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ABSTRACT

Biocultural Community Protocols (BCPs) represent legal mechanisms for indigenous peoples and local communities (IPLCs) to assert collective regulatory rights to genetic resources associated with traditional knowledge. BCPs inherently speak to power asymmetries between state and subnational actors. Yet the literature on BCPs has insufficiently engaged with questions of whether, how, and the extent to which BCP author communities utilise these protocols to demand redress for past harms which have constituted those asymmetrical power conditions. Seeking to connect scholarship on BCPs with the transitional justice literature, I explore three hypotheses positing mechanisms by which IPLCs are leveraging BCPs to assert transitional justice demands. I then evaluate these hypotheses through analysis of the 34 BCPs registered with the United Nations ABS Clearing House.

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INTRODUCTION

In March 2019, a coalition of Khoikhoi and San indigenous peoples in South Africa signed an unprecedented agreement with representatives of the country's rooibos tea industry. The deal implemented mutually-agreeable regulations for commercial entities to access, use, and distribute economic benefits from the cultivation of the rooibos plant, a resource of great cultural and economic importance to several South African indigenous peoples.[1] Reflecting on the significance of the agreement for the Khoikhoi and the San, who have endured a long, violent history of dispossession and cultural repression at the hands of colonial and Apartheid-era authorities, a member of the indigenous negotiating team reported that, by signing the deal, 'It was like a part of our dignity was being restored'.[2] The 2019 rooibos agreement was made possible by terms of engagement established in a Biocultural Community Protocol (BCP) written by Khoikhoi and San leaders. BCPs, introduced into international law by the 2010 Nagoya Protocol to the United Nations Convention on Biodiversity, are documents drafted by indigenous peoples and local communities (IPLCs). These documents establish terms for accessing and distributing benefits from the use of genetic resources constituting traditional knowledge belonging to the author community. BCPs are one example of legal mechanisms through which IPLCs can assert collective access and benefit-sharing (ABS) rights to culturally and economically-important genetic resources. These documents have illuminated new pathways for historically-disenfranchised peoples to protect their cultural heritage while conserving biodiversity in fragile ecosystems threated by climate change and resource exploitation.

While an increasing number of BCPs have been written by indigenous peoples and local communities in recent years, these documents are severely under-studied. Prior literature has predominantly framed BCPs as means for restructuring economic, social, and legal relationships between subnational communities and state governments (or other powerful actors supported by state acquiescence, such as multinational corporations). This restructuring is fundamentally an act of community resistance aimed at mitigating power asymmetries between IPLCs and state actors. Protocol drafting and implementation processes raise awareness of community members' rights, bridge local, national and international laws, identify sustainable environmental practices and link those practices to community goals, and (re)connect social networks to strengthen intra-community relationships. In doing so, IPLCs can use BCPs as 'tools for resisting exclusion in global environmental governance'.[3] This notion that BCPs are

[1] Doris Schroeder and others, 'The Rooibos Benefit Sharing Agreement–Breaking New Ground with Respect, Honesty, Fairness, and Care' (2019) 29(2) Cambridge Quarterly of Healthcare Ethics 285.

[2] Tommy Trenchard, 'Trendy Rooibos Tea Finally Brings Revenues to Indigenous South African Farmers' *NPR* (27 May 2023) <https://www.npr.org/sections/goatsandsoda/2023/05/27/1176439193/local-farmers-in-south-africa-were-cut-out-of-rooibos-tea-cash-now-change-is-bre#:~:text=Hourly%20News-,Trendy%20rooibos%20tea%20finally%20brings%20revenue%20to%20Indigenous%20South%20African,Until%20now>.

[3] Natalia Aguilar Delgado, 'Community Protocols as Tools for Resisting Exclusion in Global Environmental Governance' (2016) 56(4) Revista de Administração de Empresas 395; Maria Julia Oliva, Johanna von Braun and Gabriela Salinas Lanao, 'Biocultural Community Protocols and Ethical Biotrade: Exploring Participatory Approaches in Peru' in Krystyna Swiderska and others (eds), *PLA 65 - Biodiversity and Culture: Exploring Community Protocols, Rights and Consent* (IIED 2012) 166.

a form of resistance implies that they are written to challenge 'dominant discourses' which have marginalised worldviews, ideas, and identities tied to traditional knowledge.[4]

BCPs inherently speak to power asymmetries between state and subnational actors. Yet the literature on BCPs has insufficiently engaged with questions of whether, how, and the extent to which BCP author communities create such protocols with the explicit intention to remedy past harms which have constituted asymmetrical power conditions in the first place. The transformative translation of traditional knowledge into national and international legal rights dialogues might be helpfully conceptualised as a pathway for achieving 'transitional justice': creating institutions, policies, and practices to address harm caused by past violence.[5] Indeed, the transitional justice literature has extensively explored the development of socioeconomic rights and (re)distribution of economic dividends as mechanisms through which societies scarred by violence can receive transformative reparations.[6] While claiming socioeconomic rights and redistributing access to economic gains derived from traditional knowledge are not the sole functions of BCPs, they are important potential functions of such protocols. As such, it is worth interrogating how BCP author communities which have suffered state-sponsored violence (particularly through the traumas of colonisation, economic marginalisation, and systemic discrimination) might be framing demands for transitional justice within these documents. As prior literature on BCPs has emphasised, community protocols serve as important sites of community constitution,[7] documentation of historical practices and events,[8] and demands for economic and cultural rights,[9] and that these processes are uniquely enabled by the legal legitimacy imbued in BCPs by the Nagoya Protocol.[10] However,

4 Louisa Parks, 'Challenging Power from the Bottom Up? Community Protocols, Benefit-Sharing, and the Challenge of Dominant Discourses' (2018) 88 Geoforum 87.

5 Leslie Vinjamuri and Jack Snyder, 'Law and Politics in Transitional Justice' (2015) 18(1) Annual Review of Political Science 303.

6 Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2(3) International Journal of Transitional Justice 266; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Social & Legal Studies 171; Matthew Evans, 'Structural Violence, Socioeconomic Rights, and Transformative Justice' (2016) 15(1) Journal of Human Rights 1; Simeon Gready, 'The Case for Transformative Reparations: In Pursuit of Structural Socio-Economic Reform in Post-Conflict Societies' (2022) 16(2) Journal of Intervention and Statebuilding 182.

7 Rosemary J Coombe, 'Cultural Agencies: The Legal Construction of Community Subjects and their Properties' in Mario Biagioli, Peter Jaszi, and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property* (University of Chicago Press 2011) 79.

8 Harry Jonas, Holly Shrumm and Kabir Bavikatte, 'Biocultural Community Protocols and Conservation Pluralism' (2010) 17 Policy Matters 102.

9 Margaret Raven, 'Protocols & ABS: Recognising Indigenous Rights to Knowledge in Australian Bureaucratic Organisations' (2006) 6(20) Indigenous Law Bulletin 13; Giulia Sajeva, 'The Legal Framework Behind Biocultural Rights: An Analysis of their Pros and Cons for Indigenous Peoples and for Local Communities' in Fabian Girard, Ingrid Hall and Christine Frison (eds), *Biocultural Rights, Indigenous Peoples and Local Communities: Protecting Culture and the Environment* (Routledge 2022) 165.

10 Christine Frison, Louisa Parks and Elsa Tsioumani, 'Biocultural Community Protocols: Making Space for Indigenous and Local Cultures in Access and Benefit Sharing?' in Charles Lawson, Michelle Rourke and Fran Humphries (eds), *Access and Benefit Sharing of Genetic Resources, Information and Traditional Knowledge* (Routledge 2022) 177.

the literature has lacked conversation with scholarship on transitional justice and the specific mechanisms through which IPLCs reach out to international legal institutions to demand redress for past harms.

This article attempts to enrich such conversation by evaluating all BCPs which have been registered in the United Nations Access and Benefit-Sharing Clearing-House,[11] the official database for sharing information regarding implementation of the Nagoya Protocol. The aim of this analysis is to investigate whether and how BCP author communities are utilising these documents to make rights claims seeking redress for past violence. Analysing the corpus of BCPs registered in the ABS Clearing House provides an opportunity to hone in on a bounded universe of cases, representing BCPs specifically intended by author communities to engage with the international legal regime.[12] This sample is heavily populated with Latin American cases, which may point to entrenchment of regional legal norms[13] indicating greater proclivity towards registration within author communities and/or non-governmental partners. As BCPs have historically taken on a variety of legal and non-legal forms, and the concept of transitional justice is historically rooted in international legal institutions,[14] I believe that this group of cases is, at the very least, a promising starting point for assessing transitional justice demands within BCPs. Analysing this group of BCPs specifically may impart a clearer understanding of the conditions under which BCP author communities frame the legitimacy of legal rights claims in particular ways that speak to redress for past harm.

The plan of the paper is as follows. First, I provide a brief overview of the Nagoya Protocol's development and define relevant key terms. Then, I discuss how the scholarship on BCPs would benefit from greater engagement with concepts developed in transitional justice literatures. Based on this dialogue, I explore three hypotheses positing mechanisms by which IPLCs are leveraging BCPs to assert transitional justice demands: 1) by defining community constituencies through coupling the concepts of identity, traditional knowledge, and collective intellectual property rights, 2) by performing historical memory work and documenting how indigenous peoples and local communities have undertaken unique responsibility for protecting vulnerable genetic resources, and 3) by creating mechanisms of reparation to address past state-sponsored violence. I

[11] Accessible at <https://absch.cbd.int/en/h?currentPage=1&schema=communityProtocol>.

[12] I make an assumption here that the act of registering with the UN serves as an indicator of intent to engage with international law. This assumption is debatable. The literature on registering agreements with UN bodies is underdeveloped, particularly with regard to agreements authored by nonstate actors. However, I believe the assumption is fair in this case based on prior (state-centric) scholarship maintaining that the act of registration is evidence of intent of international justiciability, as well as the UN Secretariat's policies regarding justiciability of treaties. See D N Hutchinson, 'The Significance of the Registration or Nonregistration of an International Agreement in Determining Whether or Not It Is a Treaty' (1993) 46(2) Current Legal Problems 257. See also, *Charter of the United Nations,* Art. 102 para. 2.

[13] Kathryn Sikkink, 'Latin American Countries as Norm Protagonists of the Idea of International Human Rights' in Kurt Mills and Kendall Stiles (eds), *Understanding Global Cooperation: Twenty-Five Years of Research on Global Governance* (Brill 2021) 391.

[14] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69.

then evaluate these hypotheses through analysis of the 34 BCPs registered with the United Nations ABS Clearing House. The concluding section reflects on avenues for further research on this topic.

A. Biocultural Community Protocols (BCPs) in International Law

The United Nations Convention on Biological Diversity (CBD) is the primary international legal instrument governing the conservation of biological diversity, the sustainable use of genetic resources, and the 'fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'.[15] Fundamental to implementing the CBD is the concept of Access and Benefit Sharing (ABS). ABS refers to a wide-ranging variety of agreements delineating terms of ownership and access to genetic resources for both commercial and non-commercial (i.e., academic research) aims, as well as equitable profit-sharing arrangements in cases of commercial use. Article 8(j) of the CBD recognises the unique positionality of 'indigenous and local communities' in promoting the sustainable use of genetic resources. Here, the CBD began to carve out space for subnational groups to assert internationally-protected legal rights to participate in domestic ABS agreements.

From the onset of the CBD, state parties have struggled to incorporate the Convention into domestic practice. Lack of political will and, as Buck and Hamilton suggest, the vague language of Convention provisions, resulted in low levels of domestic adoption of ABS legislation.[16] The Nagoya Protocol to the CBD, negotiated between 2002-10, represents a concerted effort among state parties to address such compliance challenges by providing clearer guidelines for implementing ABS principles. International NGOs representing coalitions of indigenous people were instrumental in negotiating the Nagoya Protocol, emphasising the vital role of indigenous communities in preserving genetic resources.[17] These coalitions specifically sought to intervene in the state-centric framework of the CBD, which allocates primary sovereignty over genetic resources to governments who may not respect the cultural importance of certain resources to historically-marginalised peoples.[18]

The Nagoya Protocol to the CDB was finally adopted in 2010 and entered into force in 2014. Today, 141 states are party to the Protocol. In contrast to the TRIPS agreement and the broader WTO intellectual property regime, the CBD and the Nagoya Protocol do not rely on a conceptualisation of intellectual property as belonging exclusively to private, profit-seeking actors. Rather, the CBD and Nagoya Protocol advance the concept of 'traditional knowledge'. However, neither document provides a definition

15 The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69) (hereafter, CBD): Art. 1.

16 Matthias Buck and Clare Hamilton, 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity' (2011) 20(1) Review of European Community & International Environmental Law 48.

17 Maria Yolanda Teran, 'The Nagoya Protocol and Indigenous Peoples' (2016) 7(2) The International Indigenous Policy Journal 1.

18 Tim K Mackey and Bryan A Liang, 'Integrating Biodiversity Management and Indigenous Biopiracy Protection to Promote Environmental Justice and Global Health' (2012) 102(6) American Journal of Public Health 6.

of 'traditional knowledge', a source of ambiguity that poses challenges for the domestic implementation of the Nagoya Protocol.[19] In fact, there is no commonly agreed-upon definition of traditional knowledge in international law. Even the 2024 World Intellectual Property Organization (WIPO) Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, which seeks to implement patenting protections for genetic resources associated with traditional knowledge, does not actually include a definition of 'traditional knowledge'. In past publications, WIPO has acknowledged that traditional knowledge has 'different meanings for different people in different fora…' but offers that the term 'generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional and local communities…knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations'.[20] It is important to note that, while some scholarship refers to traditional knowledge as a form of collective intellectual property,[21] other work cautions against conflating the two concepts, as doing so may over-privilege privatised notions of 'property' and lead to a reductionist view of the spectrum of cultural and spiritual values that are intrinsic to 'traditional knowledge'.[22]

In a crucial legal innovation, the Nagoya Protocol introduced 'community protocols' as a medium through which IPLCs can establish terms of engagement for accessing and distributing benefits from the use of genetic resources constituting traditional knowledge. Article 12 obligates states to 'support' the development of community protocols and take community protocols into consideration 'with respect to traditional knowledge associated with genetic resources', enabling IPLCs to take on an agentive role in crafting ABS agreements.

The negotiating history of Article 12 of the Nagoya Protocol underscores the significance of incorporating binding obligations on states to consider community protocols when governing access and benefit-sharing related to genetic resources. Late in the negotiations, the French delegation objected to including any references to 'customary laws, community protocols and indigenous and local community law' in the Protocol text.[23] Arguing that such references would create unprecedented recognition of nonstate-originated customary laws in international law, France suggested the

19 Brendan M Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights' (2013) 9 Law, Environment and Development Journal 148.

20 Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - 'List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May Be Found, World Intellectual Property Organization *Doc WIPO/GRTKF/IC/17/INF/9 (2010).*

21 Camille Meyer and Kiruben Naicker, 'Collective Intellectual Property of Indigenous Peoples and Local Communities: Exploring Power Asymmetries in the Rooibos Geographical Indication and Industry-Wide Benefit-Sharing Agreement' (2023) 52(9) Research Policy 104851.

22 Daniel F Robinson, 'Legal Geographies of Intellectual Property, 'Traditional' Knowledge and Biodiversity: Experiencing Conventions, Laws, Customary Law, and Karma in Thailand' (2013) 51(4) Geographical Research 375.

23 Kabir Bavikatte and Daniel F Robinson, 'Towards A People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011) 7(1) Law, Environment and Development Journal 45.

term 'community level procedures' should replace 'customary laws and community protocols'.[24] The African Group negotiating delegation and African indigenous peoples organisations successfully pushed back against this argument, compromising by incorporating qualifying language deferring to domestic law in Article 12. Consequently, the final text of Article 12.1 reads, 'Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures...', a historic innovation developing a norm of legal pluralism in international environmental law.[25]

Documents referred to as 'Biocultural Protocols' or 'Community Protocols' were implemented by IPLCs in discrete contexts well before the Nagoya Protocol carved out a space for these agreements to be considered instruments of international law.[26] Nagoya elevated the legal character of these documents, providing IPLCs with unique opportunities to shape not only national, but regional and international law. As such, these documents represent mechanisms for closing the 'compliance gap' between the CBD and domestic policy, and 'may be seen as a bridge between customary law and positive law regimes'.[27] Participation in and dialogue with international law on the basis of membership in a 'people' or 'community', as opposed to national identity, opens up expanded opportunities for implementing international law at national and substate levels.[28]

B. BCPs as Transitional Justice Mechanisms

Transitional justice mechanisms can take diverse forms, including financial reparations, state acknowledgement of past harm, criminal prosecutions, legislative reform, collective acts of memorialisation, and state-sponsored redistribution of social resources. Seeking transitional justice through legal means depends upon the ability of both state institutions and victimised communities to identify who the victims actually *are*. Individuals and communities cannot make rights claims, and legal and administrative institutions cannot dispense transitional justice mechanisms, without defining precisely whose rights have been violated and who is eligible for redress. Defining who constitutes a 'victim' is particularly difficult in circumstances of mass, systemic, or long-standing structural violence, where rights violations are suffered by large collectivities. Such situations pose ethical and logistical challenges for the implementation of transitional justice.[29] This

24 ibid 46.

25 ibid 46.

26 Alejandro Argumedo and Michel Pimbert, 'Protecting Indigenous Knowledge against Biopiracy in the Andes' (International Institute for Environment and Development 2006).

27 Tobin (n 19) 158.

28 Sabrina Urbinati, 'The Community Participation in International Law' in Nicolas Adell and others (eds), *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage* (Universitätsverlag Göttingen 2015).

29 Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' [2004] 27 Hastings International and Comparative Law Review 169; Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 377; Kevin Hearty, 'Victims of' Human Rights Abuses in Transitional Justice: Hierarchies, Perpetrators and the Struggle for Peace' (2018) 22(7) The International Journal of Human Rights 888.

is a key issue in scholarly and policy debates surrounding the viability of distributive justice approaches to transitional justice. Particularly as theories of transitional justice have evolved beyond solely being applied to situations of armed conflict, and now encompass situations of systemic inequality, legalised discrimination, and economic marginalisation, the question of how (re) distribution of economic resources might be employed to remedy past harms hinges on defining victimised constituencies.[30]

Individual rights claim-based modalities of transitional justice have been criticised for inadequacy in addressing situations of historical or collective violence. Balint et al. (2014) emphasise dominant transitional justice frameworks' weaknesses in addressing historical and ongoing structural harms suffered by indigenous peoples. They call for embracing comprehensive models of transitional justice which seek to address structural violence perpetrated through settler-colonialism.[31] Defining what constitutes a 'people' is a key criterion for facilitating access to transitional justice in the wake of settler-colonial violence. To the extent that BCPs are written to seek redress for past injustices, we should take seriously the ways in which indigenous peoples utilise these documents to define themselves *as* peoples, and demand distributive justice for past state-sponsored harm on the basis of community membership.

Constructivist and post-colonial scholars of international relations have long emphasised that international law both expresses and produces social identities, conditioning how people arrange themselves into groups and claim individual and collective rights. Much of this scholarship has focused on self-determination, political autonomy, and statehood, exploring how international humanitarian law and legal conceptualisations of sovereignty have influenced rights claims promoted by minority, transnational, and historically-disenfranchised people groups.[32] A related, but distinct literature explores how law and indigeneity co-constitute expressions of identity in both domestic and international legal fora. Particularly amidst the decolonisation wave that followed WWII, the concept of 'indigenous sovereignty' became fundamental in motivating 'indigenous discourses' and political life, signifying commitment to achieving 'a multiplicity of legal and social rights to political, economic, and cultural self-determination'.[33] The hard-fought struggle for indigenous peoples to be

30 Felix E Torres, 'On Deserving Victims and the Undeserving Poor: Exploring the Scope of Distributive Justice in Transitional Justice Theory and Practice' (2023) 45(2) Human Rights Quarterly 306.

31 Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8(2) International Journal of Transitional Justice 194.

32 Rebecca Strating, 'Contested Self-Determination: Indonesia and East Timor's Battle over Borders, International Law and Ethnic Identity' (2014) 49(4) The Journal of Pacific History 469; Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (BRILL 2021); Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (BRILL 2021); Catherine Brölmann, René Lefeber and Marjoleine Zieck, *Peoples and Minorities in International Law* (BRILL 2023).

33 Joanne Barker, 'For Whom Sovereignty Matters' in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press 2005) 1; Mark Bennett, 'Indigeneity as Self-Determination' (2005) 4 *Indigenous Law Journal* 71.

identified as 'peoples' in international legal texts reflects the significance of 'indigenous sovereignty' as a modality of resistance to the 'empire of uniformity' that has condoned violations of the right to self-determination for colonised and occupied peoples.[34]

Imbuing people identified as 'indigenous' with the ability to lodge distinct rights claims, a practice that accelerated in both international and domestic legal systems following the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), has invited adjudications of indigeneity that can be both politically strategic and harmfully reductive. For example, Loperena (2020) writes of his experience serving as an expert witness in two cases before the Inter-American Court of Human Rights concerning Honduran state interference in Garifuna communal property rights. The Garifuna are a self-identified indigenous people of Arawak, Carib, and African descent. They are not recognised as 'indigenous' by the Honduran government. Loperena critiques the process of providing 'cultural evidence' to 'adjudicate' the indigeneity of the Garifuna. As the case concerned property rights, this process resulted in the Inter-American Court issuing a judgement that conceptually tied indigenous subjectivity to land, 'thereby deepening essentialised notions of Garifuna ethnic and racial difference'.[35] This case exemplifies the inherent hazards of attributing meaning to cultural identities through legal institutions. However well-intentioned, asserting that members of particular demographic groups are to be treated as unique legal subjects risks re-entrenching essentialist stereotypes- for example, that all indigenous people have a special relationship with 'land', and therefore must base legal claims to fair treatment on a relationship to land rather than other potential human rights-related claims.

Furthermore, the construction and representation of 'indigenous' identities are deeply context-dependent social processes that do not translate neatly into binary ways of knowing 'the truth' that are often privileged in legal processes. Disputes over who 'counts' as indigenous are intensified in situations where law creates incentives for people groups to assert themselves as the 'true' holders of indigenous identities. For example, Lucero describes how two political groups claiming indigenous identity in Andean Latin America- FEINE, the Ecuadorian Evangelical Indigenous Federation and CONAMAQ, the National Council of Markas and Ayllus of Qollasuyo, based in Bolivia- engaged in discursive battles over indigenous political subjectivity, each discrediting the other's claim to indigeneity and vying to portray their organisation as representing 'real Indians'.[36] Particularly as jurisprudence linking indigenous peoples' rights to environmental protectionism has rapidly expanded in the regional human rights courts in recent years, thorny questions of who has the right to call themselves 'indigenous', who can speak for indigenous peoples, and the extent to which indigeneity is connected to a relationship with natural resources are salient, deeply-contested debates

[34] Rashwet Shrinkhal, 'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal' (2021) 17(1) *AlterNative: An International Journal of Indigenous Peoples* 71.

[35] Christopher A Loperena, 'Adjudicating Indigeneity: Anthropological Testimony in the Inter-American Court of Human Rights' [2020] 122(3) *American Anthropologist 595.*

[36] José Antonio Lucero, 'Representing 'Real Indians': The Challenges of Indigenous Authenticity and Strategic Constructivism in Ecuador and Bolivia' (2006) 41(2) Latin American Research Review 31.

in international law.[37] Furthermore, disproportionate focus on discerning who can authentically speak for a given indigenous people is likely to elide consequential divergences of opinion and life experiences amongst community members. When assessing the normative drivers and implications of BCPs, scholars must keep in mind the diversity of indigenous identities and their political deployment.

Delineating rights on the basis of membership in a demographic group can alter the political calculus of groups seeking influence or autonomy, including over genetic resources. Because of the indeterminacy and social contingency of the concept, 'indigeneity' can be considered both a 'social construct and a political tool… a means to challenge the state…'.[38] Prior scholarship has specifically explored the instrumental use of community protocols amongst indigenous communities as a 'tool' for collective action.[39] As such, it is essential to gain deeper understanding of how self-identified indigenous peoples are organising themselves and dialoguing with international law to narrate rights claims. Analysing BCPs provides an opportunity to explore this strategic process.

Leveraging 'indigeneity' to wield international law to challenge national policy may encourage the discursive formation of other identity-based legal subjectivities, including the concept of 'local communities' codified in the CBD and Nagoya Protocol. Coombe, reflecting on her experiences performing ethnographies of WIPO meetings, notes 'strategic alliances are being forged' between indigenous NGOs, traditional healers' associations, environmental NGOs, farmers, religious organisations, and development activists, 'organised around growing opposition to existing intellectual property laws'.[40] Investigating how BCP authors (both indigenous and non-indigenous) narrate the factors motivating their choices to organise in particular configurations can shed light on alliances of resistance to state repression.

Debates surrounding access and benefit-sharing related to traditional knowledge directly invoke past harms suffered by substate demographic groups at the hands of the state. The United Nations Permanent Forum on Indigenous Issues has identified international law as a mechanism for pursuing 'transitional justice' responding to past and ongoing violence and dispossession perpetrated against indigenous peoples.[41] Given the inherent intersections between international human rights law and environmental

37 Marie-Catherine Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts' (2021) 21(1) Human Rights Law Review 132.

38 Benjamin Gregg, 'Indigeneity as Social Construct and Political Tool' (2019) 41(4) Human Rights Quarterly 834.

39 Pía Marchegiani and Louisa Parks, 'Community Protocols as Tools for Collective Action Beyond Legal Pluralism- The Case of Tracks in the Salt' in Faben Girard, Ingrid Hall and Christine Frison (eds), *Biocultural Rights, Indigenous Peoples and Local Communities: Protecting Culture and the Environment* (Routledge 2022) 185.

40 Rosemary J Coombe, 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law' (2001) 14 St. Thomas Law Review 277.

41 United Nations Department of Economic and Social Affairs. 2022. *International Expert Group Meeting on the theme, 'Truth, Transitional Justice and Reconciliation Processes'*. PFII/2022/EGM. <https://www.un-.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2022/09/EGM_2022_Concept-Note-2.pdf>.

law,[42] BCPs provide an opportunity to investigate whether and how IPLCs perceive domestic implementation of the Nagoya Protocol to be a pathway towards exposing and addressing past state-sponsored violence. If BCPs are framed by their authors as speaking to the wrongs of the past, these documents represent understudied ways in which IPLCs are narrating their own histories and demanding transitional justice.

The process of narrating community history is an essential aspect of accessing transitional justice. Corntassel discusses cultural dispossession as a particular form of settler-colonial violence enabled by disconnecting peoples from their histories: 'Ultimately, Indigenous nations are only as strong as their collective memories'.[43] In the wake of cultural loss, Corntassel underscores that '... the recovery process involves linking cultural harm and losses to the contemporary conditions of Indigenous nations and families'.[44] Corntassel points to a key source of transitional justice principles in international law, the *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*,[45] as an important starting point for what 'community and cultural restoration ought to entail'.[46] This resolution asserts remedial rights for lost 'social benefits', which can be construed as a basis for indigenous claims aimed at restoring cultural practices connecting to traditional knowledge.[47] Directly linking international law to processes of cultural restoration, applying Corntassel's insights to the study of BCPs invites us to consider the ways in which indigenous peoples are narrating their histories in these documents. Community oral and written histories are 'critical to understanding how cultural practices were interrupted or altered to reflect encroachment, contamination or other forms of disruption to sustainable self-determination'.[48]

42 See the following Inter-American Court of Human Rights decisions: *The Mayagna (Sumo) Awas Tingi Community v Nicaragua, Judgment of August 31, 2011 (Merits, Reparations and Costs); The Kichwa Indigenous Community of Sarayaku v Ecuador, Judgment of June 27, 2012 (Merits and Reparations); The Kaliña and Lokono Peoples v Suriname, Judgment of November 25, 2015 (Merits, Reparations and Costs); Xucuru Indigenous People and its Members v Brazil, Judgment of February 5, 2018 (Preliminary objections, Merits, Reparations and Costs); The Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina, Judgment of February 6, 2020 (Merits, Reparations and Costs), the following African Commission and African Court on Human and Peoples' Rights decisions: The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication No. 155/96, Case No. ACHPR/COMM/A044/1 (2002); African Commission on Human and Peoples' Rights v Republic of Kenya (App. No. 006/2012), Judgment of 26 May 2017 (ACtHPR); and the following European Court of Human Rights Decisions: Öneryildiz v Turkey (App. No. 48939/99), Judgment of 30 November 2004 (ECtHR); Bacila v Romania (App. No. 19234/04), Judgment of 30 March 2010 (ECtHR); Jugheli and Others v Georgia (App. No. 38342/05), Judgment of 13 July 2017 (ECtHR); Çiçek and Others v Turkey* (App. No. 44837/07), Judgment of 4 February 2020 (ECtHR).

43 Jeff Corntassel, 'Cultural Restoration in International Law: Pathways to Indigenous Self-Determination' (2012) 1(1) Canadian Journal of Human Rights 93.

44 ibid 103.

45 UN General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 (2006).

46 Corntassel (n 43) 108.

47 ibid 108.

48 ibid 124.

BCPs provide fora for IPLCs to narrate histories that have been repressed by dominant political powers. As such, we can consider these BCPs to represent artifacts of 'historical memory', or how a society collectively narrates its past. Historical memory narration can take diverse forms, including storytelling, signs, memorials, vernacular language, monuments, education, even law-making. How a society tells its story is intimately bound up with group members' perceptions of their identity: 'The concepts of 'historical memory' and 'identity' are inseparable from each other… since the preservation of memory is the most essential condition for…self-determination'.[49] Connected to the identity-generating functions of BCPs discussed above, these documents provide important spaces for historically-marginalised groups to tell their stories in a manner that has been imbued with legitimacy through recognition in international law.

C. Method

I read all BCPs registered in the UN Access and Benefit-Sharing Clearing House, noting their countries and communities of origin as well as whether the author communities identified as 'indigenous' or, alternatively, claimed another demographic characteristic as their legal basis for asserting collective rights to genetic resources associated with traditional knowledge. I then examined how each BCP was organised into subsections and headings, identifying common themes and content across BCPs. I recorded each BCP's use of language and/or graphics speaking to the following common themes: community history and geography, community role in biodiversity conservation, community decision-making structures and procedures, references to 'traditional knowledge', references to 'historical memory', and references to past instances of state-sponsored violence.

There are currently 34 BCPs registered in the UN Access and Benefit-Sharing Clearing-House.[50] The earliest BCP was published in 2014, and the most recent in 2022. All registered BCPs were created by communities in sub-Saharan Africa and Latin America. The following table indicates country-level prevalence of BCPs:

Country	**Number of BCPs registered by communities within that country (as of 2024)**
Mexico	18
Ecuador	8
Panama	2
Brazil	1
Benin	1
South Africa	1
Kenya	1
Dominican Republic	1
Malawi	1

Of these 34 BCPs, 29 (85 percent) were written by communities who self-identify as indigenous or as encompassing indigenous constituencies and who explicitly name indigeneity as a factor impacting their rights claims to genetic

[49] N Gusevskaya and E Plotnikova, 'Historical Memory and National Identity' 6th International Conference on Social Science and Higher Education (ICSSHE 2020) (Atlantis Press 2020) 1026, 1028.

[50] As of March 2024.

resources. The remaining five BCPs (15 percent) were written by local communities who do not identify as indigenous in their BCPs and instead assert rights claims to genetic resources based on other sub-national identity categories (for example, unique inter-generational knowledge of agricultural processes). The following section discusses five common features across BCPs in an effort to distil the central mechanisms by which IPLCs are using these documents to assert legal rights. I then evaluate three, interrelated hypotheses regarding how BCP author communities seek to instrumentalise these documents to provide a basis for transitional justice demands: 1) Communities define their constituencies through coupling the concepts of identity, traditional knowledge, and collective intellectual property rights; 2) Communities perform historical memory work and document how IPLCs have undertaken unique responsibility for protecting vulnerable genetic resources; and 3) Communities articulate mechanisms of reparation to address past state-sponsored violence.

D. Analysis – Shared features across BCPs

The Nagoya Protocol prescribes no specific substantive or formatting requirements for communities seeking to develop BCPs. As such, there is considerable variation across the content and form of these documents. This variation should be explored in future research. Still, there are remarkable consistencies, even across BCPs originating from diverse contexts.

1. Defining Traditional Knowledge claims

Every registered BCP contains a section in which the author community describes its demographics, the community's claim to indigeneity and/or locality, and the geographic area that the community calls home. These descriptions are often accompanied by historical narratives and maps illustrating the boundaries of the land in which the community claims to possess collective ownership of traditional knowledge related to genetic resources. By delineating the spatial contours of the community as well as who can (and cannot) be considered a member, these sections define who possesses rights to traditional knowledge and the economic dividends that may result from ABS agreements negotiated by the community.

Each BCP also describes the specific genetic resources over which IPLCs claim intellectual property rights. Some BCP focus on a particular resource that has cultural importance. For example, the *Mwanda Thabalaba Community Protocol*, written by the Mwanda Community of Malawi in 2020, specifically regulates the use of thabalaba, a tuberous root believed to be effective at treating a variety of illnesses including fever, diarrhea, rheumatism, and nausea. Other BCPs aim to regulate a collection of resources that are culturally and/or economically important for a community. For example, the Community of San José de Payamino, made up of a coalition of Kichwa nation tribes in Ecuador, composed a BCP in 2020 that seeks to regulate the use of 14 separate plants commonly found in those tribes' ancestral territories that are believed to have unique medicinal and spiritual uses.[51] Some BCPs seek to protect IPLCs' access to genetic resources that sustain the community's economy.

[51] Protocolo Comunitario 'Comunidad San José de Payamino' para el acceso, uso y aprovechamiento de los conocimientos tradicionales asociados o no a la biodiversidad (recursos biológicos y genéticos) (2020): 16.

For example, the Mexican community of Zacamilola, a majority-indigenous community of Nahua heritage, identified timber from local forests as constituting a genetic resource to which the community could claim access and usage rights, based in the community's long-standing reliance on that timber to create furniture for sale outside of the community.[52]

2. Description of IPLC governance structure/ institutions

Every BCP describes community governance institutions and decision-making procedures. The descriptions illustrate the bureaucratic legitimacy of IPLCs and underscore the authority of these communities as operating outside of traditional, state-based governance and dispute-resolution institutions. Several BCPs have been written by communities living within Mexican *ejidos*, communally-owned and cultivated parcels of land dedicated to agricultural production. The *ejido* system of land distribution was established in the wake of the Mexican Revolution and has special recognition within Mexican property law; as such, these communities tend to have well-established governance institutions. For example, a 2018 BCP authored by Ek Balam, a majority-Mayan indigenous *ejido* in the Yucatán state, thoroughly describes the community's governance structure, which features a sophisticated checks and balances system comprised of a general assembly, executive commission, legal advisory board, and municipal councils. A special committee dedicated to monitoring and enforcing the community's BCP was incorporated into this governance structure.[53] BCPs written by other communities reflect varying levels of formalisation in their respective governance structures. Some decision-making procedures originate from pre-existing tribal governance.[54] In other contexts, these procedures derive not from established mechanisms but rather are created through the process of writing the BCP itself. For example, in a 2014 BCP written by a local community of traditional medicine 'healers' in Brazil's Cerrado biome, the community discusses a process by which writing the BCP led to the idea to form a 'commission' of healers which would be charged with evaluating community-based research procedures and engaging in political advocacy.[55]

3. Elaboration of procedures for seeking free, prior, and informed consent

Free, Prior, and Informed Consent (FPIC) is a process by which outside actors must gain a community's permission to access and use traditional knowledge resources. FPIC procedures outlined in BCPs vary widely in their specificity and levels of institutionalisation. Several communities provide detailed lists of the information that outside actors seeking access to traditional knowledge resources must submit to community authorities before those authorities will consider granting

[52] Protocolo Comunitario Biocultural de la Congregación de Zacamilola, Atlahuilco (2019): 22.

[53] Protocolo Comunitario Biocultural de Ek' Balam, Temozon, Yucatán, México (2018): 31-2.

[54] Eg Protocolo Biocultural del territorio de propiedad colectiva de la Comunidad de Impetí Emberá (2020): 28-34.

[55] Biocultural Community Protocol for Cerrado Raizeiras (2014): 24.

permissions.[56] Other FPIC procedures are rooted in national intellectual property legislation, for example, Ecuador's *Código Orgánico de la Economía Social de los Conocimientos* (COESCCI), a 2016 law intended to promote sustainable economic development in part by recognising collective intellectual property rights of indigenous communities.[57] Other BCPs do not detail procedures for obtaining FPIC but rather simply establish that community authorities must be consulted before any governmental, commercial, journalistic, and/or academic actor attempts to access traditional knowledge.[58] However, the thread that unites all BCPs is a strong emphasis on IPLCs as possessing rights to regulate outside actors' access to traditional knowledge resources, independent from any access procedures enforced by national governments.

4. Description of minimum standards for establishing mutually agreeable terms

Establishing FPIC is only the first step in accessing traditional knowledge resources. In order for an outside actor to instrumentalise access permissions, another agreement codifying Mutually Agreeable Terms (MAT) needs to be signed that delineates case-specific terms for access, use, and the distribution of economic benefits connected to traditional knowledge. There is significant variation in the specificity with which BCPs describe baseline MAT standards. For example, the relevant section in a 2020 BCP written by the Wixárika community of San Andrés Cohamiata, Mexico is comparatively brief and open-ended, stipulating requirements such as communal dissemination of project-specific environmental impact reports and facilitating local economic growth but declining to specify procedures for achieving those goals.[59]

In contrast, some BCPs contain detailed standards for MATs, for example, imposing strict standards for access conditions, allowing IPLC leaders to oversee and/or participate in resource utilisation, and codifying the conditions under which resources can be transferred to third parties. Many BCPs outline procedures for negotiating the distribution of benefits derived from cooperation between IPLCs and outside actors, for example, advance payments, access fees, licensing fees, royalty payments, and required donations to community funds supporting sustainable development and conservation efforts.[60]

[56] eg Protocolo Biocultural de El Pescador (El Moral), Pajapan, Veracruz de Ignacio de la LLave, México (2019): 91-92; Protocolo Comunitario Biocultural de Ubilio García (2019): 71; Protocolo Comunitario Biocultural de la comunidad de Tateikie San Andrés Cohamiata (2019): 93-95.

[57] Eg Protocolo Comunitario 'Sacha Yuyay' para el accesso, uso, y approvechamiento de los Conocimientos Tradicionales Asociados o no a la Biodiversidad (2020): 30-31; Protocolo Comunitario 'Territorio de Vida Señorío de Salangome' para el accesso, uso, y approvechamiento de los Conocimientos Tradicionales Asociados o no a la Biodiversidad (2020): 28-30.

[58] Ogiek Community Bio-Cultural Protocol (2021): 16-17; Protocolo Biocultural 'Protección de los conocimientos indígenas asociados a los recursos genéticos', Comunidad El Piro, Comarca Ngäbe-Bugle, Panamá (2017): 14-15.

[59] Protocolo Comunitario Biocultural de la comunidad de Tateikie San Andrés Cohamiata (2020): 97.

[60] For examples, see Protocolo Comunitario Biocultural del Pueblo Indígena Hñahñu de Puerto Juárez, Municipio de Zimapán, Hidalgo (2019): 81-82; Protocolo Comunitario Biocultural de Ubilio García (2020): 72-72; Protocolo Comunitario Biocultural de Capulápam de Méndez, Oaxaca (2018): 52-55; Protocolo Biocultural 'Mushuk Muyukuna' para el Accesso, Uso, y Aprovechamiento o no a la Biodiversidad, Asociación Comunitaria de Desarollo Integral 'Guamán Poma' (2020): 34-37; Protocolo Comunitario 'Yo Pinda' para el Acceso, Uso, y Aprovechamiento de los Conocimientos Tradicionales Asociados o no a la Biodiversidad, Nacionalidad Indígena Tsa'Chila (2020): 34-39.

The prescribed content of MATs also depends on national intellectual property legislation. For example, in 2018, Ecuador established the National Intellectual Rights Service (SENADI). Every BCP written by an Ecuadorian community since 2018 includes a section mandating that all MATs must be registered with SENDAI and adhere to that agency's requirements. In other cases, communities have used the BCP drafting process to create new institutions for regulating access and benefit-sharing. The mandates of those institutions are then written into that community's guidelines for establishing MATs. In one such case, the *Khoikhoi Peoples' Rooibos BCP* established the Khoikhoi Peoples' Rooibos ABS Trust. This cooperative financial institution, made up of South African government representatives and indigenous community members, was established to collect payments from commercial entities accessing traditional knowledge related to the rooibos plant and distribute those funds to beneficiaries within the Khoikhoi and San communities.[61] This case evidences the ability of BCPs to generate new, institutionalised relationships between governmental and sub-state actors.

5. Description of mechanisms for monitoring and reporting on compliance with ABS agreements and adjudicating disputes

Seventy-five percent of registered BCPs describe processes through which the author communities intend to monitor and evaluate contracting party compliance with concluded ABS agreements.[62]

Several BCPs establish procedures for monitoring compliance and sanctioning non-compliance through institutions that are internal to the author community. For example, a 2020 BCP written by the Mexican village of Vicente Guerrero, a majority-indigenous agricultural community, asserts that community authorities reserve the right to conduct inspection visits and monitor any activities related to ABS agreements. The village's central governance institution, the Community Assembly, reserves the right to revoke or amend a Contract of Access in cases where the contracting party demonstrates non-compliance or neglect.[63]

In other cases, local monitoring and enforcement mechanisms are bolstered by national legislation. For example, the Kayambi indigenous community of San Antonio, Ecuador wrote a BCP in 2022 that develops a two-level enforcement procedure. First, the General Assembly of the community is empowered to dispatch a special commission dedicated to monitoring compliance. In cases of disputes between the General Assembly and an outside actor with which the community has concluded an ABS agreement, that dispute can be taken up by the national court system. This imbrication of indigenous and state justice institutions is made possible through the aforementioned COESCCI legislation. Article 534 of COESCCI establishes that, 'in the case of discrepancies or conflicts with respect to agreements that arise from a contract of access, use or exploitation of traditional knowledge, these will necessarily be resolved in Ecuadorian jurisdiction and through the mechanisms most favourable for the legitimate possessors' of the genetic

[61] The Khoikhoi Peoples' Rooibos Biocultural Community Protocol (2019): 91

[62] I have been unable to locate a text for one registered BCP, the Protocolo Biocultural de las Comunidades de Tankunche, San Nicolás, Santa Cruz, Santa María, Isla Arena y Pucnachén, Municipio de Calkini, Campeche. *As such, I do not know whether this BCP contains a framework for evaluating compliance.*

[63] Protocolo Comunitario Biocultural de Vicente Guerrero (2020): 57-59.

resources.[64] Ecuador's legislation directly activating enforcement mechanisms for BCPs demonstrates the critical potential for local-state cooperation to achieve the goals of international environmental law.

E. BCPs and Transitional Justice

Having now offered a summative picture of common features across BCPs, this section evaluates the aforementioned three hypotheses regarding the extent to which author communities are utilising BCPs to assert rights to transitional justice mechanisms.

1. Hypothesis 1: IPLCs use BCPs to define community constituencies through coupling the concepts of identity, traditional knowledge, and collective intellectual property rights.

A close reading of BCPs reveals that IPLCs strategically narrate their cultural and ethnic identities, as well as how they relate their identities to those of outsiders. For example, in the aforementioned BCP written by self-identified 'healers (*raizeiras*)' in Brazil's Cerrado biome, the community reflects on the decision made by members to identify themselves with that particular label:

> It was agreed that a social identity was fundamental to establishing a community protocol that would grant legitimacy to those claiming their customary rights in public places. The proposal is not to define a sole identity, but rather a representative identity for the occupation…The identity of 'healer' was chosen for this representation, and it is defined as having 'the gift of healing through medicinal plants'.[65]

Through empowering IPLCs to assert collective rights to regulate the use of genetic resources, the Nagoya Protocol promoted social identity formation as a way to actualise those rights. In defining their identities, IPLCs can adjudicate who belongs to their group and, in doing so, organise particular configurations of political power. In other words, the Nagoya Protocol made demographic group membership key to legitimising rights claims. Naturally, this move might provoke re-imaginings of in-group/out-group identity dynamics.

The Nagoya Protocol's identification of indigenous peoples as possessing rights to regulate the use of genetic resources has catalysed political and economic alliances between such peoples. An example of this phenomenon is evidenced in the process of drafting the *Khoikhoi Peoples' Rooibos BCP*. After the Nagoya Protocol was adopted, Natural Justice, a legal advocacy firm, began to work with the Khoikhoi and San peoples to launch a biopiracy case against the Nestlé corporation for misappropriating rooibos. It is important to note that the Khoikhoi and San are not monolithic people groups. Rather, these names refer to a constellation of several indigenous tribes who have shared experiences of state-sponsored violence in South Africa. These tribes are politically represented by two central institutions, the National Khoisan

[64] COESCCI, Ley O/2016, Art. 534; Comuna Jurídica 'San Antonio', Protocolo Comunitario Mushuk Yuyay (Nuevos Conocimientos) para el Acceso, Uso o Aprovechamiento de los Conocimientos Tradicionales Asociados o no a la Biodiversidad (2022): 30.

[65] Biocultural Community Protocol for Cerrado Raizeiras (2014): 9.

Council, established in 1999, and the South African San Council, established in 2001. It was the South African San Council that 'initiated the process of advocating for the recognition of their indigenous knowledge to the uses of Rooibos and other plants in South Africa' in 2010.[66] In 2012, South African governmental agencies began to recognise the Khoikhoi peoples as possessing traditional knowledge regarding the use of rooibos, in addition to the San. Shortly thereafter, the National Khoisan Council and the South African San Council adopted a 50/50 benefit-sharing partnership, with each Council recognising that their constitutive tribes maintained equal intellectual property rights to the use of three culturally-important plant species, including rooibos.[67]

The two Councils, now united, launched negotiations with the South African rooibos industry in an attempt to secure an ABS agreement. These negotiations and industry rejection of the concept of traditional knowledge culminated in the South African government commissioning a study in 2014, the results of which officially confirmed the Khoikhoi and San as traditional knowledge-holders of rooibos. Following this recognition, the two Councils concluded an ABS agreement with the Nestlé corporation. Having realised the political power of cooperation in this area, the two Councils then embarked on drafting a BCP codifying general ABS standards for rooibos. Along the way, the Khoikhoi and San negotiators advocated for other indigenous farming communities in the Cederberg belt region, the central rooibos-producing area in South Africa, to join their cause. This campaign was successful, and, in 2019, the Khoikhoi, San, and indigenous Cederberg belt farmers finalised the *Khoikhoi Peoples' Rooibos BCP*. The two Councils received their first 'traditional knowledge levy' payment from the South African rooibos industry in 2022, to the tune of 12.2 million Rand ($642,000 USD).[68] The story of how the Nagoya Protocol kicked off years of coalition-building across South African indigenous communities illustrates the power of ABS agreements to instigate political reorganisation of tribal leadership, refine those leaders' priorities, and transform shared histories of repression into legally-grounded demands for economic redistribution.

2. Hyopthesis 2: Communities use BCPs to perform historical memory work and document how IPLCs have undertaken unique responsibility for protecting vulnerable genetic resources.

41 percent of registered BCPs explicitly refer to the phase 'historical memory'. All 34 BCPs include some component describing the history of the author group, even if they do not specifically use the phrase 'historical memory'. There are two central motivations for IPLCs to include historical narratives in their BCPs: 1) to document ways in which the community has proactively conserved biodiversity by protecting vulnerable genetic resources, and 2) documenting historical repression of the community by state actors. These two motivations are often inextricable from one another, as, for example, in the case of a 2018 BCP written by the indigenous P'urhépecha community of Isla Yunuén, Mexico. In this BCP, the community describes a process of sustained indigenous resistance to various state efforts to introduce harmful,

66 Khoikhoi Peoples' Rooibos BCP (2019): 6.

67 ibid 10.

68 Trenchard (n 2).

non-native fish species to the island's surrounding waters. These events culminated in a dramatic episode in the 1990s when the Mexican government imposed a local fishing ban in an alleged effort to cover up the detrimental impact of past fish species introduction policies. Indigenous fishers revolted against the ban, which threatened their livelihoods, and were imprisoned as a result. The ban was eventually lifted and the fishermen released, an outcome made possible by coordinated indigenous-led protests. The community reflects on this moment with pride in their BCP, highlighting the episode as an example of how the community has consistently perceived conserving biodiversity as an act of political resistance and treated sustainable fishing practices as an integral part of their culture.[69]

In another example of communities leveraging BCPs to narrate histories of dispossession and collective resistance, the *Protocolo Biocultural del territorio de propiedad colectiva de la Comunidad de Ipetí Embera,* written by an indigenous community in eastern Panama, emphasises the community's long-standing fight for self-determination. The community documents a history of fighting for the preservation of fragile forest environments within its ancestral territories, despite repeated state-sponsored 'invasions' and highway building projects that resulted in mass deforestation. The Embera people directly invoked international law to seek guarantees of reparation and non-repetition in response to these invasions, successfully suing the Panamanian government at the Inter-American Court of Human Rights in 2014. As a result of that court case, the Embera community secured a collective land title from the government in 2015. The community writes that it is 'reassuming cultural elements that have been lost', and that codifying terms and norms for accessing the community's traditional knowledge in the form of a BCP is an integral part of that restorative effort.[70] Here we can directly observe the importance of community-authored historical memory in making rights claims aimed at remedying past harm.

3. Hypothesis 3: Communities use BCPs to articulate mechanisms of reparation to address past state-sponsored violence.

Six of the 34 registered BCPs (~18 percent) describe specific instances of past state-sponsored violence perpetrated against the author communities. All six of these author communities identify as indigenous. The instances of violence described include forced displacement, murder, police brutality, demolishing housing, slavery, indentured labour, legalised discrimination, property expropriation, extreme poverty, and public health crises provoked by state destruction, thievery, and mismanagement of natural resources.[71] An additional six BCPs (~35 percent of all registered BCPs) do not describe specific

[69] Protocolo Comunitario Biocultural de Isla Yunuén, Pátzcuaro, Michoacán (2018): 20-22.

[70] Protocolo Biocultural del territorio de propiedad colectiva de la Comunidad de Ipetí Embera (2020): 9-10.

[71] *Ogiek Community Bio-Cultural Protocol* (2021): 13-14; *Khoikhoi Peoples' Rooibos BCP* (2019): 28-38; *Protocolo Comunitario Bio-cultural del Pueblo Indígena Popoloca Santa Ana Teloxtoc* (2020): 30-34; *Protocolo Comunitario Biocultural de Ubilio García* (2019): 41-42; *Protocolo Comunitario Biocultural de la comunidad agraria y municipio de San Juan del Río* (2020): 68-73; *Protocolo Biocultural de la Comunidad de Ipetí Embera* (2020): 9-10.

instance of violence but do claim that their international human rights have been violated by governments.[72] While in the minority of cases, the fact that a significant number of BCP author communities write about past state-sponsored violence using language that invokes international human rights law points to the importance of understanding how BCPs might be leveraged to make transitional justice demands.

BCPs not only provide forums for historically-disenfranchised peoples to document their histories and resist dominant political narratives, but also empower such peoples to seek reparations for past injustices. One way that BCPs can facilitate this process is by substantiating substate actors' rights claims during international legal adjudication. For example, a BCP adopted by the Ogiek people of southern Kenya recently contributed to that community's argument in a case against the Kenyan government at the African Court on Human and Peoples' Rights (ACtHPR). In June 2022, the African Court mandated that the Kenyan government must grant the Ogiek land titles in the Mau Forest, the Ogiek's ancestral home from which community members have been repeatedly and violently evicted. In that judgment, the African Court explicitly recognised the Ogiek's essential role in preserving the fragile forest ecosystem, a conclusion for which the Ogiek's BCP provided important evidence.[73]

Historically-marginalised peoples may perceive their BCPs as reparations mechanisms in and of themselves. One example of this phenomenon can be observed by returning to the case of Khoikhoi and San rooibos farmers in South Africa. These indigenous peoples faced over 300 years of systematic oppression, violence, land dispossession, and mass incarceration that began during the Dutch colonial period and continued through Apartheid.[74] The Apartheid era introduced new forms of degradation, induced by the government's classification of the Khoikhoi and San as 'coloured' persons, an 'amorphous categorisation [that] condemned much of the Khoisan's history to oblivion and facilitated the theft of their land', and precluded the Khoikhoi and San from benefiting from post-Apartheid land re-distribution initiatives reserved for persons who were labelled 'black', not 'coloured'.[75] This history of dispossession and violent separation from their means of economic and cultural well-being has resulted in the Khoikhoi and San's disadvantaged position in South African society today. Many rooibos farmers currently pay exorbitant rent to farm land that their families were forcibly

[72] The six aforementioned BCPs, and additionally: *Protocolo Comunitario 'Comunidad San José de Payamino'* (2020); *Protocolo Comunitario Biocultural de San José de Los Laureles Tlalmimilulpan* (2020); *Protocolo Comunitario Biocultural de Pozas de Arvizu, San Luis Río Colorado. Sonora* (2019); *Protocolo Comunitario Biocultural del Pueblo Indígena Hñahñu de Puerto Juárez* (2019); *Protocolo Comunitario Biocultural de El Pescador (El Moral)* (2019); *Protocolo Comunitario Biocultural de Isla Yunuén (2018).*

[73] Lucy Claridge and Daniel Kobei, 'Protected Areas, Indigenous Rights and Land Restitution: The Ogiek Judgment of the African Court of Human and Peoples' Rights and Community Land Protection in Kenya' (2023) 57(3) *Oryx* 313, 317-19; *The African Commission on Human and Peoples' Rights v Republic of Kenya* (App. no. 006/2012). Judgment of 22 June 2022. ACtHPR

[74] *Khoikhoi Peoples' Rooibos BCP* (2019): 28-38.

[75] Laura Secorun, 'South Africa's First Nations Have Been Forgotten' (2018) Foreign Policy; Note: The term 'Khoisan' is often used to refer collectively to the Khoikhoi and San peoples.

removed from decades ago. Exacerbating this precarity is the fact that the Khoikhoi and San are still not officially recognised as 'indigenous' under South African law, despite historians, archaeologists, and DNA scientists repeatedly uncovering evidence that the Khoikhoi and San are the oldest known people groups to inhabit Southern Africa. The Khoikhoi and San strategically leveraged the rooibos BCP drafting process to link their claims to recognition to a tangible economic resource by claiming collective intellectual property rights. This move allowed the Khoikhoi and San to circumvent their lack of legal recognition as indigenous peoples and implement systems for redistributing rooibos farming profits back to native communities. As articulated in the BCP:

> The struggle for recognition by the National Khoisan Council included, in large part, securing their rights and recognition as traditional knowledge holders to their customary resources which happen to be South Africa's high-value plant species. In the absence of their official recognition, Access and Benefit Sharing has helped open a beginning on their long walk to freedom.[76]

Here we can see direct evidence of the emancipatory function of BCPs as avenues for working towards justice. BCPs impart legal legitimacy empowering communities to define and obtain reparations for past repression.

CONCLUSION

The moderate but impressive gains that IPLCs have realised by utilising BCPs points to a counterintuitive but promising conclusion: for global, seemingly intractable problems like biodiversity conservation in the face of climate change and rampant corporate greed, local remedies might represent our best hope. And international law, contrary to detractors who fixate on its chronic lack of enforcement mechanisms, can actually induce substantive behavioural change by facilitating cooperation between national and sub-state actors and even delegating some authority to non-governmental political coalitions made up of historically-marginalised people.

The role of BCPs as forums through which IPLCs can demand transitional justice has been understudied. This analysis has sought to provide an entry point to further exploration in this area, centering how BCPs can provide avenues for IPLCs to lodge transitional justice claims through defining community constituencies, narrating the past, and proposing mechanisms of reparation for state-sponsored violence. Because so little study of BCPs has been conducted, there is much that we do not know about the creation and function of these documents that should be explored in future research. For example, every registered BCP cites technical and/or logistical support provided by at least one outside actor, including a diverse array of international advocacy and legal aid organisations, governmental agencies (both foreign and domestic), and United Nations institutions. The prevalence of outside actor assistance raises important questions about the priorities that are eventually articulated in BCPs. Furthermore, a systematic evaluation of governmental and corporate compliance with ABS agreements based on BCP frameworks is needed to understanding the scope of the behavioural change that these documents are capable of catalysing, particularly with regard to transitional justice. I hope to explore these questions in future work, grounded in the imperative to explore creative solutions for balancing human rights, economic development, and the sustainable futures of biodiverse ecosystems.

[76] *Khoikhoi Peoples' Rooibos BCP (2019): 38.*

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