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A CORRECTIVE JUSTICE ARGUMENT FOR INTELLECTUAL PROPERY RIGHTS IN TRADITIONAL KNOWLEDGE

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I. INTRODUCTION

Traditional knowledge (TK), as understood here, is understanding or skill, which is typically possessed by indigenous peoples and whose existence in some form typically predates colonial contact, that relates to medical remedies, plant and animal products, technologies, and cultural expressions. The term "cultural expressions" includes religious rituals, sacred objects, rites of passage, songs, dances, myths, stories, and folklore generally.[1] These forms of knowledge and cultural expressions are rarely frozen in time. Usually they evolve over decades and centuries. Few deny that indigenous peoples possess TK – sometimes called descriptive traditional knowledge. Yet there is much dispute over whether domestic and international law do, or should, protect TK against outsiders who wish to commercialize it or use it for noncommercial purposes.

One may call any TK that is or should be protected by law normative traditional knowledge. TK thus protected would not lie centrally in the class of what lawyers call personal

[1] For explanation of this definition of TK and the specification of a robust package of legal protection for TK, see Stephen R. Munzer and Kal Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge," *Cardozo Arts & Entertainment Law Journal,* 27: 37-97 (2009), at 45-46, 48-50, 84-85.

property – that is, physical objects such as plants, animals, religious articles, or shamanistic totems. Rather, it would be a form of intellectual property (IP) – akin to, but perhaps not the same as, copyrights, patents, trademarks, trade secrets, or some existing *sui generis* IP rights. Thus, normative TK is not a set of rivalrous physical objects which are incapable of being simultaneously possessed by multiple persons in the same way. It is instead the nonrivalrous knowledge – the understanding, skill, or cultural expressions – that can be possessed and used by many people at the same time and in the same way.

A major current dispute over TK is which arguments, if any, justify intellectual property rights in the knowledge of indigenous peoples. The available arguments are of many different kinds. Some arguments adapt the usual justifications for property rights and especially for intellectual property rights. Very different are arguments that sound in human rights, distributive justice, or corrective justice. This paper considers only the last of these. Corrective justice arguments subdivide into arguments of compensatory justice (which, as to remedies in legal systems, are the moral analogue of money damages at law) and arguments of restorative justice (which, as to remedies in legal systems, are the moral analogue of injunctions, restitution, and declaratory judgments in equity).[2] Courts grant legal and equitable relief. Reparations are another form of corrective justice, although they sometimes have punitive aspects as well. If reparations are solely corrective, they can be either compensatory or restorative or both.

Reparations, as understood here, are corrective payments in the form of money, materials, or intangible assistance that attempt to make amends for and rectify past wrongs. Although historically some reparations, such as those required of Germany by the Treaty of Versailles,[3] have had a punitive dimension, that dimension is absent here. I understand reparations as being

[2] My use of "corrective," "compensatory," and "restorative" suits my aim in this paper. Other writers sometimes use these terms differently.

[3] [1919] *United Kingdom Treaty Series* 4 (Cmd. 153) (signed 28 June 1919 and entered into force 10 January 1920), especially art. 231, which assigned to Germany alone the duty to pay reparations because of "the responsibility of Germany and her allies for causing all the loss and damage" suffered by the Allied and Associated Governments and their nationals "as a consequence of the war imposed upon them by the aggression of Germany and her allies."

wholly a matter of corrective justice. So understood, the justifications for reparations are backward-looking. They appeal to past wrongs and seek to remedy them by present and future actions. There is at least one respect, however, in which reparations are forward-looking: the remedial payments should be effective and reasonably efficient. If reparations are justified, we want to have reparations that work.

I isolate four questions before putting on my case. First, should indigenous peoples receive corrective remedies for past wrongs? Second, if so, who should bear the cost of these remedies? Third, if such remedies are in order, should they be paid or otherwise made available to individuals or to groups? Fourth, would intellectual property rights in TK be, or be part of, a justifiable set of remedies? As will emerge, my answers to these questions are, in order, as follows: often yes; nations, individuals, business firms, and regional and international organizations, depending on who committed the wrongs; both individuals and groups, depending on the practical situation; yes, but the package of intellectual property rights should be modest at best and would form only a minor part of the corrective relief owed indigenous peoples for past wrongs.

II. MY ARGUMENT

There may be many arguments of corrective justice for IP rights in TK. But I have only one such argument. Indeed, you might think of it as more nearly the bare bones of an argument, or perhaps as merely a gesture in the direction of an argument. Whatever I have, it takes the following course.

Four background conditions lay out the initial steps of the argument. For IP rights in TK to be available at all on grounds of corrective justice, (1) some wrongs must have been committed against an indigenous group, some or all of its members, or both. Further, (2) the

wrongdoers are identifiable as a group, individual members of a group, or some other entity, or some combination of these. (3) The wrongs unjustifiably caused harm to an indigenous people or some members of it or both. (4) Those harmed are identifiable as an indigenous group or as individual members of an indigenous group or both.

The foregoing conditions are the beginning steps in establishing a prima facie case for some corrective relief. But they do not take into account the possibility that the wrongdoers might have some excuse or that IP rights in TK are not suitable relief for the wrongs inflicted and harm caused. Thus, it must also be the case that no excuse is available so that (5) the wrongdoers have a moral duty to correct their wrongs and the harm caused. Finally, (6) recognizing IP rights in TK would be an effective and reasonably efficient means of compensating or restoring justice to the indigenous people or its members who have been harmed. The adverb "reasonably" indicates that the means do not have to be economically optimal, but they cannot be seriously inefficient. Section IV will fill out this argument in the Chixoy Dam Reparations case, but first I must grapple with a serious objection.

III. A FOOL'S ERRAND TWICE OVER?

Some might claim that, for two reasons, it is foolish to recognize IP rights in TK. In the first place, the financial value of such rights would vary too much across indigenous groups. Some groups would receive too little. Secondly, if one crafted IP rights in TK in accordance with indigenous law or custom, the rights would vary too much in content. This variation would increase the transaction costs, especially the information costs, borne by others who wish to buy the rights or obtain licenses under them from indigenous groups.

Plainly, these considerations bear on the effectiveness and efficiency of IP rights in TK as a way to correct injustice. Nevertheless, it would be a mistake to dismiss such rights brusquely.

As to the first reason given, an indigenous group might not be seeking a financial remedy. Instead, it might want to prevent others from using their TK without attribution, or even with attribution if the group regards the TK as sacred or central to its identity or sense of identity. For these purposes the group would ask for injunctive or declaratory relief. Even if the indigenous group were seeking a financial remedy, it might regard IP rights in its TK as only *partial* compensation for or restitution of what is owed them because of past wrongs. It bears notice, too, that just compensation is not always the same as fair market value, for sometimes the latter does not capture the subjective premium (i.e. consumer surplus), the chance at surplus from transfer (i.e. the possibility of capturing some of the gains from trade), or the value of autonomy that has been lost or denied to the group.[4]

As to the second reason, different rebuttals apply. Sometimes it is justifiable to put up with a modest amount of inefficiency to promote corrective justice. Plus, one could craft the relief so as to reduce the transaction costs to third parties. For example, instead of using indigenous law or custom, one might try to formulate a uniform international law of IP rights for TK. Or at least one might attempt to do something helpful though less grand, such as adopting regional treaties or unifying the domestic law of each nation that is home to one or more indigenous groups.

IV. EASY CASES

One sort of easy case involves from the very start IP rights in TK that are both justifiable and already legally recognized together with existing identifiable wrongdoers and victims. The IP might be TK that satisfies the usual conditions for a valid copyright, trademark, trade secret, *sui generis* right, or, less frequently, patent. To illustrate, in *Milpurrurru v. Indofurn Party, Ltd.*,[5]

[4] Lee Anne Fennell, "Taking Eminent Domain Apart," [2004] *Michigan State Law Review,* 957-1004, at 960-67.
[5] 30 I.P.R. 209 (1995) (Austl.).

aboriginal artists produced images of their traditional creation myths. A Vietnamese rug manufacturer reproduced these images on its carpets and exported the carpets to Australia. The aboriginal artists had given no permission either for the use of the images or for importation of the carpets. They sued for copyright infringement and violation of the Australian Trade Practices Act 1974. The court ruled in the artists' favor and awarded them money damages, with the stipulation that the money was to be distributed to the owners recognized by aboriginal law. This case is easy because one has wrongs, identifiable wrongdoers, financial harm unjustifiably caused by identifiable individuals, identifiable indigenous persons who suffered the harm, a moral duty to compensate because the wrongdoers had no excuse for their actions, and the remedy was effective and reasonably efficient.

This sort of case is too easy to be terribly helpful. Because it begins with IP rights in TK that are already justifiable and legally recognized, it cannot by itself justify IP rights in TK in situations where the very justifiability of such rights is at stake. Elsewhere Kal Raustiala and I contend that the standard philosophical arguments for property rights in general and IP rights in particular do not support a robust package of IP rights in TK.[6] At best, they support only a modest set of IP rights. Their modesty stems from the fact that they are of limited duration, depend mainly on the fringes of current IP protection for patents, copyrights, trademarks, and trade secrets, and shelter only bits of *sui generis* IP rights created for indigenous peoples by various statutes and treaties. These rights are worth something. In particular they support "defensive" uses of TK – i.e. invalidating or blocking the enforcement of outsiders' putative IP rights, such as a patent, where the outsiders employed TK to come up with the patented

[6] Munzer and Raustiala, note 1.

invention.[7] These rights are, however, a good deal less powerful than those typically sought by indigenous peoples and TK advocates.

But wrongs can take many forms besides the violation of justifiable existing IP rights in TK. In fact, most harms inflicted on indigenous peoples involve murder, enslavement, forced migration, taking of land rights, and theft of natural resources and artifacts. There are more than enough really serious harms to go around. So now the question becomes how to work these harms into an argument for IP rights in TK. Factors that make an argument of corrective justice easier to construct in principle are a relatively short span of time between the harms caused and the relief sought, identifiable wrongdoers, and identifiable victims and heirs of victims. A useful example, which will also flesh out the rather skeletal argument of Section II, is the Chixoy Dam Reparations case dating from events in the 1970s and 1980s in Guatemala.[8]

The modernization of Guatemala required a stable source of electric power. The Rio Negro Valley was a good place to build a dam, which would be a prime source of hydroelectric power for the nation. As often happens with power dam projects, people were living in the valley and their homes and other structures would be inundated once the dam was built and water began to fill up behind it. During this period a military dictatorship ruled Guatemala and wanted the dam. The World Bank and the Inter-American Development Bank (IADB) were willing to fund its construction. Mayan Indians were the main occupants of the valley. They did not want to leave their ancestral lands. The Guatemalan government began a campaign of terror. It removed 3,000 people by force. It paid little compensation and relocated the Mayan peoples to other parts to the country without an effective resettlement policy. Some 6,000 Mayan villagers

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[7] Effective defensive use often requires steps by indigenous peoples, such as publication of their TK so that it counts as "prior art" to block outsiders' patents, or fixing their TK in a tangible medium of expression to forestall outsiders' copyrights.

[8] See The Advocacy Project, "On the Record – The Rio Negro Campaign, 11 (no. 5, 17 April 2000), available at http://www.advocacynet.org/resource/441 (last visited 28 July 2008); Kathy Powers, "The Globalization of the Reparations Movement," NAACP, available at http://www.naacp.org/advocacy/theadvocate/rat_sped/july_07/reparations/index.htm (last visited 28 July 2008).

lost their lands and livelihoods. Some villagers lost more: Guatemalan Civil Defense Patrols, known by the Spanish-based acronym PACs, killed some hundreds of Mayans, including women and children, especially from the village of Xococ.

Leaving the issue of criminal punishment to one side, and granting that most relief should involve monetary payments and effective resettlement, one can construct a straightforward argument for corrective justice in the form of IP rights in TK. Horrible wrongs were committed. Many of the wrongdoers are identifiable: the Guatemalan government, its senior ministers and the leaders of its PACs, and the World Bank and the IADB for their complicity in allowing the project to go forward without just compensation for landholdings, dwellings, personal property, and livelihoods lost in the Rio Negro Valley. Beyond question the wrongs unjustifiably harmed Mayan Indians, and both indigenous Mayan groups and often individual Mayans and their heirs can be identified. The actions of the wrongdoers were inexcusable, and so they have a moral duty to compensate and restore justice to the Mayan victims.

This argument is thus far incomplete. It remains to show that IP rights in TK would be effective and reasonably efficient means to compensate and restore justice. With equanimity one can grant that money damages, appropriate resettlement of the Mayans in other parts of Guatemala, and acknowledgments, apologies and confessions of wrongdoing by institutions and individuals of the wrongs they committed or were complicit in are the main forms of corrective relief. The case for including TK in the package is twofold. First, the regional biodiversity of the Rio Negro Valley was the source of some Mayan TK, and it may be difficult or impossible to re-create that in other parts of Guatemala. Second, in Guatemala as in most developing countries, indigenous TK not wiped out or rendered worthless by relocation receives spotty and inadequate legal protection. As much is evident in the plight of the San of southern Africa, the value of whose knowledge of uses of plants, such as those of the *Hoodia* genus, has been

undercut and inadequately protected because of war, forced migration, resettlement and government indifference.[9] So even if the Mayan Indians from the Rio Negro Valley receive only a small portion of what is due them as a matter of corrective justice in the form of IP rights in their TK, there is scant ground for withholding from them that small portion.[10]

A less easy case involves indigenous groups whose indigenous victims are dead. A plausible suggestion is to say that the heirs of dead victims should receive corrective relief. There are some technical legal problems with this suggestion. If heirs are defined by an intestacy statute, bear in mind that such statutes have different provisions depending on the jurisdiction, and some legal systems have no intestacy statute. If heirs are defined by victims' wills, the payees would be what the common law calls the devisees and legatees named or described in the wills. Variation is possible here, too, because different jurisdictions have different rules about who can be named. For instance, one jurisdiction might allow a man to disinherit his wife and leave his assets to his mistress, and another jurisdiction might prevent or limit his doing so. There are also issues pertaining to what is heritable. For instance, land and personal property are usually heritable, but some causes of action, such as a defamation lawsuit filed by a woman prior to her death but with no final judgment at the time of her death, often are not heritable. In the present situation, the question is whether an indigenous person's claim for relief would be heritable. Money damages and other remedies will be less effective if such claims are not heritable.

In short, these are technical legal problems that are now in want of legal solutions. One size does not fit all. A uniform statute detailing whether anyone inherits the deceased victim's

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[9] See Stephen R. Munzer and Phyllis Chen Simon, "Territory, Plants, and Land-Use Rights Among the San of Southern Africa: A Case Study of Regional Biodiversity, Traditional Knowledge, and Intellectual Property," *William & Mary Bill of Rights Journal*, 17: 831-94 (2009).

[10] "Breakthrough Accord Could Bring Reparations for Guatemala Massacre Survivors," *NowPublic*, 3 December 2008, available at http://nowpublic.com/world/breakthrough-accord-could-bring-reparations-guatemala-massacre-survivors (last visited 3 May 2009), reports progress on reparations but says nothing about IP rights in TK being part of any reparations.

claim, and, if so, which persons do so, seems attractive on the surface. Yet different cultures have different views about inheritance, and decisions on inheritance should be sensitive to such views. Of course, if relief to indigenous groups or their members is provided on an ad hoc basis, the relief plan can specify who, if anyone, inherits the right to compensation or other remedies.

V. HARD CASES: TRANSGENERATIONAL HARMS AND THE NON-IDENTITY PROBLEM

The previous case becomes less easy still if we increase the time and the number of generations between the deceased indigenous victims and their remote descendants. It is problematic to call them "heirs" after, say, five or ten generations. So many intervening events, including events affected by the original wrongs, have occurred that identifying a person's heirs is even harder than identifying that person's descendants. Indeed, with time it also becomes harder to identify descendants of the original indigenous victim. That is one reason why trying to pay descendants of the Etruscans for harm inflicted on them by the Roman Empire would be such an odd enterprise. Another reason is identifying which Etruscans suffered wrongful injuries by the Romans. These difficulties are lessened, though not extinguished, if the injuries are more recent, such as the harms visited upon Native Americans and black slaves in what is now the United States. One way of avoiding such difficulties, in the case of indigenous peoples, is to pick out how they suffer *continuing* wrongs that grow out of much older wrongs inflicted on their ancestors.[11]

Related to problems with the temporal and generational distance between deceased victims and their remote descendants are further well-known difficulties with inheritance-based claims because of what philosophers call the non-identity problem. Stephen Kershnar, for example, contends that such claims, do not succeed. He offers various reasons to support this

[11] See George Sher, "Ancient Wrongs and Modern Rights," *Philosophy & Public Affairs*, 10 (1980): 3-17.

contention. Among them are doubts about the existence and amount of the claims, concerns about offset (sums representing benefits that must be subtracted from compensation), and figuring out who owes compensation. But above all he worries about the existence and identifiability of those who are supposedly entitled to receive inheritance-based compensation.[12]

Kershnar's argument based on the non-identity problem is straightforward: to justify compensation one must compare the actual world in which current African Americans exist to a relevantly similar possible world in which they also exist but no enslavement and its harms existed; but slavery involved many wrongful acts that affected the freedom and mobility of slaves and played a role in intercourse between particular male and female slaves and thus the birth of ancestors of current African Americans; on metaphysical, probabilistic, and reproductive-biological grounds, there is no relevant possible world in which both black enslavement did not occur and present-day African Americans exist; therefore, the claims for reparations cannot arise, and even if they did there would be no way to determine how much compensation is in order for them. Kershnar concludes that "[s]lavery itself has probably not resulted in a compensable injury to the descendants of slaves."[13] Moreover, according to Kershnar, even if descendants of slaves inherited their ancestors' claims to compensation, each such claim is subject to further division upon passing to the next generation. It is extremely difficult to calculate the amount of the inherited fractionated claims, and it is even more difficult to take offsetting benefits into account. By parity of reasoning, harms done a century or two ago to members of indigenous groups do not give rise to rights to their descendants today. Neither do their current descendants have measurable inherited fractionated claims today.[14]

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[12] Stephen Kershnar, "The Inheritance-Based Claim to Reparations," *Legal Theory*, 8 (2002): 243-67, at 243.
[13] Ibid., p. 251. Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), ch. 16, formulates the non-identity problem. Christopher W. Morris, "Existential Limits to the Rectification of Past Wrongs," *American Philosophical Quarterly*, 21 (1984): 175-82, and others draw out the difficulties that the problem poses for rectification over generations.
[14] Tyler Cowen, "Discounting and Restitution," *Philosophy & Public Affairs*, 26 (2006): 168-85, points out further problems in calculating restitutionary payments over generations.

Kershnar's treatment of the non-identity problem is overly simple. George Sher makes plain that the situation is more tractable than the difficulties just discussed would suggest.[15] These difficulties seem to indicate that transgenerational compensation is incoherent, or nearly so. But Sher explores a two-pronged line of argument which offers a possible way out: "that (1) the unrectified wrongs of the previous generations are systematically correlated with certain wrongs done *within* the current generation, and (2) what look like claims to be compensated for the earlier wrongs are in fact claims to be compensated for the associated recent wrongs – wrongs which, having been done within the current generation, do not give rise to the non-identity problem."[16] Sher recognizes that the argument he explores is problematic, and even to the extent that it works it is "a technical [philosophical] solution to a technical [philosophical] problem."[17] Still, Sher leaves the proponent of reparations or other relief for members of indigenous groups with something to go on.[18]

There is a second way out of Kershnar's treatment of the non-identity problem. He and Sher both concentrate on individual members of groups. One can concentrate instead on groups themselves. The remote-descendant/non-identity critique is faulty or incomplete because an indigenous people is a unitary group or collectivity over time. Those who are responsible for TK form a group of *n* generations who have largely the same language and similar if evolving moral and social practices and ways of life over centuries. One can think, then, of an indigenous group – not the individuals in the group – as the entity that has a claim of TK. The identity-conditions of transtemporal groups include lineage and cultural continuity, and a particular indigenous group transcends its current membership. It is the identity of the group, rather than the non-

[15] George Sher, "Transgenerational Compensation," *Philosophy & Public Affairs*, 33 (2005): 181-200. His article does not cite and is not a direct reply to Kershnar.
[16] Ibid., p. 191. Waldron anticipated Sher's position by linking past injustices to persisting injustices. Jeremy Waldron, "Superseding Historical Injustice," *Ethics*, 103 (1992): 4-28, especially at 14.
[17] Sher, "Transgenerational Compensation," p. 200.
[18] See also Mathias Risse, "How Does the Global Order Harm the Poor?," *Philosophy & Public Affairs*, 33 (2005): 349-76; Mathias Risse, "Do We Owe the Global Poor Assistance or Rectification?," *Ethics and International Affairs*, 19 (2005): 9-18.

identity of current individual members of the group, that matters from the standpoint of corrective relief in the form of IP rights for TK.[19]

VI. HARD CASES: REMEDIES FOR VIOLATIONS OF DIFFUSE INTERESTS AND RIGHTS

Interests and rights are diffuse if they are indivisible, collective, and belong to indefinite classes of persons. A class of indigenous persons is indefinite if intermarriage and migration make it difficult or impossible to determine all and only those individuals who belong to the class. The interests of indigenous peoples in their TK as well as in their cultural identity and their survival as distinct groups are usually diffuse. Their rights *qua* members of a particular indigenous group are usually diffuse, too. Some countries in Latin America and elsewhere make room for diffuse interests and rights. Brazil is a notable example.[20] Other countries make little if any room for such interests and rights.

The relevance of diffuse interests and rights to my analysis is as follows. Suppose that the first five steps in my argument are met. That leaves the final step: that recognizing IP rights in TK would be an effective and reasonably efficient means of compensating or restoring justice to an indigenous people. Relief that is wholly untargeted is neither effective nor reasonably efficient for this purpose. For example, the Ghanaian Copyright Act 2005 vests "rights of folklore . . . in the President for the people of the Republic," who holds them "on behalf of and in trust for the people of the Republic."[21] This way of treating indigenous folklore is a spectacularly bad idea. Even if neither the President nor the government is corrupt, proceeds from folkloric rights will go to all of the people of Ghana rather than to the various indigenous

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[19] This argument adapts Munzer and Raustiala, note 1, at 64.
[20] Ada Pellegrini Grinover, "Brazil," *Annals of the American Academy of Political and Social Science*, 622: 63-67 (2009).
[21] Copyright Law, P.N.D.C.L.No. 690, secs. 4, 17 (17 May 2005) (Ghana), available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=1789.

groups that created the folklore. In most countries, members of indigenous groups are a small fraction of the total population. Hence, the share of indigenous groups in the royalties and other income from their folklore is likely to be minuscule. They are not receiving effective compensation or restorative relief for past harm done to them.

Pooling all indigenous groups in a country together is not much better, for most countries that have indigenous peoples have many different groups of them. A well-known Peruvian statute governing the collective knowledge of biological resources illustrates the problem.[22] It provides that if "the collective knowledge has passed into the public domain within the previous 20 years," a percentage of the gross sales of goods developed from this knowledge goes into the Fund for the Development of Indigenous Peoples.[23] Peru has numerous indigenous groups. If a particular group has developed TK from biological diversity native to their area, as often happens in the Andes, then the group will not receive compensation or enjoy restorative relief commensurate with the value of its own TK. There are limited circumstances in which the Peruvian pooling strategy is defensible. If indigenous groups are numerous and the value of the TK of each group is roughly the same, then it will be both fair and cost-effective to pool rather than keep separate accounts for each group. Otherwise, a given Peruvian indigenous group will not receive corrective relief for *its* TK.

If a pooling strategy is at most a second-best means of corrective relief for past wrongs, it makes sense to explore a more targeted form of relief. One way to do this is through a combination of regional treaties and domestic legislation that protect the rights of indigenous peoples. The domestic legislation would implement treaty obligations by coming up with a framework for recognizing and enforcing indigenous rights. The enforcement provisions would

[22] Law No. 27811 (10 August 2002) (Peru), Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources, available at http://grain.org/brl/?docid=81&lawid=207 (English translation); discussed in Munzer and Raustiala, note 1, at 90-94.

[23] Law No. 27811, art. 13; Antony Taubman and Matthias Leistner, "Traditional Knowledge," in Silke von Lewinsky, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, 2d ed. (The Netherlands: Wolters Kluwer, 2008), pp. 59-179, at 147.

allow indigenous groups to bring suit under the treaty once they had exhausted their domestic remedies. They would also empower judges to act creatively in fashioning remedies. Of course, equity already recognizes a range of remedies beyond injunctions, restitution and declaratory judgments: accounting for profits, adjustments of various kinds, agency of necessity, constructive trusts, *culpa in contrahendo*, discharges of various kinds, equitable liens, fiduciary duties, *negotiorum gestio* (management of the affairs of another), *quantum meruit*, rescission, set-offs, unconscionability, unjust enrichments of various kinds, and the unwinding of contracts.[24] As will become apparent, some courts have show more remedial resourcefulness than even this long list would suggest.

A good example is the American Convention on Human Rights (the "Convention") and litigation under it.[25] Article 21 protects the right of everyone to use and enjoy property. It also provides that no one may be deprived of property except upon payment of "just compensation." Article 21 does not define "property." Its language contains not the remotest hint that "property" includes IP rights in TK. That's fine. I don't want an argument for corrective justice to depend on the very point at issue – namely, whether IP rights in TK are justifiable. It's quite enough for my purposes if Article 21 protects communal rights in land and natural resources such as timber, and if the regional agreement is any kind of treaty, rather than specifically a treaty pertaining to human rights. In fact, it would be better if it were not a human rights treaty, because the argument I wish to explore is a corrective justice argument, not a human rights argument. The constitutions of many nations protect property rights much as Article 21 does.[26]

[24] See generally Ernst von Caemmerer and Peter Schlechtriem, eds., *International Encyclopedia of Comparative Law* (Tübingen: Mohr Siebeck and Leiden and Boston: Martinus Nijhoff: 2007), vol. 10 ("Restitution/Unjust Enrichment and Negotiorum Gestio"); Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge: Cambridge University Press, 2004). Equitable remedies vary across jurisdictions. Also, some remedies formerly classified as equitable might be considered legal remedies; see, for example, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-79 (1962) (casting the complaint in terms of an "accounting" does not make the remedy equitable rather than legal for purposes of the availability of a jury trial in the federal courts).

[25] Organization of American States, American Convention on Human Rights, 22 November 1969, available at http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm (last visited 6 May 2009).

[26] See, for example, Constitution of Angola, art. 10; Constitution of Botswana, sect. 8(1); Constitution of the Republic of Namibia, art. 16; South African Constitution, sect. 25; U.S. Constitution, amendments V, XIV sect. 1.

One can illustrate how a targeted form of relief would work at ground level by exploring two recent decisions of the Inter-American Court of Human Rights (the "Court"). In *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[27] the Inter-American Commission on Human Rights (the "Commission") sued the State of Nicargua on behalf of the Mayagna Awas Tingni Community (the "Community"), an indigenous group of approximately 630 individuals who live mainly on the Wawa River in the municipality of Waspan. The petitioners alleged that Nicaragua had interfered with and failed to protect its traditional lands and its right to fell trees on those lands. The Commission agreed with these allegations and argued that Nicaragua had violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention.[28] The Court agreed. It held, in particular, that Nicaragua had violated the petitioners' right to property and judicial protection.[29]

In the remedial part of its opinion, the Court held that Nicaragua must invest US $50,000 for the benefit of the Community, pay US $30,000 to reimburse the Community for its expenses, and set up a legislative and administrative infrastructure that can demarcate the petitioners' traditional lands and give them title to these lands.[30] Until the demarcation and titling are complete, Nicaragua, its agents, and third parties acting with Nicaragua's acquiescence or tolerance must not interfere with the Community's use and enjoyment of their lands or compromise the value of them.[31] Moreover, Nicaragua must submit to the Court reports of its progress on compliance with the decision every six months until the State has fully carried out its responsibilities under the judgment.[32]

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[27] Inter-American Court of Human Rights, Series C, No. 79 [2001] IACHR 9 (31 August 2001), available at http://www.worldlii.org/int/cases/IACHR/2001/9.html (last visited on 6 May 2009).
[28] Ibid., para. 2.
[29] Ibid., para. 173(1) and (2). These rulings were made by a 7-1 vote. All other rulings in the case were either unanimous or by a 7-1 vote.
[30] Ibid., para. 173(3), (6) and (7) (awarding dollar amounts "in equity").
[31] Ibid., para. 173(4).
[32] Ibid., para. 173(8) and (9).

The corrective relief in this case did not include IP rights in TK but it could have done so. From a continent away it is impossible to assess the monetary amounts ordered by the Court. But if one assumes that these amounts are just compensatory and restorative relief, it might have been possible to pay a lower amount and make up the difference by IP rights in the Community's TK. One could then recraft the Court's order to embrace judicial protection of these rights and the administrative infrastructure to back it up. Although the *Awas Tingni* case was decided under a treaty, similar results are available under the legislation of many Latin American countries. Brazil, Costa Rica, Colombia, Guatemala, and Paraguay among others have kindred provisions for enforcing the diffuse interests and rights of indigenous peoples and consumer groups.[33]

One can see similar remedial versatility in the Court's decision, five years later, in *Caso Comunidad Indígena Sawhoyamaxa v. Paraguay.*[34] Lands of the Paraguayan Chaco passed into the hands of British businessmen as a result of debt owed by Paraguay. Although Indian groups that traditionally lived in the Chaco usually remained in the area, they often became farmhands and employees of British landowners. As large private estates were over generations divided into smaller holdings, and as the economy became less dependent on agriculture, Indians could no longer practice their traditional ways on their traditional lands and they grew sedentary. One such Indian group was the Sawhoyamaxa Indigenous Community, which in 2006 had 407 members spread over some 83 dwelling places in their traditional habitat. After exhausting its domestic remedies, the Community sued Paraguay in the Court, which ordered reparations under Article 63(1) of the Convention.[35]

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[33] Pellegrini Grinover, note 20, at 64-65, 67.
[34] 29 March 2006, Corte Interamericana de Derechos Humanos, Series C, No. 146 (Spanish), available at http:www.corteidh.or.cr/casos/articulos/seriec_146_esp2.pdf (last visited on 13 May 2009). There is not yet an English translation of the full opinion, but bits of it are translated into English in Henry J. Steiner, Philip Alston, and Ryan Goodman, eds., *International Human Rights in Context: Law, Politics, Morals – Text and Materials,* 3d ed. (Oxford and New York: Oxford University Press, 2008), pp. 1049-57. Quotations are from this translation.
[35] Ibid., para. 194, at p. 1055.

The Court stressed that the "reparations . . . consist of measures tending to eliminate the effects of the breaches perpetrated . . . [for] both the pecuniary and the non-pecuniary damages caused."[36] Although the Court believed that it could not order private landowners to turn over their property to the Community, it did enjoin the Paraguayan government to consider purchasing or condemning private lands for return to the Community. If that were not possible, then the State had to make available "alternative lands" and formally grant them to the Community, and "the extension and quality of the lands must be sufficient to guarantee the preservation and development of the Community's way of life."[37] The Court was mindful of the distress and suffering inflicted on the Indians, and observed that they were "at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations."[38] It ordered the State to pay US $1,000,000 to a community development fund and US $20,000 for each of 17 members who had been killed, and imposed time limits and reporting requirements on the State.[39]

VII. THE BOTTOM LINE

The case for IP rights in TK based on corrective justice is scarcely overwhelming. One should have no illusions that the two ways out of difficulties stemming from transgenerational harms and the non-identity problem have disposed of these problems forever. The remedies surveyed in Section VI display an encouraging plasticity and resourcefulness on the part of judges in dealing with the rights of indigenous peoples. None of these remedies, however, involves IP rights in TK – though recognizing these rights remains an option. If one revisits Section III, one might think that a fool is still pursuing an unpromising errand. The worth of IP

[36] Ibid., para. 198, at p. 1056.
[37] Ibid., paras. 212, 215, at p. 1056.
[38] Ibid., paras. 215, 222, at p. 1056.
[39] Ibid., paras. 224, 226, 235, 236, 248, at p. 1057.

rights in TK is highly variable, and the rights might well vary too much in content, even in light of my efforts made to keep the train on track.

By no means are these the only difficulties with the argument advanced here. At some point, one has to think about what indigenous peoples *need* and *want.* Their needs are not always and everywhere the same, and neither are their wants. Yet, to paint with a broad brush, they likely need land, health care, education, and access to material resources more than they need IP rights in their TK. If I put myself in an imaginary conversation with an indigenous leader who has just seen his or her group conferred with IP rights in TK, he or she would probably say, "I have huge problems involving a place for my people to live, prevention of disease, and access to trees and water – and all you have brought me is some 'rights' which I don't quite understand and seem to me of questionable worth!" Whatever the force of my argument of corrective justice, it still seems puny in its attempt to support IP rights in TK when indigenous peoples have so many other problems demanding their attention.