

**TRANSITIONAL JUSTICE AS PEACEBUILDING:
OF BRIDGES OR BARRIERS?**

by

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Certificate of Approval

This is to certify that the accompanying thesis by William J. Kotnik has been accepted in partial fulfillment of the requirements for graduation with Honors in Politics.

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I. INTRODUCTION

During the two-and-a-half-decades long struggle between Indonesian military occupants and the East Timorese, there were between 100,000-200,000 deaths and even more displacements.¹ In the 1990s, Yugoslavia dissolved into six separate nations over the course of three wars and at the cost of nearly 150,000 lives.² In the thirty-six years of civil war between the Guatemalan military and indigenous guerilla resistance, 250,000 victims were disappeared or lost to shocking spectacles of violence.³

Each of these conflicts involved unique forms of societal terror and physical violence that defies the scope of what we want to believe humanly possible. “Transitional justice” is an international branch of post-conflict peacebuilding designated to fostering reconciliation in the aftermath of such conflict and mass atrocity. Conceived in the 1980s, transitional justice (TJ) gained remarkable traction due to its loudly heralded successes, understood in mainstream discourse as the facilitation from oppressive regimes to democratic governance. The conflicts mentioned above were all sites of transitional justice, most of which were later projected as illustrations of its effectiveness. In the years following Guatemala’s disappearances and massacres, for example, domestic and international efforts rallied behind “ground-breaking” truth-seeking initiatives in order to promote transparency and closure for the victims.⁴ Reconciliation efforts following the breakup of Yugoslavia and the Rwandan genocide were similarly commended, both

¹ “Timor-Leste,” International Center for Transitional Justice (ICTJ), accessed April 24, 2020, <https://www.ictj.org/our-work/regions-and-countries/timor-leste>

² ICTJ, “Yugoslavia.”

³ Ibid, “Guatemala.”

⁴ Ibid, “Guatemala.”

being met with over one billion dollars to fund gargantuan ad hoc international criminal tribunals to hold violators of human rights responsible.⁵ Truth commissions and international criminal tribunals such as these are the two most widely recognized and orchestrated mechanisms of transitional justice, broadly functioning under the premise that rebuilding confidence in the rule of law and establishing the truth will lead to justice.

With time, however, the success stories of TJ began to fissure. In 2002, for example, transitional justice efforts in East Timor were celebrated as an example of TJ's competency; by 2006, violence had started up again—a post-transitional recurrence not isolated to East Timor.⁶ Given notable shortcomings such as this, TJ has been critiqued extensively. However, the impulse of critics has been to highlight conditions such as local political corruption, unenthusiastic support or participation from domestic actors, and lack of resources. This impulse thus locates problems of justice either in out-of-touch 'realities' such as limited global capital, or positions them within the local context in question; the people, cultures, or institutions of those localities. Sure enough, there are many complications with the practical and logistical side of TJ—matters of funding, time, and other resources. However, when the failures of transitional justice cross such a wide range of specific and unique contexts, perhaps this suggests the presence of flaw not only within post-conflict contexts, but also within the very concepts forming transitional justice.

There has been far less scholarship interrogating the conceptual foundations of TJ. Attempting to rectify transitional justice by pumping more resources into its institutions

⁵Denver Journal of International Law, "The Comparative Cost of Justice at the ICC," accessed April 16, 2020 <http://djilp.org/the-comparative-cost-of-justice-at-the-icc/>

⁶ Lia Kent, *The Dynamics of Transitional Justice International Models and Local Realities in East Timor*, Routledge (2012), 69.

is a futile endeavor if TJ is conceptually inimical to the possibility of creating conditions of reconciliation. As such, this project aims to engage with transitional justice on a largely conceptual level to explore its limited and conditional success. By asking, “under what conditions can transitional justice be a genuine force of reconciliation and peace?” it is possible to critique TJ from both within and without its conceptual boundaries. Implicit within this larger question are issues of what “success” itself means for TJ—the matter of what is gained or lost from a purportedly successful transition such as in East Timor, the matter of TJ’s underlying political currents and agendas.

In interrogating these questions, I begin with the epistemological development of transitional justice so as to better understand exactly what TJ is and, in doing so, identifying the principle concepts guiding its motives, movements, and effects. The underlying epistemological currents found within TJ are organized into three differentiated but mutually reinforcing conceptual forces: temporality, universality, and Truth as an absolute. Temporality is questioned in its capacity to perpetuate the universal narrative of modernity whilst continuing the colonial practice of excluding all other narratives as antithetical to progress and development. The universality of TJ is interrogated primarily through the function of international criminal tribunals and retributive justice, revealing the potential incompatibilities between international paradigms and institutions of justice with communities existing in other unique historical conditions. Truth as an absolute explores the role of narrative in creating tension between tribunals, which value testimony only insofar as it provides objective facts, and truth commissions, which valorize experience within narrative and testimony. The concluding chapter analyses the underlying but formidable presence of narrative in each

concept identified as foundational to TJ, and calls for an epistemological shift regarding narrative as a possibility for fundamentally altering the internal workings of TJ while simultaneously reconceptualizing the broader ways in which notions of justice are approached.

II. THE EPISTEMOLOGICAL DEVELOPMENT OF TRANSITIONAL JUSTICE

Despite being ubiquitous in international post-conflict processes since the 1980s, transitional justice appears to be something that resists concrete definition. In fact, nearly every scholar of transitional justice includes certain qualifying phrases in their descriptions of the concept, such as transitional justice being “broadly conceived as” a set of responses to mass atrocity,⁷ or “generally taken to refer to” attempts to address past wrong-doings.⁸ Despite the apparent hesitation of scholars to ground transitional justice within a nonmalleable definition, there *are* fundamental characteristics of transitional justice that come to mind whenever mentioned. In popular discourse, whether from scholars, politicians, or legal experts, transitional justice is most widely understood as an assortment of practices designed to cultivate reconciliation and facilitate the transition from a post-conflict authoritarian context to that of a burgeoning democracy. The use of the term implies the event(s) of mass atrocity, whether from an oppressive state regime or rebellious armed resistance.

Synonymous with transitional justice are its two dominant mechanisms—international criminal tribunals for prosecuting war criminals, and truth commissions wherein both victims and perpetrators of the atrocities give public testimony in the hopes of community-strengthening. These mechanisms aim to reinstate and maintain lasting peace by sorting through history, memory, and truth in order to ultimately arrive at or

⁷ Dustin Sharp, *Rethinking Transitional Justice for the Twenty-First Century* (2018), 1.

⁸ Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (2017), 1.

deliver justice.⁹ A number of presuppositions underlying the mainstream understanding of TJ requires further investigation. The first is that the transition in question leads, non-negotiably, to the protection of Western liberal democratic values and rights by a democratic government. This perhaps explains history, truth, and a break with the past as central tenets of TJ.

Understanding the existence of these conjectures requires an analysis of the ideological origins of transitional justice. Just as it is difficult to define TJ, it is comparably challenging to pinpoint its origins. There are two historical locations that scholars generally refer to as the beginnings of the concept. The first is the Nuremberg Military Tribunals organized after World War II by the victorious Allies in order to prosecute high-profile Nazis for crimes against humanity.¹⁰ However, Paige Arthur, the director of the Research Unit at the International Center for Transitional Justice, points towards war crime tribunals as far back as two centuries ago, and similar trial practices reaching two millennia back.¹¹ Arthur notes that none of the actors during those historical moments would have considered the process as transitional justice; equating these historical instances as more than merely reminiscent of TJ, but rather as a form of TJ itself, serves to impose our 21st century understanding of the concept in a temporally universalizing manner.¹² This threatens the historical narrative of those moments; the actors involved likely had considerably different views of these related mechanisms than present-day actors theorizing on transitional justice. As such, Arthur takes the foundational moment of the present understanding of transitional justice to coincide with

⁹ UN Secretary General, *United Nations Approach to Transitional Justice*, 8.

¹⁰ Sharp, *Rethinking TJ*, 2.

¹¹ Paige Arthur, *How Transitions Reshaped Human Rights*, 327.

¹² *Ibid*, 328.

the introduction of its name, as the invention of new phrases are “responses to concrete problems faced in political life.”¹³ Transitional justice was conceived through a number of conferences during the 1980s and 90s, beginning with the 1988 Aspen Institute Conference.¹⁴

It is important to historically locate the political and social circumstances informing these conferences. The leading sentiment at the time, shortly after the fall of the Berlin Wall and collapse of the Soviet Union, is best embodied by Francis Fukuyama’s famous essay entitled “The End of History,” which posits the inevitability of a Western liberal democracy.¹⁵ Hitched to Fukuyama’s understanding of liberalism as an ideology is a presupposed partnership with free market capitalism. This asserts a teleology wherein civilizations progress along a relatively fixed line towards the systems and values of Western liberal democracy which *necessarily* accommodates a laissez-faire market, articulating a utopian political homogeneity that “means the growing ‘Common Marketization’ of international relations, and diminution of the likelihood of large-scale conflict between states.”¹⁶ This notion of liberal democracy as inter-state peace was transmuted into the core operations of TJ. As it’s imagined in mainstream discourse, *transition* in transitional justice therefore means a transition to democracy—a commentary on the importance of temporality in the project of TJ.

The relatively narrow demographic of those who effectively disseminated TJ scholarship and participated in the Aspen Institute has meaningful implications in its present-day operations. The participants consisted primarily of human rights activists,

¹³ Ibid, 328.

¹⁴ Ibid, 349.

¹⁵ Francis Fukuyama, “The End of History,” *The National Interest* (1989) 7.

¹⁶ Ibid, 17.

legal scholars, lawyers, donors, and political scientists.¹⁷ Informed by elite educations from predominantly Western universities and schools of thought, as well as an era permeated with the ‘end of history’ post-Cold-War logic, the Aspen Conference was oriented around that which was valued in Western democracies: civil and political rights, human rights, and good-governance.¹⁸ Two governing influences reflect the overwhelming authority of legal scholars and human rights activists in these conferences: retributive justice, and restorative justice. Both of these theories, explored later in detail, are tethered to assumptions about Truth as an overriding absolute, albeit in contradictory ways. Retributive justice, closely related to trial law, upholds objective courtroom fact as indisputable Truth. In efforts to value alternative aspects of testimony such emotion and experience, restorative justice maintains experience as the ultimate form of truth. These assumptions of Truth as an absolute subsequently manifested in transitional justice’s institutions of retributive and restorative justice: international tribunals and truth commissions.

While Arthur is right to be cautious of imposing 21st century conceptions of TJ on historical moments reminiscent of TJ mechanisms and objectives, we should be equally wary of curtailing the epistemological development of TJ’s conception in the 1980s and 90s. The invention of a new phrase such as transitional justice indeed indicates a response to a specific political problem, but some of the foundations of transitional justice evolved from deeper roots. The legal scholars and international lawyers who were the most influential voices in formulating TJ were producing theory by and from the epistemological lexicon available to them—namely, that of international law, which has

¹⁷ Arthur, *How Transitions Reshaped Human Rights*, 324.

¹⁸ Sharp, *Rethinking TJ*, 10-11.

been critiqued by postcolonial scholars for its “Western origins and cultural bias inherent” throughout its development.¹⁹

The beginnings of international law are marked by the colonial encounter with the ‘New World’ and guided by the jurisprudence of Francisco de Vitoria, a Spanish jurist of the 16th century.²⁰ Author Antony Anghie describes how Vitoria introduced as intrinsic to international law and the doctrine of sovereignty the “dynamic of difference.” Vitoria develops the dynamic of difference by including Indians as ontologically level with Europeans, thus enveloping them in a Vitorian/European concept of international law and making them vulnerable to its tenets.²¹ Because of the cultural differences between the Spanish and Native Americans, the Spaniard’s system of legal and social norms were incompatible with indigenous society; take the ‘right to travel,’ wherein “to keep certain people out of the city or province... are acts of war.”²² Depicted as an alleged breach of the ‘right to travel,’ Indian resistance to foreign penetration justified (in the Vitorian sense) European conquest and the usurpation of their sovereignty by Europeans. In this way, cultural differences positioned non-Europeans in a place of constant violation of international law; and because Vitoria’s international law was based on a universal idea of Spanish and Indian identity and “presented in the language of liberality and even equality” he was understood as a defender of human rights.²³ The colonial moment, then, shaped the notion of sovereignty by making non-Europeans vulnerable through the universalization of European doctrines.

¹⁹ Lia Kent, *The Dynamics of TJ*, 27.

²⁰ Antony Anghie. *Imperialism, Sovereignty, and the Making of International Law*, Cambridge (1996), 13.

²¹ *Ibid*, 20

²² *Ibid*, 22.

²³*Ibid*, 28.

Anghie identifies the continuance the dynamic of difference in subsequent evolutions of international institutions and jurisprudence. These developments included positivism in the 19th century, which introduced the ‘civilizing mission’ and projected the dichotomy of civilized (Western) vs. uncivilized peoples (non-Western), again cloaking Western imperial expansion in humanitarian terms.²⁴ Similarly, the Mandate System following World War I gave the Western European victors administrative control over their colonies so that they could allegedly guide them to self-governance. The Mandate system was based on the premise that economically undeveloped nations (non-Western) required outside aid from developed nations (Western)—continuing the civilizing mission even as it verbally opposes it, and altering the dynamic of difference to encompass economic difference.²⁵ Each iteration of the dynamic operates on observational differences: culture, affluence, development, etc. These differences are postulated as benchmarks of progress by the narrative of modernity²⁶—any divergence from the European standard of modernity thus justifying international intervention in the name of the civilizing mission.

The continuation Anghie outlines of colonial values and practices under the guise of modernity is what Anibal Quijano conceptualizes as *coloniality*. Defined succinctly by Maldonado-Torres, coloniality “refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations.”²⁷

According to Catherine Walsh and Walter Mignolo, coloniality introduces and saturates

²⁴ Anghie, *Imperialism, Sovereignty*, 113-114.

²⁵ *Ibid*, 148.

²⁶ Walsh and Mignolo, *On Decoloniality*, Duke University Press (2018), 117.

²⁷ Maldonado Torres, *On the Coloniality of Being*, Cultural Studies (2007), 243.

ruling concepts such as the heteropatriarchal/racialized/gendered capitalist hegemony within which we live; it structures the lenses through which epistemological and ontological assumptions are made; and, in accordance with Anghie's research, it is engrained in international legal infrastructure by its constitutive relationship to modernity.²⁸ As such, international law—universally enveloping all humanity in its jurisprudence and perpetuating the dynamic of difference along teleological concepts of modernity—serves the purposes of coloniality.

As a field created primarily within the terms of international lawyers educated by elite Western institutions, in an era of unprecedented hegemonic Western liberal democracy, it stands that transitional justice as understood in mainstream discourse operates as a branch of international law stooped in coloniality. Certain logics deriving from TJ's epistemological development are fundamentally imbued in transitional justice: a teleology wherein Western liberal democratic values are the end-all-be-all; the universal transferability of international practices in other spatially and historically unique communities; and the presumption of Truth as an absolute. Given its intimate relationship to international law (being largely facilitated by international institutions such as the UN), then, success for transitional justice does not necessarily mean accomplishing meaningful reconciliation and instating lasting peace—rather, it means ensuring that post-conflict regimes resort to a liberal free market democracy under the wing of Western superpowers. The following section examines the specific ways in which transitional justice wields temporality, universality, and absolutes in order to accomplish this agenda.

²⁸ Walsh and Mignolo, *On Decoloniality*, 17.

III. TRUTH, UNIVERSALITY, AND THE TEMPORAL FRAMING OF TRANSITIONAL JUSTICE

Truth, universality, and temporality are arranged by transitional justice in such a way as to be mutually reinforcing and constitutive of one another as well as of TJ. They have been separated into different categories primarily as an organizational tool to better address the nuances within each section, but not to signify a departure from one concept to the other. The temporal framing of TJ is a central component in the structuring of both truth commissions and tribunals, and serves to reinforce the presumed universality of international practices and the valorization of absolutism within TJ.

i. Temporality – a “Rupture with the Past”

The way time is perceived has important political implications. Both truth commissions and international tribunals operate with the premise of creating a “rupture” or break from the past by establishing an authoritative narrative about the ‘truth of what happened’ during the conflict in question.²⁹ Such a break is reminiscent of the creation of a new calendar following the French Revolution—asserting the transition from an aristocracy to a fledgling democracy as a new timeline of existence.³⁰ This temporal partition is consistent with imperial tendencies in the foundations of Western liberal democracy. In *On Liberty*, John Stuart Mill justifies colonial rule in asserting that freedom “has no application to any state of things anterior to the time when mankind have become capable

²⁹ Kent, *Dynamics of TJ*, 25.

³⁰ Shaw, Matthew, *Time and the French Revolution*, Boydell Press (2011), 1.

of being improved by free and equal discussion.”³¹ More recently, Fukuyama contends that the “vast bulk of the Third World remains very much mired in history” as opposed to liberal nations embracing free market capitalism and the “end of history.”³² Land devoid of Western ideas and institutions are therefore considered pre-historic.

The exclusion of non-Europeans from history is a key function of the narrative of modernity. According to Quijano, modernity

“generated a new temporal perspective of history and relocated the colonized population, along with their respective histories and cultures, in the past of a historical trajectory whose culmination was Europe. Notably, however, they were not in the same line of continuity as the Europeans, but in another naturally different category. The colonized peoples were inferior races and in that manner were the past vis-à-vis the Europeans.”³³

The narrative of modernity distinguished inferior societies along observable differences such as cultural traditions, affluence, and technology. These perceived differences, formulated under the terms of the colonizer, informed the concepts of civilization, progress, and development. As illustrated by Anghie, these notions are intrinsic to the dynamic of difference maintained in the development of international law. Modernity then, is constitutive of and by coloniality—coloniality being its “dark side,” the lived realities of colonialism obscured by the false promises and universal narrative of modernity.³⁴

A continuation of the logic informing the French Revolution’s call for a new calendar, the temporal exclusion paradigm of modernity is reiterated in transitional justices’ alleged rupture from the past depicted as an event starting at point A (non-democratic) and ending at point B (democratic). Arthur describes how this perception of

³¹ Mill, J.S, *On Liberty*, Cambridge University Press (1989), 14.

³² Fukuyama, *End of History*, 14.

³³ Quijano, Anibal, “Coloniality of Power, Eurocentrism, and Latin America,” *Neptantla* (2000), 542.

³⁴ Walsh and Mignolo, *On Decoloniality*, 111.

transition further evolved during the conferences of the 1980s, identifying a shift from the Marxist notion of transition based on social transformation to that of political transition. This revolutionized the approach to political transition by introducing the “notion that a democracy could be established in almost any country without much reference to socioeconomic conditions—that is, through a shortened ‘sequence’ of elite bargaining and legal-institutional reforms rather than through long-term socioeconomic stages...”³⁵ By separating the before-and-after of TJ, it is implied that the accomplishment of establishing a Western liberal democracy and free market is significant enough to warrant a separate timeline—or rather, be subsumed by the West’s timeline. That this accomplishment is achieved, purportedly, by the involvement of Eurocentric international measures and institutions such as the UN and its advocacy of international criminal tribunals, paints the West as a source of salvation; only by adopting political and social values originating from Western epistemology can reconciliation be found, and only with the guidance of the West can previously authoritarian communities realize those values.³⁶

To Arthur’s point, curtailing the temporal window of TJ as an event of democratic reform rather than a process of ongoing reconciliation overlooks community-specific histories of socio-economic and structural inequalities. This in part indicates the preservation of the assumption that transition to democracy necessarily entails transition to a free market capitalism: under this reasoning, if Western liberal democratic institutions are constructed in previously authoritarian regimes, free market capitalism will follow. This assumes the universal transferability of such reforms, overlooking particular conditions that might be incompatible with liberal democratic values and

³⁵ Arthur, *How Transitions Reshaped Human Rights*, 338.

³⁶ Kent, *Dynamics of TJ*, 39.

invalidating other forms of governance as acceptable archetypes of peace and reconciliation.

ii. Universalizing the Values of Western Liberal Democracy

The previous section attempted to show how the temporal framing of transitional justice functioned as a propellant of the narrative of modernity, conveying a teleology wherein any political community not organized by Western liberal values of democracy are backwards, undeveloped, a part of the past, and in need of assistance from Western international institutions in order to facilitate a transition to the modern – i.e., Western liberal democracy and free market capitalism. This section expands on the temporal structuring of TJ as inevitably positioning the values of Western liberal democracy as universally transferable.

As a field based primarily on reconciling human rights violations and crimes against humanity, TJ is closely engaged with human rights—a discourse and practice that by its very nature declares itself as universal. The first words of the UN’s *Universal Declaration of Human Rights* (UDHR) assert that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”³⁷ Although the UN notes that the UDHR was written by “representatives with different legal and cultural backgrounds,” the content and structure closely resemble the French Revolution’s *Déclaration des droits de*

³⁷ United Nations, *Universal Declaration of Human Rights*, (1948), accessed April 12, 2020, preamble. <https://www.un.org/en/universal-declaration-human-rights/>

l'homme et du citoyen written in 1789, and the United States' Declaration of Independence in 1776 and Constitution of 1789, each asserting inalienable rights enumerated in a series of articles and solidified in a legislative doctrine resembling a contract. Tellingly, the UDHR is divided into two covenants—the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. The articles of the former covenant in particular take the shape of fundamentally individualistic legal protection;³⁸ this also happened to be the covenant most strongly advocated for by Western states.³⁹ This indicates that, while assuming intrinsic universal value, the articles of human rights are specific to Western epistemological thought.

This universalizing instinct within human rights discourse, reflected in the mainstream view of TJ as a short-term event leading to democracy, has been institutionalized through international criminal tribunals—a practice of TJ that has firmly engrained itself as a fundamental mechanism of asserting justice and fostering reconciliation. Tribunals are the embodiment of one of the main hallmarks of human rights and Western liberal democracy: the rule of law insofar as it takes the shape of retributive justice.⁴⁰ Intrinsically presumptive of liberal individuality, the central problem informing retributive justice is, “How should society respond to perpetrators of wrongdoing?”⁴¹ Retributive justice perceives wrongdoing as that which inflicts damage by marring one's sense of moral value. The idea is that retribution is just because it

³⁸ Mark Goodale and Sally Merry, *The Practice of Human Rights*, (Cambridge University Press, 2007), 6.

³⁹ Nancy Flowers, “A Short History of Human Rights,” accessed April 20, 2020. <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm>

⁴⁰ Sharp, *Rethinking TJ*, 21.

⁴¹ Murphy, *Conceptual Foundations*, 84.

“remakes the social world” by rejecting the power dynamic asserted by the perpetrator against the victim, reinstating their damaged self-value.⁴² In transitional justice this translates to legal and moral accountability for individual perpetrators of human rights violations, with the intent of deterring future violations, stabilizing local confidence in the rule of law, and completing a moral obligation to publicly acknowledge the events that took place and punish those responsible.⁴³ The formation of ad hoc international tribunals and the International Criminal Court (ICC) based out of the Hague demonstrate the internalization of retributive justice in TJ. Perhaps the predominance of punitive legal action as a solution to mass atrocity comes as no surprise given the key role assumed by lawyers and legal scholars in conceptualizing TJ, wherein “anything short of Western-style courtroom justice is often seen as compromised justice.”⁴⁴ In many instances of conflict across the globe the persecution of human rights violators is deemed an important step towards reconciliation by fulfilling a duty owed to victims, rebuilding trust in the rule of law, and recreating the social world on more equitable terms.

However, the idea of Western courtroom justice was conceived for a particular purpose informed by a particular context which differs from many of the post-conflict realities TJ is supposed to operate in. While it may be extremely important to victims, it is a system contingent on many specificities to accomplish justice on a meaningful level. As observed by South African lawyer Paul van Zyl, “Criminal justice systems are designed to maintain order in societies where violation of law is the exception. These systems simply cannot cope when, either as a result of state-sanctioned human rights

⁴² Ibid, 87.

⁴³ Kent, *Dynamics of TJ*, 33.

⁴⁴ Sharp, *Rethinking TJ*, 10.

abuses or internal conflict or war, violations become the rule.”⁴⁵ Part of this critique is based on scale. As a western project infused with liberal individualism, a key concept in the doctrine of retributive justice is the idea of proportionality, wherein one is punished in proportion to the degree of their crimes and the culpability of the perpetrator.⁴⁶ In the post-conflict context of transitional justice that involves reconciling mass atrocities, the question changes from one of individuality to collectivity—how can the requirement of proportionality distinguish the culpability of an individual in the participation of collective crimes?⁴⁷

Another explanation for van Zyl’s prognosis is that retributive justice creates an abstract and ideal circumstance for its operations. It presupposes a genuine and functioning democratic government capable of “remaking the social world” through appropriate punitive measures and in doing so reaffirming the value of a victim whose sense of equality has been damaged.⁴⁸ This is predicated on a context where inequality is a deviant factor rather than the status quo. Author Colleen Murphy argues that in a post-conflict setting, retributive justice is operating in a reality of pervasive structural inequality where many of the atrocities were most likely committed *by* the state authorities who are supposed to be dealing out justice.⁴⁹ This might imply that paradigmatic institutions of retributive justice such as in the U.S are not wracked by structural inequality, leading one to the argument that, because the UN and other international powers are largely facilitating these operations, TJ undertakings are in fact

⁴⁵ Murphy, *Conceptual Foundations*, 9.

⁴⁶ *Ibid*, 84.

⁴⁷ *Ibid*, 89.

⁴⁸ *Ibid*, 87.

⁴⁹ *Ibid*, 88.

backed by institutions of stable democracy. On the contrary, I would argue, the UN and U.S are extremely proficient in re-inscribing obfuscated structural inequalities and the primarily retributive judicial systems of these international powers are one of the key agents in doing so.⁵⁰ The question of retributive justice in the context of TJ remains: how can a sense of equality be re-established when those who ought to be enforcing justice reinforce and normalize *inequality*?

In operating on a plane of abstraction, institutions of international tribunals occupy a place of inaccessibility and detachedness to many actors in post-conflict constituencies. Apart from the issue of scale, a function of defaulting to a mode of Western courtroom justice is that tribunals “lead policymakers to view transitional justice mechanisms as ‘technical’ projects that are short term in nature, embody ‘universal’ values and are transferrable to a variety of locations.”⁵¹ The presumed transferability of TJ mechanisms overlooks the ways in which liberal values and institutions function in particular contexts of conflict.

To understand this relationship, it is important to recognize the meaning of ‘the global’ and ‘the local,’ two central concepts in human rights and international law. In essence, these terms suggest generalized spatial and ontological communities neatly separated by imagined borders drawn by those in power. The rise of this terminology likely paralleled the deeply debated concept of ‘globalization,’ which Anghie defines as the internationalization of neoliberal economic policies through economic human rights institutions such as the World Bank and IMF.⁵² In lending economic support to

⁵⁰ Michelle Alexander, *The New Jim Crow : Mass Incarceration in the Age of Colorblindness*, New York: New Press (2011), 47.

⁵¹ Kent, *Dynamics of TJ*, 31.

⁵² Anghie, *Imperialism, Sovereignty*, 245.

“undeveloped” nations conditional upon neoliberal policy-changes, globalization equates the ‘global’ with the Western universal, thereby forcing the ‘local’ into a relational paradigm as the global’s antithesis, the embodiment of the parochial Third World.⁵³ Mark Goodale and Sally Engle Merry criticize the global/local dichotomy for positing only two levels within which social and political processes can unravel, asserting a vertical hierarchy wherein the global is universal and “above” while the local is particular and “below,”⁵⁴ thus reiterating a Hegelian dialectic of modernism/teleology by orienting the dynamism between global/local interaction on a trajectory solely towards the “period of ‘global/local times.’”⁵⁵ Consequently, actors outside of this dichotomy are de-legitimized and de-politicized insofar as they are not included in the scope of established international policy norms.

The effects of this abstraction are evidenced in the international tribunals of TJ. Following the breakup of Yugoslavia, the Balkans was one of the earliest sites of mainstream transitional justice efforts. The ad hoc International Criminal Tribunal of Yugoslavia (ICTY) established in 1993 was one of the first organized tribunals since the Nuremberg trials after WWII. However, the ICTY was located not in the Balkans (a region often described as the focal point between the East and the West), but at the Hague. Moreover, the judges and staff were comprised mainly of international actors. By assuming universal jurisdiction and excluding the participation and expressed needs of local actors, the ICTY ignored “sensitive issues particular to the Serbian environment but not necessarily of concern to international actors”: clashing collective memory between

⁵³ Ibid, 263.

⁵⁴ Goodale & Merry, *The Practice of Human Rights*, 14.

⁵⁵ Ibid, 15.

the formerly-warring constituencies, questions of responsibility and equity in punishment, and outstanding political corruption.⁵⁶

Furthermore, almost all documented ‘successes’ of the ICTY were a result of international coercion. Noteworthy arrests and indictments of Serbian war criminals, including of the Serbian regime’s leader Slobodan Milošević, coincided with the international deadlines imposed on Serbia via threat of economic penalties.⁵⁷ This international coercion exhibits what Jelena Subotić describes as the international justice industry, wherein international justice organizations (including ad hoc tribunals) and “quasi states, such as the EU, use transitional justice as leverage to force adopter states into changing their behavior in internationally appropriate and desirable ways,”⁵⁸ mirroring in this way the project of globalization. This self-fulfilling prophecy both justifies the legitimacy of the institutions while expanding international agendas and ideas.

In disregarding the unique sensitivities of the Serbian environment, excluding local participation, and using economic threats for international gain, transitional justice fostered not reconciliation but distrust in the local populace of former Yugoslavia. The administration following Milošević’s utilized these local tensions to their advantage, reducing “questions of substantive justice to formal, quantifiable benchmarks, like the delivery of indictees or documents.”⁵⁹ Milošević’s successor, President Vojislav Koštunica, framed the surrender of Serbian war criminals as an act of ultimate patriotism. This cultivated a sense of victimization in the Serbian population, resurfacing residual

⁵⁶ Gordy, E.D. *Tracing Dialogue on the Legacy of War Crimes in Serbia*, 2013, New York: Springer, 114.

⁵⁷ Jelena Subotić, *Hijacked Justice*, Cornell University Press 2008, 30.

⁵⁸ *Ibid*, 22.

⁵⁹ *Ibid*, 114.

animosity towards their previous enemies and the international community. At the same time, because indictments and arrests are measurable means of gauging Serbia's commitment to rule of law and transitional justice, the international community rewarded Serbia with each step of 'progress' towards justice.⁶⁰ The cooperation of the Serbian government with the ICTY only served to relax international demands for judicial reform despite the actual decrease in substantive progress towards reconciliation.⁶¹ And this utter disruption between the 'local' and the 'global' refers only to Serbia—the participating countries in the breakup of Yugoslavia included six ethnically, religiously, culturally, and politically specific and unique countries, with correspondingly unique responses to the abstract universalization of the ICTY. Moreover, that this was the outcome in Southeastern European nations with relatively dominant Western values, shows the complexity and sensitivity of local receptivity in coming into contact with international paradigms.

As the failures of the ICTY began to surface, there were attempts to find resolutions for ad hoc tribunals. In Sierra Leone, Kosovo, East Timor, and Cambodia, there emerged hybrid tribunals with limited jurisdictions that were located in the post-conflict countries themselves, inviting a wider range of local, national, and international actors. However, these were entirely underfunded compared to the ad hoc tribunals such as the ICTY, and “domestic authorities were largely marginalized or disengaged”⁶² in favor of international 'experts' who continued to dominate as collectors of testimony, expert witnesses/advisers, and lobbyists.⁶³

⁶⁰ Ibid, 31.

⁶¹ Ibid, 33.

⁶² Sharp, *Rethinking TJ*, 49.

⁶³ Subotić, *Hijacked Justice*, 22.

Furthermore, just as the domestic Serbian elite used the ICTY to their own benefit, hybrid tribunals functioned in large part as a means for the international justice industry to repair the narrative of success for themselves. The East Timor Serious Crimes Process and Commission for Reception, Truth, and Reconciliation (CAVR) was a UN-devised state-building process purportedly demonstrating shared national, international, and local ownership—although it was headed by the United Nations Transitional Administration in East Timor (UNTAET), which effectively superseded the regional government.⁶⁴ The Serious Crimes Process established a hybrid tribunal “as a means of combating impunity and restoring ‘universal’ human rights values and the rule of law,” with the CAVR forming a Community Reconciliation Process (CRP) as a mode of truth-telling to “resonate with East Timor cultural values and practices.”⁶⁵ Such rhetoric was pivotal to the UN’s assertion that its “short-term, externally devised programme could effectively respond to East Timor’s complex legacy of conflict.”⁶⁶ After two-and-a-half years, the UN was proclaiming East Timor’s ascendancy to nationhood as its own accomplishment.

In 2006, four years after the formal independence of East Timor was announced, the country devolved back into conflict.⁶⁷ Shrugged aside by international actors, the reigning sentiment among the local populace during the initial transitional justice period had been that a “forgive and forget” protocol would be most effective in moving forward. Xanana Gusmão, then leader of the National Congress for Timorese Reconstruction (CNRT), argued that “improving peoples’ living standards... would enable people to

⁶⁴ Kent, *Dynamics of TJ*, 46.

⁶⁵ *Ibid*, 47.

⁶⁶ *Ibid*, 49.

⁶⁷ *Ibid*, 69.

move on with their lives and forgive, which a narrow focus on ‘formal justice’ through the judiciary, trials, punishment and prison, would not.”⁶⁸ Gusmão’s reasoning was that, given the remaining high-tensions among the post-conflict constituencies and the international dominance within the courts, prosecutions would soak resources while creating popular backlash against international efforts. Those resources would be better spent attempting to address underlying economic issues exacerbating tensions.⁶⁹

This pragmatism stemmed from a comprehensive understanding of regional sentiments and histories that the international paradigm ignored—the CAVR even narrowed its focus to the violence in 1999, making it impossible to account for the decades-long state-sponsored coercion and violence leading up to the events of 1999.⁷⁰ The recurrence of violence in 2006 showed that the UN’s enthusiasm to present a successful transition as a two-and-a-half year ‘event’ under the guidance of the UNTAET failed due to its short-term temporal scope and disregard for historical social economic, and political conditions of the Timorese.⁷¹

Bypassing these spatially-specific conditions is another effect of the abstraction of a universalizing TJ, brought to attention by Murphy’s critique of the presumed democratic stability in post-conflict locations, which are in reality wracked by structural inequality. The abstraction takes an interesting shape—assuming a broad idealism of Western liberal democracy for its operations, its alleged transferability actually narrows the level of valid actors to the global/local binary and overlooks the complexity of the dynamics and relationships that do exist. Similarly, in operating on a broad plane of

⁶⁸ Ibid, 55.

⁶⁹ Ibid, 51.

⁷⁰ Ibid, 82.

⁷¹ Ibid, 69.

idealism, TJ also narrows the focus of human rights violations to acts of physical or immediate violence that can be addressed in a courtroom.

This orientation towards physical violence fits primarily within the jurisdiction of civil and political rights⁷²—two of the primary concerns of liberalism. In a continuation of the way modernity overlooks its own dark undertakings of coloniality, focusing on merely civil and political rights in attempting to reconcile atrocities ignores the very particularized historical elements of social and economic inequalities as driving contributors to conflict. Scheper-Hughes describes structural (or economic) violence as referring to:

“the invisible *social machinery* and oppression that reproduces pathogenic social relations of exclusion and marginalization via ideologies and stigmas attendant on race, class, caste, sex, and other invidious distinctions. Structural violence erases history and consciousness of the social origins of poverty, sickness, hunger and premature death, so that they are simply taken for granted and naturalized, and no one is held accountable, except, perhaps, the poor themselves.”⁷³

While structural violence and physical violence are mutually reinforcing,⁷⁴ the fixation of TJ’s mechanisms on immediate violence further constricts the temporal window to legal action in the courtroom and directs attention to crimes in the public sphere, while leaving household/economic/structural crimes in the private realm.⁷⁵ Once more, the wariness of encroaching on the private lives of its constituents aligns with the liberal values in civil and political rights. However, these liberal ideals are not always appropriate for fostering lasting reconciliation in post-conflict communities with their own historical social, economic, and political realities. While trials can be a critical component in satisfying a

⁷² Sharp, *Rethinking TJ*, 20.

⁷³ Kent, *Dynamics of TJ*, 37.

⁷⁴ Sharp, *Rethinking TJ*, 20-21.

⁷⁵ Kent, *Dynamics of TJ*, 38.

longing for tangible justice, conflict is bound to return if its driving factors are allowed to continue unaddressed and unresolved.

This is inextricably tied to the fact that in conventional Western-style courtrooms purposed for purely retributive justice, such underlying context is rarely accessible due to the idolization of objectivity and neutrality in Western legal practices. By valorizing objectivity, the institutional processes of trials purport to establish an absolute and undisputable ‘Truth,’ an accurate account of the past backed by the authority of a courtroom judgement and unclouded by the whims of subjective interpretation. But whose Truth does this portray?

iii. Truth as an Absolute

Closely tied to universality, transitional justice discourse always seems to circle back to piecing together and disseminating ‘the truth.’ The ‘objective’ Truth manufactured in a courtroom indicates an official government acknowledgement of the atrocities of those convicted, fortifying the place in history for judgements with institutional authority. However, this Truth tends to favor the overarching narrative of Western universality. Contrary to expectations, focusing on that which is considered observable fact generates a skewed and limited version of reality. This is a critique heavily emphasized by scholars of critical race theory (CRT). Critical race theorist Charles Lawrence takes issue with the reality that “the story that is told within the dominant discourse has systematically excluded the experience of people of color and other outsiders, and where we are trained to believe that the story told by those in power

is a universal story.”⁷⁶ As has been shown, the projection of a universal story at the cost of the exclusion and silencing of certain narratives also occurs in international tribunals.

Objectivity has been a tool of the West for some time. Mary Hawkesworth describes the creation of objective identity markers such as race and gender as a project of modernity, enabling “a form of ‘unkowing’: the brutality of colonization, conquest, displacement, dispossession, enslavement, and dehumanization are omitted from official histories as discourses about white men’s civilizing mission convey a very different story.”⁷⁷ The valorization of objectivity thus echoes the narrative of the dominant script, the singular narrative of ‘Truth’ constructed and reconstructed from the scaffolding of those in power, while necessarily canceling the narratives of marginalized voices belonging to those whom Lawrence calls the “outsiders.”

Rather than grounding explanations for how the world is, prioritizing objectivity further abstracts conditions of lived reality. According to Lia Kent, courtroom burdens of proof, customs of testimony, and rules of evidence reduce victims of atrocity to mere witnesses, dismissing the value of their personal narrative.⁷⁸ In courtrooms dominated by international experts, judges will analyze witness testimony as competing individualistic subjectivities, wading through experience to arrive at the objective Truth. They take witness testimony only insofar as they ‘establish the facts of the case,’⁷⁹ restricting that which is imbued with personal history and experience within the confines of objectivity. In doing so, judges merely create an imaginary context based on their own subjective judgements of importance, originating from their experiences rather than those of the

⁷⁶ Lawrence, Charles, *The Word and the River*, in *Critical Race Theory*, the New York Press, 337.

⁷⁷ Hawkesworth, *Embodied Power*, Taylor and Francis Group (2016), 72.

⁷⁸ Kent, *Dynamics of TJ*, 34.

⁷⁹ *Ibid*, 86.

witness.⁸⁰ This leads to the abstraction of post-conflict communities to an ahistorical and idealized plane, alienating historically located economic, social, and political elements driving the conflict. Displacing structural explanations of conflict favors immediate or physical violence, essentializing the conflict as “natural,” occurring due to intrinsic elements tied to the participants themselves.⁸¹ For example, the Rwandan genocide can be seen as the fault of inherent tendencies towards violence within the Tutsi and Hutu communities, rather than the culmination of various tensions driven by modes of structural violence put in place since Belgian colonialism.

As pointed out by Kent, the critical point of departure is the dismissal of personal narrative. Narrative must be taken as a valid and even essential component of discourse in order to challenge the singular and universalizing Truth of courtroom objectivity and contextualize what would otherwise be an ahistorical and abstract understanding of events. But what exactly is meant by narrative, and how can it historicize context?

What sets narrative apart from objectivity or fact is the welcoming of perspective, informed by experience, emotion, and subjective influence. Lawrence, borrowing from Vincent Harding the designation of “the Word” to connote the power of narrative, articulates three intertwined meanings of subjectivity in the Word:

“subjective, indicating the scholars’ positioned perspective in viewing and recording social constructs; subjective, indicating nonneutrality of purpose, that the scholar embraces certain values and that her work is avowedly political (read liberationist); subjective, indicating that the scholar places herself in the linguistic position of subject rather than object, a being capable of acting upon the world rather than as one upon whom others act.”⁸²

⁸⁰ Lawrence, *The Word*, 345.

⁸¹ Hawkesworth, *Embodied Power*, 114.

⁸² Lawrence, *The Word*, 338.

Contrary to the Western notion that subjectivity obfuscates reality, Lawrence's descriptions of subjectivity position narrative as a political praxis, a product of the conditions acting upon the narrator while at once a means of producing those conditions. This recognition of narrative as constitutive of and by historic conditions defies the authority of objectivity as the sole reality. It explains how experience, emotion, and the language with which we use to describe them are refractions of the narrator's interpretation of the world, and therefore reshapes the world in relation to the narrator. Testimony as such re-articulates the narrator as an actor rather than an object upon whom others act—rendering what Kent describes as a mere witness to that of a political actor, a narrator of the Word, with real value and creative power.

The validation and inclusion of testimony as narrative is the mandate of truth commissions. This emphasis has garnered truth commissions much support from critics of retributive justice, who often juxtaposed them to tribunals as the restorative justice component of TJ. Restorative justice is premised less on individual retribution and more on communal healing and the mediation between post-conflict constituents, where “offenders offer atonement and victims reciprocate with forgiveness.”⁸³ In accordance with this objective, truth commissions generally consist of publicized testimony from a variety of participants in the conflict. Published in the 1990s, the Argentina and Guatemala *Nunca Más* reports were considered by the International Center for Transitional Justice to be among the first successful and comprehensive examples of TJ.⁸⁴

A model for many other truth-finding initiatives under the scope of TJ, the *Nunca Más!* (translating to *Never Again!*) reports are an example of the tradition of *testimonio* as

⁸³ Kent, *Dynamics of TJ*, 33.

⁸⁴ ICTY, “Guatemala,” accessed May 27, 2020

a style of literature in Latin America. *Testimonio* is considered to weave testimony and narrative, distinct from courtroom testimony in that the intentionality of the narrator is dominant—whereas courtroom testimony is traditionally only valued for the ‘facts’ that can be gleaned from the speaker and subsequently manipulated by the intentionality of the judge rather than the orator. Furthermore, *testimonio* is historically reserved for those who can only act on the margins of literature, “representing in particular those subjects—the child, the ‘native,’ the woman, the insane, the criminal, the proletarian—excluded from authorized representation when it was a question of speaking and writing for themselves.”⁸⁵ In inviting participation from the margins and valuing the narrator as a political actor shaping the world with their intentionality, the testimony of truth commissions can be seen as one way to circumvent the problem identified by Lawrence wherein the dominant discourse excludes the counter-narratives of the “outsiders.”

Notably, such narrative has also opened up a possibility which has yet to be adequately seen in trials—the acknowledgement of underlying historical factors and structural violence contributing to conditions of conflict. While present in many truth commissions,⁸⁶ this is clearly evidenced in the Guatemalan *Nunca Más!* report, one of a series of collected testimonials published in South American countries following their respective authoritarian regimes. Organized by the Guatemalan Archdiocese Human Rights Office, the text consists of hundreds of spoken accounts provided by survivors, perpetrators, and others actors involved directly or indirectly in the conflict, edited and organized with intermittent analyses by writers from the Archdiocese office.

⁸⁵ Beverly, John, “The Margin at the Center: On *Testimonio*”, *Modern Fiction Studies* (1989), 13.

⁸⁶ Sharp, *Rethinking TJ*, 24.

The report includes an entire section dedicated to elucidating the underlying history of a racialized economy as a byproduct of colonialism, explaining how the Ladino descendants of Spanish *conquistadores* accumulated economic influence through the forced labor of indigenous Mayan populations. Through a series of liberal labor reforms such as the 1877 vagrancy law, this dynamic was swiftly institutionalized as a racialized oligarchy maintaining influence throughout the 20th century.⁸⁷ The *Nunca Más* report deliberately identifies this underlying historical context as a root cause of the conflict, acknowledging that the extreme violence shown towards peasant populations was a “continuation of the historical contempt with which the dominant sectors have always treated them.”⁸⁸

The admission of underlying historical circumstances is further delineated in the recommendations offered by the report. Suggestions for addressing the socio-economic realities burdening indigenous Guatemalan populations include matters of land distribution and demilitarization, some of the most historically contested issues between the oligarchic plantation owners and the peasant populations.⁸⁹ Furthermore, an entire section focuses on the “Concepts found in the Mayan culture,” many of which are incorporated in their proposed mechanisms for “preventing a recurrence.” For example, elements from the Mayan notion of *cosmovision*, the “interconnected-ness of person-nature-community,”⁹⁰ are echoed in the report’s urging to establish a *collective* memory to be disseminated throughout the world-community.⁹¹ By situating its recommendations

⁸⁷ Catholic Institute for International Relations, and Latin America Bureau, *Guatemala, Never Again!* (Maryknoll, N.Y), 181.

⁸⁸ *Ibid*, 88.

⁸⁹ *Ibid*, 95.

⁹⁰ *Ibid*, 52.

⁹¹ *Ibid*, 89

in the history, values, and customs of the indigenous peoples, the report proves the ability of *testimonio* to better reconcile the issue of local/global ownership in transitional justice discourse.

Given the community-oriented focus of restorative justice, the notion of collective memory has since been internalized in truth commissions. Consequently, the question of “whose truth?” becomes much more complicated. John Beverly situates the narrator of *testimonio* as one who is articulating an “everyday epicity” in that their normal lived experience is representative of a collective lived experience. In this way, the narrator “evokes a polyphony of other voices, other possible lives and experiences.”⁹² This is exemplified in the *testimonio* of Rigoberta Menchu, the indigenous Guatemalan activist whose words were used extensively in the *Nunca Más* report as well as other human rights initiatives. Menchu begins her famous *testimonio* by asserting, “My story is the story of all poor Guatemalans. My personal experience is the reality of a whole people.”⁹³ In this way, Menchu’s *testimonio* projects a truth organized from a collective memory that encompasses multitudes of experiences within one; it is narrative as neither individual and purely subjective truth, nor singular and absolute Truth. This communal-based understanding of narrative confounds the singular and adversarial dimensions of objective testimony valued within courtrooms, eliciting confusion and outrage amongst advocates of objective authority. One such advocate, sociologist and historian David Stoll, wrote an entire book with the intention of discrediting Menchu based on historical imprecisions in her story. For him, “the story of an individual cannot be the story of

⁹² Beverly, *Testimonio*, 16.

⁹³ *Ibid*, 16.

everybody,” and contends that one of the main problems with her *testimonio* is that it is an inaccurate account of the problems she and her village faced.⁹⁴

The reaction ensuing from Menchu’s declaration of a collective experience of poor Guatemalans shows that a part of the world is still operating under the assumption that any truth being offered does so purely as an absolute. The collective nature of *testimonio*, then, is perceived as the universalization of subjective experience and thus a threat to the hegemony of objective Truth—and so this ‘challenge’ is responded to by negating the validity of experience by employing the authority of objectivity. The effectiveness of this offensive is exemplified in the relative disarming of truth commissions. David Sharp remarks that in “those few instances where truth commissions have made penetrating recommendations related to addressing socioeconomic inequalities—in Guatemala and Sierra Leone, for example—those recommendations tend to be ignored by policy makers.”⁹⁵ Equating experiential narrative to the universal, as critics such as Stoll do in *testimonio*, reiterates the perception of truth as a singular and absolute Truth, creating tension between advocates of trial justice and truth commissions. Thus, so long as truth is understood only as singular and absolute, truth commissions stand to inhibit rather than augment possibilities for reconciliation.

However, advocates of objective Truth are not the only ones who tend to universalize truth. While welcoming subjectivity and experience is an integral component of fending off the universal narrative of objectivity, Joan Scott cautions against the inverse tendency of critical and interdisciplinary scholars to elevate subjective experience

⁹⁴ Garcia, Fernández Dina, *Interview with David Stoll in The Rigoberta Menchu Controversy*, University of Minnesota Press (2001), 68.

⁹⁵ Sharp, *Rethinking TJ*, 31.

as the ultimate evidence, the “most authentic kind of truth.”⁹⁶ Universalizing experiential truth essentializes experience in such a way that the collective identity in question is naturalized in a limiting manner. When this is the case, a shared experience becomes the common denominator upon which subjects identify themselves. Scott describes this as a “unifying phenomenon” that “overrides other kinds of diversity.”⁹⁷

Scott argues that experience is both collective *and* individual.⁹⁸ While universalizing experience is inclusive in that it realizes a collective identity, it does so at the expense of other possibilities of social or political organization. In the case of transitional justice, positing truth commissions as a purely collective experience homogenizes that collectivity as *victims*, subsuming the multitudes of other identities enveloped in that categorization—gender, ethnicity, religion, sexuality, etc. According to Scott, “What this obscures is the contradictory and contested process by which [identity] was conceptualized.”⁹⁹

Engagement with this process is part of the project of “historicizing” experience, recognizing identity as fluid, historically contingent, and contextual. Rather than taking experience as *merely* evidence of social conditions and structures (although it is important to acknowledge it as one’s subjective interpretation of such conditions), we must also interrogate the way in which pre-existing historical conditions produce the very experiences that conceptualize identities.¹⁰⁰ This articulation of experience refutes experience and identity as fixed foundations taken for granted; rather, it is reformulated

⁹⁶ Scott, Joan, *Experience in Feminists Theorize the Political*, Routledge, Taylor & Francis Group (1992), 27.

⁹⁷ *Ibid*, 29.

⁹⁸ *Ibid*, 34.

⁹⁹ *Ibid*, 30.

¹⁰⁰ *Ibid*, 27.

as constitutive of *and* by historic realities. It is possible then to value experience as a narrative device the way it has been articulated by critical race theorists—at once a refraction of social conditions as interpreted by the narrator, a non-neutral and political act, and a creative force upon the world—while avoiding the naturalization of identities based purely on collective experience.

This is paramount in transitional justice. If truth commissions universalize the testimony put forth by those who had undergone atrocity, then that entire group is ontologically re-signified as *victims*. The collective experience of trauma that is being shared with the entire world becomes essentialized—reconciliation efforts may then focus solely on “saving victims” and in doing so gloss over the historical conditions leading to the creation of the identities that made them victims in the first place. It is not a flaw to acknowledge post-conflict subjects as victims of horrible acts—however, it can be detrimental to the project of reconciliation if this becomes the overarching and absolute identity that determines subsequent measures taken. This, then, temporally limits the scope of action to more immediate forms of violence as is the tendency of retributive justice. Historicizing narrative, taking the experience of subjects as both collective and individual, beckons an analysis of experience as it is “at once always already an interpretation *and* in need of interpretation.”¹⁰¹ It complicates experience and identity as multifaceted, contested, a commentary on social conditions, as well as a product of social conditions.

This is not to say that the testimony of truth commissions are inherently flawed. Certainly, challenges with compiling testimony must be acknowledged: the translations

¹⁰¹ Ibid, 37.

from indigenous languages to that of their historic conquerors, Spanish; the potentially imperfect editing and organizational decisions made by external parties; the guiding intentions of donors where Sharp notes the tendency of truth commissions to “hew to a ‘dominant script’ that has been established over time not because it was necessarily perfectly attuned to each new context, but as a result of ‘repeated information exchange and consultations’ between experts.”¹⁰² Despite these potential drawbacks, there is nothing in the report or Menchu’s words to indicate the essentialization of identity. While Menchu speaks for the collective “poor people of Guatemala,” she does so under the premise of *testimonio* that her narration expresses her own political intentionality—in this way, it is both collective and individual, as Scott describes. Furthermore, the Guatemalan report works towards historicizing the identity of Guatemalan indigenous victims as *more* than mere victims by including structural realities that helped produce the racialized identity of the indigenous population.

Rather, it is the configuration of truth into what must be an absolute Truth—from both those who valorize objectivity as well as scholars who challenge objectivity with experience—that yields to negate the political power of narrative. If we were to heed Lawrence’s definition of subjectivity once more, in conjunction with Scott’s analysis of experience, we can see that the power of narrative comes from the creative, reflective, and political interpretation of the conditions within which one exist. In vocalizing that interpretation, telling that story, we “do more than offer another possible description of the world around us: we define ourselves and our relationship to that world.”¹⁰³ In this way, experience and narrative animates the agency of the individual subject. But in the

¹⁰² Sharp, *Rethinking TJ*, 56.

¹⁰³ Lawrence, *The Word*, 340.

vein of *testimonio*, it simultaneously speaks as a collective voice of those who are not offered a stand in the dominant discourse. Lawrence also demands that practitioners of the Word (his borrowed term for narrative) assume the position of a collective subject: “We must assert our humanity by... unashamedly employing ‘I’ and ‘we’ in our language. We must describe other subjects in our stories and, by presenting multiple points of view, subvert the closed, coherent, noncontradictory world that makes us objects.”¹⁰⁴ The power of the individual subject thereby moves fluidly with the power of the collective—and by fusing the two, the intricacies and complexities of each unique subject is unencumbered by the essentialization of a universal experience.

¹⁰⁴ Ibid, 341.

IV. CONCLUSION: NARRATIVE AS THE POINT OF CONVERGENCE

The concepts identified as the foundations of transitional justice and their institutional counterparts have now undergone thorough analysis. What needs to change might seem glaringly obvious in some respects. TJ must be grounded in the real, not the abstract and ideal: it must be able to address historical and structural factors that create the conditions of conflict and form the identities of victims. It must customize specialized responses based on those conditions rather than presuming the infallibility of Western liberal and international legal practices, and it must see these responses as ongoing and indefinite projects of maintaining peace rather than short-term events. The global/local dichotomy of political communities needs to be problematized, inviting new conceptualizations of what maintains a political community, and the teleology of political transition must be disturbed so as to allow those communities new opportunities. The singular narrative of modernity has to meet the narratives of marginalized voices as equals, dismantling Truth as an absolute. Under these conditions, TJ will be far better equipped to accomplish genuine reconciliation. These are examples of the what. But *how* might this be accomplished?

Underlying each section, there has been a common thread weaving together the operations of transitional justice—the presence or lack thereof of narrative. Much of this has to do with the epistemological development of TJ, wherein the discourse was dominated by scholars coming from a relatively unified epistemological background in international law and human rights. Thus, the ways of thinking that informed TJ lacked the diversity and type of narrative that would be necessary for a versatile and adaptable

conceptualization of justice. This set the stage for international law to extend the universal narrative of Eurocentric modernity.

As a universal narrative, modernity necessarily obfuscates the workings of coloniality; this means silencing or devaluing the narratives of marginalized people living the realities of this dark side of modernity. The portrayal of temporality, universality, and Truth as they are implicated with transitional justice in mainstream discourse, are integral components of achieving this.

The temporal configuration of TJ as a short-term event leading to Western liberal democracy marks the inundation of pre-historical or historically absent communities into the timeline of the West, propelled by tales of progress and development. In this way the narrative of modernity is itself ahistorical, proliferating the “unknowing” of narratives of coloniality.

Universalizing the transferability of Western liberal democracy and its values similarly requires the negation of historicized narrative, particularly evident in institutions of mainstream retributive justice. In failing to attend to the unique historical, political, social, and economic context of post-conflict communities, trials are unable to cope with the scale of mass atrocity, the receptivity of the local populace, and the social and political realities of structural inequality. Furthermore, tribunals systematically exclude local participation and distort the testimony of participants by rejecting that which doesn't conform to the legal valorization of objective Truth: narrative.

Given its orientation towards narrative and subsequent historicization of domestic realities of coloniality, truth commissions have been supposed as something like an antidote to the purely objective Truth dominant in tribunals; in conjunction with trials,

both retributive and restorative justice can be achieved concurrently. However, truth commissions have consistently fallen short of meaningful advances towards reconciliation. This is because the celebration of experiential narrative essentializes that experience into a universalizing identity, re-inscribing truth as an absolute Truth. As there can only be one absolute Truth, positing objective and experiential Truth side-by-side is contradictory and creates conflict between advocates of retributive and restorative justice.

Thus the majority of conceptual tensions within transitional justice converge on the juncture of narrative. What then is the appropriate place of narrative in TJ? I have previously argued that truth commissions are not inherently flawed. Given the underlying currents of narrative throughout TJ and its mechanisms, I extend this possibility to tribunals as well as other (seen or not-yet seen) operatives of TJ. This suggests that there must be a fundamental reconceptualization not only within transitional justice, but of the overarching consciousness with which TJ is approached. I propose that one of the first steps in making the conditions for reconciliation accessible is an epistemological shift regarding the way in which narrative is perceived and, by extension, discarding the assumptions of truth which allow it to be put forth only as an absolute.

Such an understanding of Truth cripples the potentiality of experience and rejects the multidimensional power of narrative. In order to alter this perception, narrative as both an individual and collective political formation has to be accepted: a refraction of the social conditions that informed the experience of the narrator while also a unique subjective interpretation with creative power. To clarify, I call not for the aggrandizement of subjectivity, which might essentialize individual identity, but rather the admittance of individual subjectivity as a politically valid and influential force maneuverable

throughout the spaces beyond a singular and absolute Truth. If testimony—in courtrooms, truth commissions, and elsewhere—were accepted as narrative in such a way, transitional justice would be able to engage in the spaces between, outside, and around the dichotomy of the local and the global, to go beyond the one-dimensional and essentializing distinction between collectivity and individuality. The acceptance of multifaceted narratives in TJ would bury the dominance of a singular and universal narrative, welcoming diverse participation and different definitions of ‘expert’ while grounding its operations in historicized context rather than abstractions; it would note the uniqueness and fluidity of each individual’s identity while acknowledging patterns of collective experience. The temporal framework would be disturbed, opening possibilities of TJ not as a singular event but as an ongoing process, not as a teleological progression but a multidimensional explosion of open possibilities. Finally, it would assess the compatibility of Western liberal-democratic values (among others) in addressing each particular post-conflict setting, deconstructing the presumptive qualities of retributive and restorative justice. Reconceptualizing narrative in such a way would necessarily reconceptualize transitional justice as it pertains to its internal mechanisms while *also* fundamentally altering the world-consciousness we approach it with. I pose this as one possible prognosis for efforts of reconciliation. Just as transitional justice must be an ongoing process, so too must our interrogations of TJ.

BIBLIOGRAPHY

- Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge: Cambridge University Press, 2005.
- Arthur, Paige. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31, no. 2 (2009): 321-67.
- Arias, Arturo, and Stoll, David. *The Rigoberta Menchú Controversy*. Minneapolis: University of Minnesota Press, 2001: 66-69.
- Beverley, John. "The Margin at the Center: On Testimonio (Testimonial Narrative)." *Modern Fiction Studies* 35, no. 1 (1989): 11-28.
- Denver Journal of International Law & Policy. "The Comparative Cost of Justice at the ICC." Accessed April 16, 2020.
<http://djilp.org/the-comparative-cost-of-justice-at-the-icc/>
- Flowers, Nancy. "A Short History of Human Rights." University of Minnesota Human Rights Center. Accessed April 20, 2020.
<http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm>
- Fukuyama, Francis. "The End of History?" *The National Interest*, no. 16 (1989): 3-18. Accessed April 24, 2020.
- Goodale, Mark, & Merry, Sally Engle. *The Practice of Human Rights : Tracking Law between the Global and the Local*. Cambridge: Cambridge University Press, 2007.
- Gordy, E.D. *Tracing Dialogue on the Legacy of War Crimes in Serbia*. 2013, 111-130. Springer Series in Transitional Justice v.8; New York: Springer, 2014.
- Hawkesworth, M. E. *Embodied Power : Demystifying Disembodied Politics*. New York, NY: Routledge, Taylor & Francis Group, 2016.
- International Center for Transitional Justice (ICTJ). "Regions and Countries." Accessed April 24, 2020.
<https://www.ictj.org/our-work/regions-and-countries>
- Kent, Lia. *The Dynamics of Transitional Justice International Models and Local Realities in East Timor*. Abingdon, Oxon [U.K.] ; New York: Routledge, 2012.
- Lawrence, Charles. *The Word and the River: Pedagogy as Scholarship as Struggle*, pp. 336-351. in Gotanda, Neil, Gary Peller, & Kendall Thomas. *Critical Race Theory: The Key Writings That Formed the Movement*. New York, NY. New York Press, 1995.

Maldonado-Torres, Nelson. "ON THE COLONIALITY OF BEING: Contributions to the Development of a Concept." *Cultural Studies: Globalization and the De-Colonial Option* 21, no. 2-3 (2007): 240-70.

McCreery, David. *Land, Labor, and Community*. The Guatemala Reader, Duke University Press 2011, p.117-124.

Mignolo, Walter, & Walsh, Catherine E. *On Decoloniality : Concepts, Analytics, and Praxis*. On Decoloniality. Durham: Duke University Press, 2018.

Murphy, Colleen. *The Conceptual Foundations of Transitional Justice*. Cambridge: Cambridge University Press, 2017

Proyecto Interdiocesano Recuperación De La Memoria Histórica, Catholic Institute for International Relations, and Latin America Bureau. *Guatemala, Never Again!* Maryknoll, N.Y: London: Orbis Books; CIIR: Latin America Bureau, 1999.

Quijano, Anibal, and Michael Ennis. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla: Views from South* 1, no.3 (2000): 533-80.

Scott, Joan. *Feminists Theorize the Political*. New York, NY: Routledge, Taylor & Francis Group, 1992.

Sharp, Dustin N. *Rethinking Transitional Justice for the Twenty-first Century : Beyond the End of History*. New York: Cambridge University Press, 2018.

Shaw, Matthew John. *Time and the French Revolution : The Republican Calendar, 1789-Year XIV*. Royal Historical Society Studies in History. New Series. Woodbridge, Suffolk, UK ; Rochester, NY: Royal Historical Society/Boydell Press, 2011.

United Nations. *Universal Declaration of Human Rights*. United Nations General Assembly, Paris 1948. Accessed April 12.
<https://www.un.org/en/universal-declaration-human-rights/>