtained a US plant patent from the shamans indigenous community in the Amazon, the community was not able to effectively claim their TK rights, and therefore the USPTO¹⁰³ granted the patent to the patentee.¹⁰⁴

In the *Hoodia Cactus case*, the San in southern Africa, who use this plant to stave off hunger and thirst on long hunting trips, were faced with losing the right to the TK of this plant by the patenting of Hoodia by Pfizer. At the end, the dispute was resolved with an understanding granting the share of a small percentage of the future royalties.¹⁰⁵

In both cases, the IPR mechanisms were challenged without success.¹⁰⁶ The local indigenous communities could feel that their rights were neither respected nor redressed. In these cases, it is vital that there is an effective international system that could address the problem under an indigenous rights-based approach and therefore grant a fair and integral redress for the communities. As was concluded in *Section II A*, so far the regional HR system is the only adequate international forum to bring forth these kinds of cases. For instance, even in the case of patents granted in the US, these cases could be submitted before the Inter-American Commission based on the American Declaration on the Rights and Duties of Man, such as the *Dann v. US case*.¹⁰⁷ Therefore, the HR system provides a remedy for TK.

CONCLUSIONS AND RECOMMENDATIONS

The current international HR system could effectively protect TK, rather than the IP or environmental system for four main reasons: i) it recognizes collective indigenous peoples' rights; ii) it calls upon domestic protection and effective domestic remedy; iii) it is the only international mechanism that grants standing for indigenous communities, and iv) the integral reparation system assesses the damages and the reparation measures with a holistic approach that included indigenous rights that could benefit the community as a whole.

The HR system must start to seriously address issues such as IPR and TK, that were previously considered a part of other arenas, such as IP or the

environment. That means that the HR system has to be prepared to receive indigenous complaints for violations of the protection of TK, and to start to expand its analysis, approach and scope, through mechanisms such as *General Comments, Advisory Opinion and Recommendations*.

Civil society has to become aware of the current lack of effectiveness of the IPR system for protecting TK, and must begin to shift their concerns to the HR system. This could pressure international organizations such as the WTO to adapt its standards in a more holistic and humane way.

In order to perfect the enforceability of the right to protect TK, it would be relevant to recognize traditional knowledge in a binding treaty, such as a convention or protocol that would be monitored by a treaty body. This would open the possibility for claiming protection of TK rights in a direct way and would increase the focus on the need for more domestic measures of protection and implementation. Meanwhile, TK could be protected through the right to property (civil right) mechanism as well as the right to benefit from the moral and material interest of the author (ESCR), depending on the nature of the manifestation of the TK.

The implementation of the recently adopted *UN Declaration on the Rights of Indigenous Peoples* by the UN General Assembly, as well as the Proposed American Declaration, will provide a good tool for the interpretation of TK rights by the existent systems,¹⁰⁸ such as the UN HR Committee and the I/A Commission on HR respectively.

Finally, the IPR system faces the significant challenge of including in its existing initiatives (WIPO, Doha, UNCAT, FAO), an indigenous peoples HR approach that allows for the protection of TK in the IP system.¹⁰⁹

TK is an indigenous peoples' right that must be protected, maintained and promoted.

NOTES

1. Examples of countries with very limited protection of TK are: Canada, Australia, Peru, Panama, and Costa Rica.
2. Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation*, UNCTAD-ICTSD, Issue paper No. 1 (2003), at. 16 See also Lars Anders Bears, *Protection of Rights of Holders of Traditional Knowledge, Indigenous Peoples and Local Communities*. WORLD LIBRARIES, Vol. 12, No. 1, (2005). at 5.
3. Define as the “appropriation of the knowledge and genetic resources of framings and indigenous communities by individuals or institutions seeking exclusive monopoly control over these resources and knowledge”. Cited in CIPR, *Integrating Intellectual Property Rights and Development Policy*, at 74-8.
4. *I.e.* Cases such as *Ayahuasca*, *Hoodia Catus*, *Neem*, *Tumeric*.
5. *I.e.* Cases of Misappropriation: Milpururru (Australia).
6. Other Convention that includes TK is the Convention on Biodiversity (CBD);
7. Christine Haight Farley, *Protecting Folklore of Indigenous People: IS Intellectual Property the Answer?*, 30 Conn. L. Rev. 1, 5 (1997). See also U.N. Econ. & Soc. Council [ECOSOC], *General Comment No 17* (2005), E/C.12/GC/17.
8. These IPR mechanisms are inter alia: *Collective Trade Marks*, *Geographical indicators*, *Patents*, *Copyrights*, and *Certification Marks*.
9. *Sui generis* refers to an area where country practice differs – a unique system of protection. E.g. a country may pass a specialized TK law rather than incorporating such protections into one of the universal categories (copyrights, patents, TM, etc).
10. See U.N. Econ. & Soc. Council [ECOSOC], *General Comment No 17* (2005), E/C.12/GC/17. See also European Convention on HR, American Convention on HR.
11. Cf. The Twelve Saramaka Clans v. Suriname, Case 12.338, Inter/Am. C. H. R., Report No. 9/06, OEA/Ser/L/V/II.124,Doc.16, (2006). (Concluding that “The State of Suriname violated Articles 1 and 2 of the Convention by failing to recognize or give effect to the collective rights of the Saramaka people rights to their lands and territories”. Para 259. The case is pending of resolution before the Inter-American Court on HR). See also ECOSOC, Permanent Forum on Indigenous Issues, Report of the Secretariat on Indigenous Traditional Knowledge. E/C.19/2007/10 (March 2007), (Hereinafter, “Report on Indigenous TK”).
12. Mugabe John, *Intellectual Property Protection and Traditional Knowledge*, WIPO, Panel discussion on Intellectual Property and Human Rights, (1998), at. 8. available at: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/index.html>. (Considering two reasons: I) the bio-piracy cases contriving fundamental moral, ethical and legal norms, and ii) knowledge of indigenous peoples is their property and there are no reason why international law should discriminate them creating barriers to their enjoyment of their property). See also, Debates before the Sub-Commission on the Promotion and Protection of Human Rights.
13. UN-GA. Resolution, A/RES/61/295, (A/61/PV.107, 13 Sept. 2007 GA/10612) The United Nations Declaration on the Rights of Indigenous Peoples has been approved after 143 Member States voted in favour, 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the text. Antecedent: Human Rights Council Res. 2006/2, Working group of the Commission on Human Rights to elaborate a Draft Declaration in accordance with paragraph 5 of the General Assembly res. 49/214 of 23 December 1994 (2006).
14. See Farley, *supra* note 8, at 39.
15. John Mugabe, *supra* note 12, at 3.
16. Convention on Biological Diversity, G.A. res. 51/182, 51 U.N. GAOR Supp. (No. 49) at 166, U.N. Doc. A/51/49 (Vol. I) (1996).
17. Report of the Permanent Forum on Indigenous Issues, 3rd Sess., UN Doc. E/2004/43/e/C.19/2004/23 (2004), at. 27.
18. See WIPO, Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge.
19. See Peter Drahos, *Towards an International Framework for the Protection of Traditional Groups Knowledge and Practice*, UNCTAD, (2004).
20. John Mugabe, *supra* note 13, a t 12

- Sawhoyamaxa Indigenous Community v. Paraguay. Judgment of March 29, 2006. Series C No. 146; I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Judgment of April 29, 2004. Series C No. 105. See also, *The recently The Twelve Saramaka Clans, pending resolution before the IA Court HR. 2007.*
52. See Report on Indigenous TK, note 12.
53. Prof. Daes, Draft principles and Guidelines for the protection of the heritage of indigenous Peoples (holding that indigenous peoples are recognized as collective legal owners of their knowledge, in perpetuity).
54. Professor Dina Shelton clarifies that the word “remedies” contains two separate concepts: procedural and substantive. The first case refers to the process but is arguably where claims human rights are decided. The second notion refers to the outcome of the proceeding; the relief afforded to the successful claimant. DINA SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW*, at. 7, Oxford, (2005).
55. There is a debate about whether the right to an effective remedy is an independent right. Article 25 of the American Convention on Human Rights have been considered, in contrast with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
56. *I.e.* Article 2(3)(b) of the International Convention on Civil and Political Rights. Cited in Dina Shelton *supra* note 55 at, 114.
57. SHELTON, *supra* note 55.
58. Article 7 includes a remedy for “rights recognized and guaranteed by conventions, laws, regulations and customs in force”.
59. *General Comment No 17*, note 11, *Id.* para. 40 d).
60. Corte IDH. Caso Velásquez Rodríguez Vs. Honduras. Sentencia de 29 de julio de 1988. Serie C No. 4, para 64.
61. *Id.*, at para. 66.
62. Dina Shelton, *supra* note 55, at. 114
63. See, A.A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law 1*, at 57 (1983).
64. See *Factory at Chorzow, 1927*, P.C.I.J., No. 8 (ser. A), No. 9, at 21. (July 26).
65. See *supra*, note 55, Text adopted by the Commission at its Fifty-third session, in 2001
66. See U.N. Econ. & Soc. Council [ECOSOC], *General Comment No. 16*, U.N. E/C.12/2005/3 (May 13, 2005.) (*supporting the obligation of the State to protect human rights*). See also GC 12, p 15, 14 para 37; 15, para 25.
67. Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.
68. See UN Committee on Human Rights, *Wilson v. The Philippines* 868/1999 (158) 30 October 2003. (*The UN Human Rights Committee specified the nature of the damages caused and provided remedies for each one.*)
69. See Manfred Nowak, *The Right of Victims of Gross Human Rights Violations to Reparation. RENDERING JUSTICE TO THE VULNERABLE*, (Liber Amicorum in Honour of Theo van Boven), at. 203 – 224. Kluwer Law International, Netherlands, (2000).
70. *I.e.* Article XI (1) of Annex 6 of the Dayton Peace Agreement for Bosnia and Herzegovina DPA; Article 6 Convention on the Elimination of Racial Discrimination; CEDAW; Article 14 of the UN Convention against Torture; Article 15(2) ILO convention No. 169; Article 19 of the Declaration on the Protection of all Personas from Enforced Disappearance, GC Working Group; Protocol I to the Geneva Conventions of 12 August 1949 (related with Victims in international Armed Conflicts); and Article 31 – 39 of the Text on the Responsibility of the State for its Wrongful acts.
71. *General Comment No 17, supra*, note 11, para 40 d).
72. *Reparations Principles. infra*, note 74., Preamble (*victim’s right to benefit from remedies and reparation*).
73. See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* G.A. Res. 60/147, U.N.Doc. A/RES/60/147 (Dic. 16, 2006). (*Reparation Principles*).
74. See U.N. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 of 29 November 1985.
75. Case: Aloeabatoe, Moiwana, Zarayaku, etc. See, note 52.
76. See *Morales de la Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01 (2001) (*recognizing that all the women in*

105. *Id.*

106. *Id.*

107. Mary and Carrie, *Dann v. United States*, Case 11.140, Inter-Am. C. H. R., Report No. 75/02, OEA/Ser.L/V/II.117, Doc. 1 rev. 1 (2003). (addressing whether the administrative procedure of the US Indian Claim Commission (ICC), which extinguished the indigenous ancestral rights over their territories, violated the right to property, fair trial and equal protection under the American Declaration)

108. See, *Dann v. US case*, *supra* note 108 (ruling that when examining the claims of indigenous

peoples, the American Declaration should be interpreted and applied broadly with due regard to other principles of international human rights law that governs the individual and collective interest of indigenous peoples. In accordance with the purpose of the Declaration, it must safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights). (see paras. 128, 129, 130, 131).

109. Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach*. Mich. L. Rev. – (2005), (Proposing a Declaration on TK and Trade for the WTO).

