

**Addressing the needs of families of the Missing:  
A test of contemporary approaches to  
transitional justice**

Simon Robins

**PhD Post-war Recovery Studies**

University of York  
Post-war Reconstruction and Development Unit (PRDU),  
Department of Politics

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## Abstract

This thesis aims to interrogate the current practice of transitional justice from the viewpoint of the victims of the violations that it seeks to address. The study challenges approaches to legacies of violence that are rooted solely in the human rights discourse and that emerge from national and international elites, remote from those most impacted by conflict. The needs of victims of one of the most serious and intractable violations, disappearance, are investigated in two contexts emerging from conflict, Nepal and Timor-Leste, and the impact of ongoing transitional justice process on those needs evaluated. The aim is to understand how a *victim-centred* transitional justice process can be constructed.

Victims of conflict in both Nepal and Timor-Leste have little understanding of rights, articulating the needs, often the most basic, with which they are confronted on a daily basis. Whilst rights are the product of a discourse that claims to be global and universal, needs are necessarily local and particular, the product of culture and context. This drives the methodology of the study which is ethnographic, using qualitative research methods with families of the Missing. The research was conducted in a participatory way with Associations of Families of the Missing, with the aim of empowering victims' organisations, and the results published in relevant languages in both contexts with the aim of impacting policy. The result of this engagement with more than 300 families of the Missing in the two states was a comprehensive understanding of the impact of disappearance. In contrast to the legalist orientation of the global transitional justice project victims do not see judicial process as a priority. Rather, they urgently seek an answer concerning the fate of the Missing and to retrieve human remains. The latter is motivated partly by traditional spiritual beliefs, particularly in Timor where the impact of malign spirits of the Missing is severe. As important are livelihood issues where families are struggling to cope with the loss of breadwinners and seek support to ensure economic security. In Nepal the social impact on wives of the Missing was extreme, with women stigmatised in family and community as a result of traditional patriarchy. In both contexts families sought recognition for both the Missing and themselves as victims, demanding a place in collective memory through memorials and other reparative process.

The gap seen between the needs of victims and what transitional justice process has delivered is a result of the institutionalised and prescriptive approach the

international community advances in all contexts, dominated by trials and truth commissions, that fail to resonate with the needs of victims remote from such institutions. Victims of violations require process that is rooted in the social and symbolic worlds in which they live and that accounts for the complex dynamics of post-conflict societies. They seek a transformative transitional justice that challenges the narrow agenda of political and ethnic elites and that resonates with the everyday experience of those most impacted by conflict. The study draws a map for the empowerment and mobilisation of victims of conflict to become actors in an emancipatory approach to legacies of violence.

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*The Book of Belongings of Those Found Dead*

*lies open across my lap. I cradle it  
and look and look, not knowing  
what I must find, half hoping*

*to recognise nothing. Photograph  
after photograph, page after page  
of someone's jacket, trousers, shirt:*

*I'm searching the fabric for stitches  
my hands had known, for threads  
my thumb had pulled. This book*

*is heavy with more than belongings:  
with gestures an arm has left  
in a sleeve, with breath filling*

*the breast of a shirt. I place  
a plate on a table surrounded  
by empty chairs. Each speaks to me*

*in the voice of a husband, a son.  
Those found dead are a handful.  
I sweep away the crumbs.*

Poem by Brian Johnstone from his collection "The Book of Belongings" [Arc, 2009]  
(Johnstone, 2009)



**For my Mum**



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## Declaration

I declare that this thesis is entirely my own work. Some elements of the studies discussed here have been published elsewhere.

The discussion in Section 9.2 of ambiguous loss in the light of the data from Nepal is a condensation of: Robins, S. (2010) Ambiguous loss in a non-Western context: Families of the disappeared in post-conflict Nepal. *Family Relations*, 59: 253 – 268. Some of Chapter 6 has appeared in: Robins, S. (2011) Towards victim-centred transitional justice: Understanding the needs of families of the disappeared in postconflict Nepal. *Int. Journal of Transitional Justice*, 5(1): 75 - 98. The methodology, as applied in Nepal, has been published in: Robins, S. (2010) A Participatory Approach to Ethnographic Research with Victims of Gross Human Rights Violations: Studying Families of the Disappeared in Postconflict Nepal, in *Participatory Research Methodologies in Development and Post Disaster/Conflict Reconstruction*, ed. Alpaslan Özerdem and Richard Bowd. London: Ashgate. Other elements of the data and the analysis have been presented at various conferences in 2009 and 2010.

The analysis of the data in both contexts has been published during the course of this work by the International Committee of the Red Cross in the form of reports intended to impact on policy in both states:

- International Committee of the Red Cross (2009) *Families of missing persons in Nepal: A study of their needs*. Kathmandu: ICRC. (also published in Nepali)
- International Committee of the Red Cross (2010) *Needs of families of the missing in Timor-Leste*. Dili / Jakarta: ICRC. (Also published in Indonesian, Portuguese and Tetun)

Production of these reports constituted an integral part of the Action Research methodology of this thesis, driven by the desire of respondents, the families of the Missing, to see their needs presented to the authorities and others they perceived as in a position to address them. These reports constituted both an ethical approach to the research, through the provision of a framework for the study that was understood and welcomed by respondents, and a direct route for the study to impact on the concerned contexts.



# Chapter 1 Introduction

## 1.1 Defining the problem

The first decade of the twenty-first century has been characterised by the emergence of a new politics of human rights. Globalisation has seen not only a transnational flow of labour and capital but also the increasing circulation of rights-based norms and representations that have made human rights the defining agenda of much national and international politics and the terrain on which many movements for social justice have been waged. This universalist discourse has gained unprecedented leverage in global debate, propelled by valorising narratives that rarely pause to question the ontology that underlies them. This is nowhere more true than in the practice of human rights after conflict or political violence, where transitional justice has become a hegemonic approach to addressing legacies of violations, backed by an industry of practitioners and donors.

This study aims not to revisit debates about cultural relativism or the validity of this claimed universality, but to explore the impacts of this transnational discourse on those most affected by the violations of conflict: their victims. It seeks to understand how human rights claims are instantiated in a concrete context and how this emergent global human rights culture operates in highly unequal societies emerging from conflict. By focussing on a particular set of victims, the families of those disappeared and missing, this study aims to understand how transitional justice impacts on the everyday lives of those attempting to recover from conflict. The ethnographic approach taken here seeks to allow the perspectives of the everyday to be the lens through which the impact of transitional justice is measured, and through this to drive a practice that places the victim at its centre. This necessarily challenges universalist understandings with the local and the particular, with the well-being of victims and the addressing of victim needs serving as the ultimate arbiters of the success of such process:

The everyday is a space in which local individuals and communities live and develop political strategies in their local environment, towards the state and towards international models of order. It is not civil society, often a Western-induced artifice, but it is representative of the deeper local-local. It is often transversal and transnational, engaging with needs, rights, custom,

individual, community, agency and mobilisation in political terms. Yet, these are often hidden or deemed marginal by mainstream approaches. (Richmond, 2010: 6)

This study aims to ask who sets the goals of processes that seek to respond to histories of violations and how is success defined for such processes. Transitional justice aims to impact on those communities most affected by conflict and to transform societies in ways that ensure sustainable peace. Despite this, the question as to what such communities seek after conflict is one that remains frequently unasked. By privileging the views of victims, typically those from the most marginalised communities, this study seeks to understand how they compare with the agendas of the powerful who drive such processes. How does what victims seek relate to the perceived goals of global transitional justice and how do the national goals of a transitional justice process compare and contrast with the very local and particular goals of victims in a rural society? Given the assumption that transitional justice builds peace, this study will attempt to understand what victims' needs of peacebuilding are at a local level and ask how and whether these map onto building a broader national peace.

Whilst transitional justice typically seeks to create institutional mechanisms, it is clear that victimhood has emotional, psychological and social impacts. These have rarely been explored in terms of their implications for such processes and are a principal topic of investigation here. More particularly, this thesis constitutes a detailed study in two low income contexts of the impact of disappearance on individuals, families and communities, conducted with the aim of understanding how a state can respond to these in ways that most effectively address the needs that disappearance creates. The aim is to develop an empirical analysis of the globalising rights discourse, with an emphasis on how it impacts upon those most affected in states emerging from conflict. The study seeks to contrast an ontology 'from below' that privileges the perspectives of the disempowered and the victimised with the largely external and elite perceptions that drive the contemporary practice of human rights after conflict. This study aims to define a *victim-centred* approach to transitional justice, in which traditional violation and perpetrator centred approaches to violations are replaced by mechanisms that have an awareness of the centrality of victims and their needs to the process.

## ***Responses to the violations of conflict***

Responses to histories of violence have typically been motivated by a desire to either 'build peace' following conflict or institute a legal response to crimes committed, the latter often on the understanding that accountability and the rule of law strengthen peace. In neither case do efforts to understand the needs of victims drive processes: international peace builders are concerned largely with re-establishing institutions, whilst the human rights and transitional justice discourses emerge from a legalist analysis and prioritise truth and justice, restricting their interest to the minority of victims whose cases will be brought before some formal mechanism. Such prescriptive approaches, premised on a Western model of "liberal proceduralism" (Gready, 2011: 61), are remote from the communities they claim to serve. Approaches that emphasise institutions have been challenged by those who assert that recovery from conflict must be rooted in an understanding of how mass violations have impacted and transformed affected populations (Pouligny et al., 2007; Breen Smyth, 2007). In many post-conflict interventions both the individual and collective consequences of violations remain largely unexamined. To go beyond a prescriptive approach, studies are required that engage with those who have experienced violations, understanding the meaning that populations give to such events and the symbolic and social worlds people occupy:

It is not possible to respond to the different needs of the victims and survivors of mass crime if one does not understand the local forms and logic of social ties, their transformations and the manner in which local actors have tried to survive and understand mass violence: their cultural strategies of dealing with death, mourning and suffering. (Pouligny et al., 2007: 2-3).

The views of conflict affected populations have only rarely been considered in the creation or evaluation of transitional justice mechanisms; indeed, much of the literature of transitional justice is of experts speaking *for* victims:

[A] grave disservice is done to victims by those who seek to speak on their behalf, whether in the name of justice or reconciliation. By so doing, [...] they render the victims silent. Generalised and conveniently summarised victims' expectations tend to denigrate the complex and inconsistent human identity of such victims and survivors, ignoring the extent to which needs vary from victim to victim and change across time. Presumptions that victims need or demand punitive justice are no more reliable than are the claims that victims

are willing to forgive perpetrators who confess, or that they merely seek acknowledgement and symbolic reparations. (Cullinan, 2001: 19)

To respond to violations rooted in the experience of its victims demands an understanding of the subjective reality of victims, of the narratives and meanings that have been created by their experience of conflict: this requires an empirical and an ethnographic approach (Pouligny, 2006), necessitating empirical work of a highly interdisciplinary nature and an understanding of the role of the so-called 'primary' institutions of the family and community that hold the key to recovery from such extreme events (Bonnano, 2007; Sveaass and Castillo, 2000; Hawley and de Haan, 1996). Studies made on this basis can also begin to understand the implications for recovery at all levels: individual, family, community, institutions and the state.

This research examines the process of transition in societies emerging from conflict from the point of view of victims, and appraises the impact of contemporary transitional justice processes on victims. The research will allow victims themselves to identify their needs, and evaluate the extent to which transitional justice process has succeeded in addressing these. The research seeks to develop an understanding of what victims need and how transitional processes can fully respond to those needs.

### ***The Missing***

**missing:** *adjective* **1** absent and of unknown whereabouts. **2** not present when expected or supposed to be. (OED, 2010)

Definitions of the Missing flow from law, and in this study the Missing will be understood as all those "unaccounted for as a result of international or non-international armed conflict or internal violence" (Crettol and La Rosa, 2006: 355). This definition derives from International Humanitarian Law and can be contrasted with that deriving from Human Rights Law where 'disappearance' is confined to those persons taken under the control of states and never seen again, excluding those not explicitly arrested and cases perpetrated by non-state actors. These definitions and their implications are discussed in detail in Appendix I. Here, the Missing will include all those whose families are unaware of their fate as a result of conflict or political violence, and those killed in conflict whose bodies have not been retrieved by their families.

Disappearance is more than anything a demonstration of power and of the ability of the state to exercise control over individual life, what Foucault called biopolitics (1978).

Whilst modernity has given the state the potential to protect and nurture life, it has also enabled life to be included in the mechanisms and calculations of state power: “modern man is an animal whose politics calls his existence as a living being into question” (ibid: 188). Most of the Missing discussed here are those whose politics (or ethnicity) have led to their lives becoming subject to the capricious demands of states that feel threatened by them. More than simple killing however, disappearance confronts those impacted by it with the power of perpetrators; power to not only deny life, but to deny even confirmation of death. As a result, power is embodied not only in the very present absence of the bodies of the Missing but also in the minds and bodies of their families through trauma and somatism. More than any other violation disappearance has a power that outlives even the regimes and individuals responsible for it. The Missing, situated as they are between life and death, assume a power of their own, something familiar that has been made unfamiliar as a result of political repression. It is a defining feature of the Missing that they resist the dichotomous classification of present versus absent, and it is this that most determines the experience of the families of the Missing as characterised by ambiguity and ambivalence (Section 9.2). This ‘ghostly’ role that the Missing play is reinforced in the traditional societies studied here where the discontented spirits of the Missing are themselves actors in mechanisms to address the needs of families.

One of the key tensions examined here will be that between the bodies of the Missing as evidence of crime (the rhetoric of truth and justice) and the bodies as a reference point for mourning and the addressing of trauma (the rhetoric of memory) (Damanska, 2006). Whether the bodies of the Missing are considered objects of forensic investigation that serve judicial purpose or are sacred relics of a loved one that must permit mourning determines which of these understandings is prioritised. This thesis is premised on the understanding that work with the Missing serves the living and most notably their families. It will be seen that the bodies of the Missing represent a space of conflict between different interests, including power, knowledge and the sacred (ibid). The evidential approach will seek to emphasise the past, while families will seek approaches that permit them to address their present and their future, which will include the identification that transforms remains from an object into the relics of a loved one. In contrast to most approaches to the issue that privilege discourses external to the context from which the disappeared come, here the perspective that is prioritised is that of the families of the Missing.

It has been argued by Agamben (1998) that the abandoning of enemy bodies to spaces beyond legality, as most exemplified by disappearance, is simply the extension of other forms of disempowerment. That the social exclusion that typifies both the contexts studied here can be seen as a qualification for or prelude to disappearance will be explored in this thesis. This echoes Agamben's concept of 'bare life' (1998), in which certain groups occupy a liminal category excluded from legal protection. This emphasises the extent to which disappearance is a problem of *context*. People are disappeared as a result of who they are and the communities they come from and this is made possible by social exclusion that dehumanises them. As a result, the impact of disappearance is *collective* with entire communities affected, as is the explicit goal of such political violence. The role of context and community in both ameliorating and deepening the impact of disappearance for the families of those missing is ever present in this study.

## 1.2 Transitional justice: an introduction

This section aims to introduce transitional justice, the concepts that underlie it, dominant contemporary approaches and their critiques, through a brief review of the literature. Transitional justice describes what societies do to try to come to terms with the legacy of the past when emerging from a period of armed conflict or political violence (Teitel, 2000). Typically, these are institutional responses to violations of international humanitarian law, human rights law or domestic law that occurred during a previous regime. That transitional justice has become "an entire new academic discipline" (Weschler, 1998: 283) has been a consequence of the sheer number of transitions, largely to democracy, that have taken place since the end of the cold war (Garrett, 2000): the so-called "third wave" of transition (Huntington, 1991). Transitional justice emerged from a legal standpoint and whilst emphasising a prosecution based response to violations is dependent upon a broader understanding of the concept of justice that includes non prosecutorial mechanisms.

The goals of transitional justice include:

- Addressing the divisions in society that both caused the conflict, and that were created or deepened by the conflict;
- Seeking closure and healing wounds of both individuals and society at large, through "truth telling";
- Providing justice to victims, and making perpetrators accountable;

- Creating an accurate historical record for society;
- Restoring and strengthening the rule of law;
- Reforming institutions to promote democratisation and human rights;
- Ensuring that human rights violations are not repeated;
- Promoting national reconciliation, co-existence and sustainable peace.

(Anderlini et al., 2004; Hayner, 2011)

It is clear from the breadth of these goals, that transitional justice must necessarily define the concept of 'justice' in a way that goes beyond the traditional prosecutorial, retributive way it is understood in a criminal justice system. Whilst transitional justice process is about what has happened in the past, its aim is to modify outcomes in the future, i.e. "...to address the past in a constructive future-oriented manner" (Rigby, 2001: 2). The agenda of transitional justice in any particular context is of course highly contested, and there remain debates about who drives such process and whose goals are or should be privileged. The research of this study seeks to understand the extent to which the aims of contemporary transitional justice processes coincide with victims' goals of transition. In particular, we will seek to grapple with the concept of a "victim-centred approach" to transitional justice: a term often used (e.g. Aldana, 2006; Lemman-Langlois, 2000), most notably with reference to the South African Truth and Reconciliation Commission (TRC) (Republic of South Africa, 2003) to suggest that a process revolves around the interests of victims, placing them at its centre. This idea however remains poorly conceptualised, and is discussed in detail in Section 3.2.

Contemporary literature on transitional justice issues has been dominated by two general orientations, a legalist approach that is normatively driven, and a more pragmatic consequentialist approach, premised on achieving certain goals (Vinjamuri and Snyder, 2004). The legalistic approach is premised upon the primacy of a universal standard of justice, and is characterised by an emphasis on judicial process to enforce international law. The principal legalist argument is that trials of individual violators are the best way of preventing and deterring future violations (Orentlicher, 1991). It is also claimed that punishment is able "...to honor and redeem the suffering of the individual victim." (Weschler, 1990: 244), and that "...the individualization and decollectivization of guilt ... would help bring about peace and reconciliation." (Meron, 1998: 282). A legalist approach has heavily influenced the human rights community, notably certain NGOs, and this perspective has driven the campaign to create the International Criminal Court.

The consequentialist approach stems largely from political realism, and takes note of power relations in transition, and of the self-interest of elites in preventing retributive justice:

[W]hat happened was little affected by moral and legal considerations. It was shaped almost exclusively by politics, by the nature of the democratisation process, and by the distribution of political power during and after the transition. (Huntington, 1991: 213-15, discussing the transitions of the 'third wave'.)

Pragmatists are more likely to see trials as not always feasible, given limiting political factors. Non-retributive processes, such as the truth commission, were seen as crucial when the scope of prosecutions was limited by a desire to prevent a return to conflict (Cobban, 2007; Lambourne, 2009). Such a position refutes any antagonism between peace and justice, by pursuing all transitional goals, including accountability, but through whatever means are possible at any one time in the process (e.g. Roht-Arriaza, 2006). Such an outlook is more likely to consider non-retributive mechanisms as an alternative route to justice, pending the possibility of prosecutions at some point in the future.

Attempts to define transitional justice are also framed by these categories. A more legalistic definition is given by Teitel:

Transitional justice can be defined as the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes. (Teitel, 2003: 69)

Such a definition gives less emphasis to the many non-retributive mechanisms which have constituted much of the practice of transitional justice in recent decades: whilst transitional mechanisms in practice will be seen to be largely *institutional*, many of them are actually *non-legal* in nature (Section 3.1). Roht-Arriaza offers an alternative definition:

[T]ransitional justice includes that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law. (Roht-Arriaza, 2006: 2)

This definition broadens the remit of transitional justice beyond the purely legal, to 'practices, mechanisms and concerns', the latter indicating that the breadth of transitional justice includes potentially all those areas where society is impacted by the legacy of conflict. Whilst a legalist understanding sees transitional justice as 'justice to the extent possible', i.e. a limited justice, a broader view sees it as a "...a different *kind* or *type* of justice - one especially befitting the circumstances of transitional societies." (Llewellyn, 2006: 88, emphasis in original). This latter approach attempts to address past wrongs without undermining a potentially fragile transition and acknowledges that criminal justice may have to be compromised and non-retributive processes emphasised, in order to address the broader goals of transition. It does not acknowledge that the justice it seeks is limited, only that it is more appropriate. In such an understanding *restorative* approaches (Section 1.2) are usually emphasised, in contrast to the traditional, retributive response to wrongdoing.

### ***Concepts of transitional justice***

The fundamental objectives that drive approaches to transitional justice are typically defined as justice and reconciliation (e.g. Anderlini, 2004; Rigby, 2001; Abu-Nimer, 2001):

[In transitional justice] there are two underlying values involved: *justice and reconciliation*. Although they appear to be at opposite ends of the spectrum the goal in both cases is an end to the cycles that perpetuate war, violence and human rights abuses. (Anderlini, 2004: 1, emphasis in original)

The mechanisms of transitional justice, such as truth telling, payment of reparations or trial and punishment can be seen merely as instruments of these two concepts. This section aims to review the conceptual framework of transitional justice and the nature of its practice, as it is seen in relevant literature. The breadth of the understanding of justice, once seen beyond the confines of retributive process, can be substantial:

Justice here refers to a multifaceted, ongoing set of processes moving toward social relations that are regarded as equitable by the people engaged in them. [...] We are most concerned here with varying degrees of justice among parties in social relations, as assessed by members of those parties themselves. (Kriesberg, 2001: 48)

Whilst not all processes or approaches will presume such a broad definition, it will be seen that the goals of some processes are set high indeed, in terms that echo this understanding. By choosing to define justice in terms of *social relations*, this puts a successful engagement with those most concerned with the violence of the past at the heart of a transitional justice process.

Reconciliation is a concept that has been placed at the centre of ideas of transitional justice, and there is a consensus in rhetoric of its importance but no consensus as to what reconciliation actually means, or how to achieve it. Most acknowledge reconciliation as relationship mending and that after conflict: “Reconciliation implies that both parties not just get to know, but truly acknowledge, what happened in the past.” (Bar-Tal & Bennink, 2004: 11). Bar-Tal and Bennink (ibid.) propose the need for a ‘new narrative’ to replace the previous collective memory on all sides, suggesting that issues of truth and memory are at the centre of the process of reconciliation. The literature encompasses the ambiguity of reconciliation as both process and outcome. Much of the work on reconciliation that is now applied to societies emerging from conflict originated in concepts deriving from interpersonal reconciliation and, as a result, many psychological concepts such as hurt, trauma, healing and acknowledgement are applied (e.g. Barsalou, 2005). In much literature this vocabulary is applied to societies or communities, even though these terms may not be well understood in their new context (Fletcher and Weinstein, 2002): as long as the language and literature of post-conflict reconciliation borrow terms from social psychology which remain poorly defined or only vaguely understood the literature will not serve practitioners well. One alternative is to permit those most affected to define reconciliation on their terms; this will be attempted here.

### ***Retributive and restorative justice in transition***

Justice as retribution has been a traditional response to wrongdoing in many societies, and is considered to be crucial in societies emerging from violence to end cultures of impunity and ensure non-repetition (e.g. Olson, 2002). Whilst many emphasise the importance of maintaining global norms that demand the prosecution of those responsible for violations of international law, in practice it is extremely difficult to ensure the prosecution of all offenders. Pursuing prosecutions may not always be possible despite their desirability: where powerful elites associated with the previous regime still have sufficient power, prosecution will not be possible without threatening peace. Where prosecutions have occurred following transition these have often involved those at the

highest levels or with most responsibility for violations, i.e. “exemplary prosecutions” (Orentlicher, 2007: 15).

Contemporary approaches to trying perpetrators of violations of human rights and humanitarian law offer a range of possibilities. Justice has globalised with the rights discourse: international tribunals have been created in those situations where the international community believes it should contribute to the process (i.e. Rwanda and former Yugoslavia) and hybrid processes containing both domestic and international components have been used (e.g. East Timor, Sierra Leone, Iraq, Cambodia). With the creation of the International Criminal Court, there also now exists a standing global mechanism to address such violators where domestic courts are unable (Schabas, 2007). Data have been presented that suggest that domestic trials of human rights violators are the dominant mechanism of contemporary transitional justice (Sikkink and Walling, 2007): in each year of the last decade some 30 countries have been holding such trials. However, post-conflict judicial systems are likely to be weak and the domestic courts may be unable to handle the load. Punitive justice is seen as one of the principal priorities of victims, in that prosecutions can give victims a sense of justice that allow grievances to be addressed and so prevent further rounds of conflict. However, the fundamental limitations of prosecutions are that alone they will not address the range of concrete needs of victims, nor address the societal condition that led to abuses (Hayner, 2011).

Restorative justice is a term that has increasingly been used in the literature of transitional justice, but which originated in approaches to criminal justice (e.g. Zehr, 1990). Restorative justice sees wrongdoing in terms of harms to relationships, and aims to *restore* relationships between people and communities, after wrongdoing: doing justice means repairing these harms. The most obvious relationship damaged by an offence is that between victim and offender, but a restorative justice process aims to restore all relationships damaged by wrongdoing. Restorative process puts the victim at the centre of any process, rather than as witness or spectator, as in a purely punitive approach (e.g. Huyse, 2003: 111). This approach is echoed in the needs based approach of this study and may as a result aid an understanding of *victim-centred* justice in transition (see Section 3.2). Restorative justice is usually presented as an *alternative* to retributive justice since, whilst few have suggested that restorative processes can entirely replace the retributive in transitional contexts, they have a role to play complementary to judicial process, particularly where the latter is delayed or denied. In

addition to the concepts of victim and community participation in restorative models in criminal justice, there is an emphasis on contact between victim and offender:

Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. (United Nations, 2002).

Whilst a significant literature exists on the restorative model in a transitional context (e.g. Gormally, 2005; Menkel-Meadow, 2007; Llewellyn, 2006) it remains under conceptualised. In transition the nature of the restoration of relationships will differ fundamentally from those in a criminal justice context:

Restorative justice does not aim at a return to the status quo ante. It is not focussed on discovering some prior state of equality to which it seeks to return. If this were its ambition then restorative justice would have nothing to offer transitional contexts, in which very often the history of the society is one of inequality and intergroup conflict, oppression, or violence. (Llewellyn, 2006: 92)

In terms of facilitating justice (in its broadest sense) and reconciliation, restoration is less likely to be a backward looking concept, and more likely to involve looking forward to a future situation in which both the injustice of the violation and any general longstanding injustice in the relations between victim and perpetrator are addressed. In a typical situation where the perpetrator is the state this suggests that restorative goals are very broad indeed, if they include an addressing of issues of general social injustice. However, many transitional processes do include such aims, at least notionally. The relevance of restorative justice for a victim-centred approach to the missing issue is discussed in Section 3.2.

### ***Contemporary approaches to transitional justice and their critiques***

Two profound critiques of current transitional justice process drive the methodology of this study, namely the lack of an evidence base for most interventions, which drives the empirical element of the research, and the lack of victim agency in most processes (Section 2.2.2), which is the basis for a needs driven study, using the language that victims themselves choose. There is a range of other critiques of contemporary practice in transitional justice relevant to this study, largely centred around the fact that it is

perceived as offering a 'one size fits all' approach (Crocker, 1998; Nagy, 2008) to post-conflict societies that can fail to appropriately consider the context in which it works. Transitional justice has been called "implicitly prescriptive" (McGrattan, 2009: 165) and accused of representing a solution to the challenges of post-conflict societies that is highly decontextualised (Nagy, 2008).

Much conflict in low income states is structurally driven by poverty and exclusion, with victimhood often exacerbating existing livelihood challenges. Whilst transitional processes are not a panacea to solve all the problems of states emerging from conflict, they do permit an examination of the broader injustices in society. To prevent the re-emergence of conflict it will often be necessary to address the grosser aspects of social exclusion and a lack of access to basic needs, and in this sense, social and economic justice will be on the transitional agenda (Arbour, 2007). This is a test of the limits of transitional justice: victims seek to confront the poverty of the past, rather than seek a return to it through a purely restitutive process. If transitional justice is to address the past in ways which impact on the future (Rigby, 2001), then as well as the violence of violations it must confront the structural violence of poverty and inequality and a lack of economic development that very often contributed to conflict. Transitional justice has been critiqued for largely ignoring such issues historically, but has recently begun to engage with the issues of development and social injustice (e.g. Mani, 2008) and to challenge a narrower understanding of its remit. Many conflicts emerge from systematic social, economic and political marginalisation on the basis of ethnicity, gender and/or class. Those most disempowered in such societies seek approaches to transition that aid empowerment, and address not just the direct impact of conflict but also help deliver social justice. The rupture that conflict and transition represent can be used to advance progressive agendas and challenge inequalities that threaten long-term peace, to deliver 'transformative justice' (Lambourne, 2009). The data of this study will be used to reflect on how reparation might potentially address such issues and how it can be linked to issues of development.

### ***Transitional justice and the liberal peace***

The language of peacebuilding has emerged to imply that peace is a practice that can be consciously pursued, rather than something which simply emerges when conflict ceases (UN General Assembly, 1992). It is an overarching concept that includes conflict transformation, justice, the healing of trauma, reconciliation, development and governance: it clearly overlaps, and by some definitions entirely contains, transitional

justice. Peacebuilding has become a label used by a range of organisations working in conflict and post-conflict contexts as well as by the international institutions of the UN and its powerful member states in describing interventions of all types. Emerging as it did in a post-Soviet world where a liberal-democratic dispensation was perceived as the goal of peacebuilding, the peace that such interventions try to build has been called the 'liberal peace' (MacMillan, 1998; Duffield, 2001; Paris, 2004). The strongest critique of the liberal peace is that the institutions of liberal democracy are the priorities of such peacebuilding, with an emphasis on peace agreements, elections and the mechanics of democracy, rather than a commitment to social justice (Richmond, 2002 & 2006). It is argued that the liberal peace is a peace 'from above', imposed by the powerful according to a global prescription that serves to reinforce existing hierarchies of power and neglect the social, economic and political needs of those most affected by conflict (ibid). This extends to critiques of transitional justice:

To further understand how transitional justice actors often rob victims of their agency in ways that are inimical to victims' empowerment, let alone active citizenship, we need to view 'transitional justice' as a global project aimed at reconstructing Third World states in Western liberal democratic terms (Madlingozi, 2010)

The implications of this critique for the addressing of legacies of violence is that both the inputs to and outputs of transitional justice are constructed to align with liberal democracy, blind to social justice and the structural violence that underlies conflict (Nagy, 2008; Mani, 2002). Such approaches ignore cultural and social factors that differentiate the contexts studied here from the "benevolent models" (Nagy, 2008: 277) of the liberal democracies that promote them. This echoes Galtung's understanding of a 'negative peace', implying the absence of armed conflict, and a 'positive peace' in which all forms of violence, including the structural, are addressed (Galtung, 1996). Both transitional justice and the liberal peace of which it is often a component have a vision that aligns largely with that of peace as the absence of armed conflict.

Whilst definitions of transitional justice have broadened from previously highly legalistic definitions to include issues of social justice (e.g. Roht-Arriaza's, in Section 1.2), such elements remain almost wholly absent from practice. The 'global project' (Nagy, 2008) that transitional justice has become is criticised for consisting of a range of mechanisms that reflect a liberal bias that emphasises freedom and liberty over equality

(Mani, 2002) and consistently assign lower priority to the gendered and socioeconomic impacts of political violence than its victims do. Whilst approaches that also emphasise social, economic and cultural rights have begun to be discussed, these remain largely absent from praxis (Arbour, 2006). The alternative proposed by those advancing this critique is an *emancipatory* peacebuilding, rooted in the lives of ordinary people:

[W]hereas the Liberal peace is concerned first with centralizing the 'legitimate' use of force in the hands of the State and creating elite political institutions in metropolitan centres, emancipatory postconflict peacebuilding is not constrained to such limits [...] it would reflect what a majority of the population needed after mass direct violence has been checked. And, rather than the locus of such discussion involving solely elite institutional democratization, it would be concerned with matters identified by the population, from below. (Roberts, 2011)

This perspective informs the desire here to seek a *victim-centred* process (Section 3.2), one rooted in what victims seek from transition and in the everyday lives of the conflict affected. Whilst conceptual discussion of the emancipatory peace as an alternative to a hegemonic liberal peace is well advanced (e.g. Richmond, 2007; Patomaki, 2001), there is little empirical work that engages with the concrete needs and views of the conflict affected in a specific context. This study thus constitutes one of the first empirical efforts to concretise the implications for emancipatory and transformative approaches to peacebuilding.

### **1.3 Aims and objectives of the study**

Armed conflict has always left a legacy of human misery in its wake and continues to devastate lives across the globe. Contemporary conflict is fought not on the battlefields of the past, but in communities and population centres (Münkler, 2004; Kaldor, 2007). Increasingly conflict is internal to the state, inter-ethnic and inter-communal: violence involves states targeting their own populations and insurgents targeting civilians. The laws of war and the international norms that have been painstakingly established over the last century to define the limits of conflict are increasingly violated. The result of such violence is to transform individuals, communities and societies; new social identities are constructed by conflict (Theidon, 2007). Those most deeply affected are the victims of conflict, with lives and families utterly changed by their experience and their victimhood

used by those who benefit from conflict to mobilise their community, deepen social divisions and perpetuate violence.

From the starting point of the highly contingent everyday needs of victims of conflict, this study seeks to engage with the following themes:

- *An evidence base for work with victims of conflict:* Norm based approaches tend to deprioritise the need for an evidence base and in much current transitional justice practice there is little emphasis on the impact of such processes (van der Merwe, Baxter, and Chapman, 2009). This study will propose methodologies for evaluating the quality of transitional justice processes that are rooted in the needs of victims.
- *A contextualisation of transitional justice process:* Universalist approaches do not significantly acknowledge culture and the particular as inputs to the development of mechanisms to address legacies of violence. This study will determine the extent to which such generalisation is valid.
- *Needs and rights:* Whilst transitional justice emerges from a rights driven approach, it ultimately aims to address the needs of both individuals and societies. This thesis will examine what concepts of both victims' needs and rights bring to the understanding of processes to address violations in conflict and how these respective perspectives interact with the power relations that determine who drives transitional justice process.
- *Victim agency and empowerment:* This thesis will ask who determines what processes occur to address violations in conflict and what role victims play in their creation, particularly in highly unequal societies. It will seek ways in which marginalised communities that have been victimised can become agents in addressing the impact of violations.

This study proceeds from the premise that victim needs can be a crucial part of a state's efforts to recover from conflict and build sustainable peace. Here the needs of victims of conflict will be assessed as a potential driver of transitional process, in contrast to rights driven approaches that are led by a legalist logic. It is argued that reframing transitional justice as needs based necessarily localises approaches, challenging the prescriptive and universal nature of global discourses, and leading to local and particular approaches that emerge from the culture and context. This work aims to impact policy in

states in transition and of the international community in working with such states, to inform theories of transitional justice and provide evidence of the feasibility of a *victim centred* approach in societies in transition.

This victim-centred and needs based approach is explored using a set of victims of disappearance, perhaps the most difficult violation to address and one that severely impacts the families of those missing. The contexts researched, Nepal and Timor-Leste, are typical of those in which much contemporary conflict occurs, low income states with long histories of violence and inequality. Ethnographic research methods are used to understand the impact of disappearance on families and the range of needs families perceive their victimhood creates. This research has been conducted in a participatory way with families and victims' organisations with the explicit aim of impacting ongoing responses to violent pasts in both primary contexts. The needs of those families, in the broadest sense, are investigated and the success of transitional justice mechanisms in addressing those needs is tested. This research constitutes a victim centred evaluation of the efficacy of transitional justice in societies emerging from conflict in answering victim needs, as perceived by victims themselves.

The orientation of the study as a victim driven exploration of the impact of disappearance necessarily demands that it draws upon a range of disciplines, rather than attempting to examine victim experiences through the lens of any one particular approach. As a result this research engages with a diverse range of approaches, including law, psychology, anthropology, memory studies, post-war recovery and peacebuilding, among others. One implication of a victim-centred approach is that the politics of victimhood, of disappearance and of post-conflict contexts more generally is made explicit: the addressing of the needs of families of the Missing demands political action both in relation to disappearance and to communities that were traditionally excluded.

### ***Towards an evidence based transitional justice***

The most relevant question to ask when trying to review or evaluate transitional justice process is "Did it make a difference?" (Roht-Arriaza, 2009: viii), and this is a question that directly challenges the substantial body of research and scholarship that exists in the field. The tradition of scholarship in transitional justice is of the study of transitional mechanisms through a largely descriptive approach, rather than through empirical research that uses observation to accumulate evidence for or against theory.

One issue with many empirical studies in the field is that their starting point is an institution of transitional process. Measuring the impact of a transitional justice process necessarily demands asking if the broad goals of transition were met, and not just if any one mechanism, such as a truth commission, satisfies its particular aims. Studies that start from the needs of transition of those most affected, such as victims, as well as of the broader society, offer the possibility to both construct and evaluate what has been called 'evidence-based transitional justice' (Pham and Vinck, 2007). Beyond this there are questions as to who defines what is being measured, particularly in terms of operationalising abstract concepts such as truth and reconciliation, in practice largely done by elites and external experts remote from the lives of those most affected. Here, the victim-centred approach explicitly aims to allow victims to articulate the goals of a transitional justice process and to evaluate its success in terms of meeting those goals. This is done through an ethnographic approach, with a participatory component that gives victims the opportunity to both steer the direction of the research and to benefit from its outputs. This study thus constitutes Action Research, in that it aims to impact on both the victims studied and on national policies towards the families of the Missing.

The symbolic worlds victims and their communities (and indeed perpetrators) occupy determine how the events of the past are perceived and, inevitably, how they should be addressed:

Particularly crucial in such a process are the public and private rituals and narratives that sustain collective and individual memories of the history, causes and course of mass crime. (Pouligny, Chesterman and Schnabel, 2007: 12).

Recovery from the events of conflict for such communities means developing new narratives of the past. To construct coherent and comprehensive interventions in such communities demands empirical studies, of a necessarily ethnographic nature to understand the highly contextual needs of victims. It also requires an acknowledgement that victims are not passive subjects of intervention, restricted to being witnesses in trials and recipients of reparations, but *actors* who can be mobilised on the basis of their victimhood to prolong conflict, just as they can become the prime movers of reconciliation and peacebuilding. Victims and communities have resources that can be mobilised and coping mechanisms that can be strengthened to transform both their own lives and their societies, but this can only be done on the basis of an understanding of

what these are and what victims need. This understanding forms the foundation upon which the study of this thesis is built.

## **1.4 Research design**

Here the formal structure of the research design is reviewed in terms of the research question, supporting theoretical propositions and questions of validity.

### ***Research question and theoretical propositions***

*How effectively do transitional justice processes address the needs of families of the Missing in societies emerging from armed conflict and political violence, and which mechanisms are most effective in addressing those needs?*

This question has two components, namely an understanding of the needs of families of the Missing, and a study of the effectiveness with which transitional mechanisms address those needs. This leads to additional theoretical propositions that will be tested in this work

### ***Proposition one***

The needs of families of the Missing are largely described by the following:

- Truth, human remains, resources, justice, support.

The priorities families assign to these needs depend upon culture, context and degree of need; the marginalised who constitute many of the victims of contemporary conflict prioritise basic needs over prosecutorial justice. Support here is to be defined contextually, but is likely to include both emotional support and assistance with basic material needs.

### ***Proposition two***

The mechanisms created during the transitional period to address issues arising from conflict are largely determined by the balance of political forces at the time: victims of the conflict play little role in this and their needs are generally not given a high priority in the development of transitional mechanisms.

### ***Proposition three***

Rights driven approaches fail to give sufficient consideration to the social, economic and culturally contingent needs of victims, prioritising instead civil and political rights.

#### ***Proposition four***

Transitional justice mechanisms are most likely to address the needs of victims when victims participate in both their creation and implementation.

#### ***The research approach***

A case study is: "...an in-depth, multifaceted investigation, using qualitative research methods, of a single social phenomenon." (Feagin, Orum and Sjoberg, 1991: 2): as such it is peculiarly suited as a strategy for this research. There are two principal components to the research: the understanding of family needs, and the study of transitional mechanisms and their effectiveness in meeting those needs. The focus on families of the Missing allows the latter question to be answered through the understanding of the families themselves. Implicit in this is a constructivist ontological approach that understands that victims' views of both their needs and the success of efforts to address them are a product of their own cognition.

The case studies seek to understand the ecology of a transitional society at several levels, notably those of victims, civil society and those driving the transition: each case is thus a *vertical* case study (Vavrus and Bartlett, 2006), albeit with an emphasis on victims. These analyses allow an understanding of the interconnectedness of observed phenomena with global processes, and how power and policy are locally instantiated (*ibid*), situating local action and interpretation within a broader political and historical investigation. To understand the complex nature of the transitional mechanisms in any context demands an engagement with a number of actors at various social locations, and the study of a wide range of issues that interact. In bringing the two strands of the analysis together and understanding which transitional mechanisms have addressed which needs in any one context, there is a need to understand the interaction between the mechanisms and the needs of families (i.e. across the vertical levels of analysis). Thus whilst the data of the study derives primarily from families, the needs they express are contextualised in the framework of an ongoing transitional process driven by other actors.

The unit of analysis in this research, i.e. the 'case' being studied, is the interaction in each context between the transitional justice mechanisms and the needs of

the families. This is a result of the study seeking to understand not just the needs of families of the Missing but the impact that transitional justice has on them: the quality of this interaction determines the effectiveness of a victim-centred process. Since there are two components to the analysis this will be approached using two embedded units of analysis, namely the needs of the families and the transitional mechanisms (or more precisely the performance of those mechanisms). The empirical results of the case study research will be generalised using the theory developed by the propositions of Section 1.4 (*analytic generalisation*). Thus the two embedded cases, concerning the needs of families and the performance of the transitional mechanisms, will be generalised to the relevant propositions (namely one and two respectively). The results of the global analysis of the effectiveness with which the mechanisms meet family needs will be generalised using proposition three. The interpretations of propositions one and three are defined by families and so these will necessarily be unambiguous. The veracity of proposition two concerning the drivers of transitional mechanisms will be inferred from data largely derived from documentary sources and elite interviews, and care will have to be taken not to permit the common rhetoric of inclusive process to obfuscate the largely elite origins of most mechanisms. Proposition three, understanding the role the global rights discourse plays in the development of transitional justice process and its relationship to victim priorities, will be tested through a comparison of the priorities of victims with those expressed by elites, both in interviews and in documentary sources. The final proposition is likely to be the most difficult to confirm or refute, since victim participation in transitional process remains minimal in all contexts: conclusions will be drawn on the basis of experience where victims have been able to play a role in such mechanisms.

The contexts studied have been chosen to provide the most effective set of cases to test the propositions of Section 1.4 and in so doing to effectively answer the research question. This choice will now be justified.

To understand family needs (proposition one), since a literal replication of results in each context is expected, we need only to ensure that contexts with a sufficient sample of families of the Missing can be accessed. In order to control for potential cultural effects in the data, these contexts should ideally be culturally similar in some respects. Given that the addressing of some needs can affect the perception of others (as illustrated by Maslow's pyramid of needs in Section 2.2.4), ideally one context should be at an early stage in the development of transitional processes, i.e. where needs have

not yet been addressed at any significant level. To understand what drives transitional process (proposition two), why some mechanisms are created and not others, and the political process behind this, requires an early stage transition that can be studied in some detail. Conversely, to understand the nature of transitional process and which mechanisms are effective in addressing family needs (proposition three), it is necessary to find transitional process that is rather advanced, i.e. a context where any ongoing process is highly developed. The advanced context studied should also present a range of transitional process, including both restorative and retributive components, so that the effect of each can be studied in terms of the addressing of needs.

The two contexts chosen, Timor-Leste and Nepal, thus represent two states in transition, comparable in some ways culturally, that represent one well advanced transition and one that is at an early stage. The discussion of Chapter 4 demonstrates that both Nepal and Timor-Leste are low income states, suffering from inequality and uneven development and both emerging from decades of structural violence and armed conflict. Cultural traditions in both states are important to those who suffered most in the years of conflict and traditional structures of governance, healing and spirituality have thrived as a remote state remained barely present in many areas. Rural communities in both Nepal and Timor-Leste have been forced to rely on their own resources and have a relationship with the post-conflict state that remains ambiguous in many respects. Experiences of disappearance in the two contexts resonate: in both a majority of cases were perpetrated by a state from which rural people were alienated, with a minority perpetrated by those who claimed to be fighting on behalf of ordinary people. The transitional process in Timor-Leste is considered largely complete, while in Nepal in the two years between the end of armed conflict and this research, political stalemate prevented any progress on the mechanisms of transitional justice. In both contexts violence and instability has continued as those who feel excluded by the emerging post-conflict dispensation, encouraged by political spoilers, resist elements of current governance.

### ***Scope of the study***

This study has the primary intention of contributing to the theory and practice of transitional justice and responses to violations in conflict more generally, but also of increasing understanding of the impact of disappearance. The study has created a qualitative data set with victims of conflict in two contexts that is largely unprecedented in terms of its ability to inform processes to address victim needs. Transitional justice

remains resistant to the use of empirical methods, with most studies rooted in largely descriptive approaches rather than rigorous evaluation or comparative work (van der Merwe, Baxter & Chapman, 2009; Fletcher, Weinstein & Rowen, 2009). This study conceptualises a victim-centred approach to transitional justice that can be used to both steer and evaluate transitional justice process according to victim priorities. It represents a proof of concept of an empirical evaluation technique that seeks to test many of the assumptions that underlie transitional justice, particularly concerning the value to victims of trials and truth processes. It also demonstrates the importance to the addressing of the impact of political violence of culturally particular understandings, such as the spiritual, and challenges a liberal Western perspective of what drives change in traditional societies.

The study highlights novel approaches to addressing legacies of violence, such as psychosocial programmes (Section 9.2) and 'valorisation' schemes (Section 7.5) that are not part of mainstream transitional justice practice. It also serves to underline the importance of issues of basic needs and livelihood to victims in low income contexts that remain marginal in the transitional justice discourse, and consequently demonstrates the need for an engagement of transitional justice with the broader issues of development and structural violence. The study ultimately argues that a rights driven approach is not congruent with one that addresses the needs of those most impacted by violations, and that the rights discourse fails to define an agenda that coincides with that of victims. More generally, this study has confirmed the irrelevance of much transitional justice process to victims, as a result of its origins among elites and foreign experts, far from the lives of those most affected by violence. It is shown that transitional justice can be a discourse used by domestic elites to advance their own agendas at the expense of the traditionally marginalised and thus remains intrinsically political (Section 9.1).

This study represents the most comprehensive of families of the Missing in any context that aims to articulate victim priorities, rather than investigate solely on the basis of an external agenda (e.g. Wagner, 2008). It demonstrates that one cannot generalise about the needs of such victims, as they are deeply contingent upon the context, in terms of culture, livelihood and power relations in family, community and society. Spiritual aspects become crucial in societies where the spirits of the dead are considered to be actors in a transitional process. In patriarchal and hierarchical societies, disappearance can deepen and complicate issues of stigmatisation and exclusion. In both Nepal and Timor-Leste the results of the study have been published (ICRC, 2009:

ICRC, 2010a) with the intention of impacting policy makers, and in both contexts legislation has been modified in direct response to its findings (Section A4.5).

## **1.5 Thesis structure**

This section summarises the layout and contents of this thesis. Following this introduction, Chapter 2 seeks to localise victims in the post-conflict context, understanding both the impact they and their unmet needs have on prospects for peace or continued violence and reviewing the range of needs articulated by conflict victims. Global and universal human rights are compared with the local and particular needs voiced by victims. The literature on the needs of families of the Missing is then reviewed, and an argument made that victims' needs must be privileged in post-conflict contexts to ensure sustainable peace. Chapter 3 continues the review of relevant literature, by examining the mechanisms that have defined the praxis of transitional justice, each of which is addressed in terms of its potential to impact upon the needs of the families of the Missing, and the neglected topic of gender in transitional justice is introduced.

Chapter 4 introduces the two contexts, Nepal and Timor-Leste, studied in this thesis. For both, cultural issues are discussed, including social structures and attitudes to death that can be important in approaching the missing issue, and the histories of violence that led to persons being missing briefly outlined. The status of transitional justice in the two contexts is then presented and the literature around those processes, very modest in the case of Nepal and substantial for Timor-Leste, reviewed. The two contexts are then compared in terms of their relevance for this study: many similarities are found not least in the way in which transitional justice process is exclusively defined by elites.

Chapter 5 describes the methodology of the research, introducing the ethnographic and participatory philosophy that underlies it and the engaged, activist role of the researcher. The formal research structure, in terms of the research question and supporting propositions, is presented and the qualitative research methods (interviews and focus group discussions) outlined. Potentially problematic issues of sampling and of ethics, addressed largely through the participatory element, are discussed.

The data collected in the two contexts are presented in Chapter 6 (Nepal) and 7 (Timor-Leste). In each case this begins with a profile of the more than 150 families interviewed and a summary of the priorities they identified when asked an open question

about the needs arising from the disappearance. This is followed by the presentation of data concerning each of the needs discussed, using quantitative data from interviews as well as qualitative input from both interviews and focus groups, including quotations from victims. Chapter 7 includes an overview of victims' attitudes towards the transitional justice mechanisms that are largely complete in Timor-Leste, providing a victim-centred evaluation of the decade of transitional justice process.

Chapter 8 and Chapter 9 aim to discuss the data and draw conclusions for processes in Nepal and Timor-Leste and for transitional justice process more generally. Chapter 8 critiques the practice of transitional justice in the light of the gap seen between the needs of victims and the goals of contemporary process. It highlights the 'top-down' nature of such process, the dependence upon the concept of truth as reconciliation and healing, the excessive legalism that defines it and the failure of reparative process to be relevant to disempowered communities. Chapter 9 seeks to use the data of the study to provide a context for transitional justice to be more relevant to victims. It outlines how and why transitional justice is a largely elite discourse and how issues that appear to be of an emotional or psychological nature for victims can have a substantial impact on the politics of memory in a society attempting to deal with a violent past. The importance of culture in such processes in traditional societies is then discussed, considering how trauma expresses itself in a society where the spirit world is important and how the rights discourse that drives transitional justice is a fundamental challenge to how traditional people conceive of their world.

The final chapter, Chapter 10, aims to make concrete proposals for the creation of victim-centred transitional process, on the basis of the data of this study. It suggests that transitional justice as a discipline is too narrow to address the needs of victims, and broader approaches, including recovery and peacebuilding must be integrated with it. A victim-centred process is conceptualised in terms of challenging liberal approaches that dominate transitional justice today and ensuring the agency of victims, through empowerment and mobilisation.

Four Appendices add further details. Appendix I discusses legal definitions of the Missing and the disappeared; Appendix II contains the research instruments, semi-structured interview scripts, used to collect data from families of the Missing in each of the two contexts; Appendix III lists the interviews and focus groups made in the two contexts; Appendix IV summarises the recommendations of the study for the

Governments of Nepal and Timor-Leste in terms of addressing the needs of the families of the Missing and concludes with a summary of the impact of the Action Research component of the research on legislative and other processes in both.

## **Chapter 2 Emphasising the local and the particular: Needs after conflict**

This chapter describes the contingent nature of the demands of victims of conflict of both transitional justice in particular and the transition more broadly. These are dependent on the type and form of violence to which they have been subject, but also on the socioeconomic context in which it occurred and the impact of marginalisation and disempowerment that both pre-existed the violation and is exacerbated by it. This chapter explores the literature on the nature of the overlap and interaction between needs and rights and in particular their respective links to the local and the universal. It seeks to understand the implications for victim agency of privileging a particular discourse in the light of victims' demands. This discussion serves to define a framework in which the empirical work of this thesis is made, using a methodology that does not privilege either needs or rights, but seeks to understand victims' articulation of the way they seek to address the impacts of their victimisation, on their own terms. It will be seen that the majority of victims met in the study, poor and with little formal education, predominantly articulate their demands in terms of *needs* (Chapter 6 and Chapter 7).

### **2.1 Post-conflict recovery and the needs of victims**

Whilst there are normative reasons to prioritise the addressing of victim needs: "societies have a special moral obligation to those who have suffered the worst" (Soni, 2009: 192), there are also very practical motives. Conflict victims<sup>1</sup> occupy a unique role in their societies; they signify the history of the conflict for a community, shaping memories of suffering, and their needs can serve to justify further violence. This work contends that victims and the needs of victims should be privileged to maximise the success of peacebuilding and transition from conflict.

Violent conflict occurs when "society cannot manage or resolve its different interests in a productive manner, thus initiating a degenerative or destructive cycle of violence" (de Zeuw, 2001: 10). A principal aim of transitional justice is to end such cycles of violence by addressing the consequences of conflict and, as a result, the causes of future conflict. Whilst the fields of transitional justice, post-conflict recovery (or reconstruction) and peacebuilding are uniquely defined, in practice they necessarily

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<sup>1</sup> Definitions of who is a victim are discussed in 2.3.

overlap (Barakat, 2005): all are ultimately about the prevention of future conflict. This has been made explicit by Leatherman, who writes that conflict interventions require: "...a rehabilitative dimension oriented to the past, a resolute dimension oriented to the present, and a preventive dimension oriented to both the present and future." (Leatherman, 1999: 204) This could equally serve as a description of the broader aims of transitional justice (see Section 1.2). The World Bank's definition of post-conflict reconstruction focuses on "the rebuilding of the socio-economic framework of society" and the "reconstruction of the enabling conditions for a functioning peacetime society [to include] the framework of governance and rule of law." (World Bank, 1998) An emphasis on governance has emerged in the recent theory and practice of post-war recovery (e.g. Barakat and Chard, 2002) as the most crucial component in preventing state failure that is both a cause and consequence of conflict. Whilst governance approaches often focus on institutions, definitions of fragility include issues of rights, poverty and development, with state fragility characterised as "the *failure of states to perform certain functions* to meet citizens' basic needs and expectations" (McGloughlin, 2009, emphasis in original). As such, a needs-based approach would appear to be an effective way to measure fragility, effectively the lack of governance. Governance has, in turn, been defined as consisting of *security, legitimacy* and *effectiveness* (Brinkerhoff, 2005): successful post-conflict governance demands the delivery of all of these to populations.

Violence will often continue in a limited fashion in a post-conflict context, and the challenge is to contain and defuse it. *Security* after conflict is most threatened by 'spoilers' (Stedman, 1997) seeking to advance agendas that challenge peace. Victims play a crucial role in justifying the violence of spoilers: the cycle of conflict is largely perpetuated by feelings of revenge for real or imagined transgressions:

After violent conflict, revenge takes many forms, from reciprocating one's own suffering by expelling the expeller to creating myths about the eternal evil of the ethnic Other. Often motivated by personal frustration with continued injustice, individuals act to solve their own problems where jural authorities, or the state, will not or cannot act. (Borneman, 2002: 288)

Often the locus of a spoiler problem will be a victim community seeking recognition and redress of a grievance, real or imagined (Stedman, 2000: 12-14): the perceived suffering of victims will serve to mobilise a community and legitimise a discourse of continued violence: "Indeed hatred (and the desire for revenge) often seems to be more

the result than the cause of violent conflict...” (Mueller, 2004: 15). This is particularly true in traditional societies where networks of social relations provoke much stronger obligations than are felt to the state (Boege, 2007). To undercut such appeals for revenge, the grievances of victims must be understood as broadly as they are by victims themselves, and not according to some external and prescriptive discourse. *Legitimacy* of post-conflict governance refers to the acceptance by populations of a post-conflict regime as correct and appropriate (Brinkerhoff, 2005), ultimately understood to revolve around a population’s willingness to be ruled (e.g. Simmons, 2001). In most transitions the new regime is linked to at least one of the parties to the conflict and, as such, the victims of those assuming authority will be the most challenged to accept the legitimacy of the new authorities.

To maximise victim communities’ acceptance of the new regime the state must make efforts to be inclusive, representative and to address injustices perceived by victims: participation from victim communities in governance, including in institutions devoted to transitional justice can serve to demonstrate this. This will be particularly relevant where victims come predominantly from minorities who have not traditionally felt allegiance to rulers from the majority community. Victims are the most vulnerable in their communities; they are the displaced, the disabled, the orphaned and the widowed. They are visible to their community as in need of services from the state and represent the greatest challenge to the *effectiveness* of the state. Despite the addressing of the needs of the population not featuring highly in the legitimacy discourse in comparison with the satisfaction of international norms, there is an emerging literature that challenges global benchmarks as the sole basis for the legitimacy of governance. Milliken and Krause (2002) suggest that everyday needs and their addressing are a source of legitimacy for the state, expanding understandings of what creates conditions for governance from security and order to welfare and basic needs. Given that the populations of post-conflict states are often characterised by extreme and unmet needs, the ability of a state to deliver core services and address needs is perceived as impacting upon its legitimacy (Clapham, 2003; Call and Cousens, 2008). Defining legitimacy locally, rather than according to global benchmarks, and understanding that populations legitimate states according to the lives they lead, has been called “performance legitimacy” (Francois and Sud, 2006), relating both to the policy priorities of states and the quality of their realisation. Where victims’ needs can be met their communities can gain confidence that the state not only intends to serve them but also that it has the capacity to do so. This in turn serves to enhance the legitimacy of the new regime in the eyes of the victim

community. Since issues of legitimacy and governance in large measure depend upon victims, with their treatment crucial to the acceptance of a post-conflict dispensation by those to be governed, victim-centred<sup>2</sup> approaches can act as an empirical test of the quality of governance at the grassroots.

## **2.2 Needs and rights, the local and the universal**

This section explores the relationship between needs and rights in the context of the violations of conflict, and the implication for work with victims of privileging one over the other. Rights have emerged in recent years as the central focus for most work with victims of conflict and remain the central pillar of transitional justice, constituting claims rooted in law. Rights arise from a universalist discourse, with claims of global validity and relevance, while needs are contingent upon all aspects of context and the circumstances of the individual or group articulating them. Whilst human need remains a leitmotif in humanitarian aid and the very justification for its existence, there is little theorising about what constitutes needs in such work and who defines them. This section reviews the literature on theories of need and attempts to understand how needs and rights relate to each-other and the implications for understanding and addressing victims' demands. This study seeks not to normatively prioritise either approach but in articulating a victim-centred approach uses open questions to understand what victims seek. This permits victims to use the language that they prefer and that reflects their own experience, and serves to guarantee victim agency in the elaboration of a victims' agenda.

### **2.2.1 The global rights discourse and the local victim**

The needs focus of this study arises indirectly from a very traditional critique of rights, namely that the subject of rights is abstract in nature, divorced from the real person who is both socially situated and constructed:

Abstract rights are so removed from their place of application and the concrete circumstances of the persons who suffer and hurt that they are unable to satisfy their real needs. (Douzinas, 2002: 154)

Such abstraction contrasts with the very real needs with which victims are confronted daily in the highly unequal societies studied here. The subject of human rights has lost

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<sup>2</sup> *Victim-centred* as understood in this thesis is defined in Section 3.2.

her real identity, with its class, gender and ethnic characteristics, even though these lead directly to many of her needs. Indeed, an increasing critique of transitional justice practice is that the structural violence of poverty and exclusion is absent from its remit (e.g. Mani, 2002 & 2008). For both structural factors and the violence of conflict many impacts are collective, impacting communities as well as individuals, and demanding approaches that encompass the collective and the social. This section will discuss the efforts made to bridge the gap between local circumstance and universal rights discourse to address very particular needs.

Whilst the claims to universalism of the discourse of rights have long been critiqued from a culturally relativist perspective (e.g. Donnelly, 1984; Perry, 1997; Franck, 2001), this is not the aim of this thesis. It seeks rather to understand how rights work in the real world, in particular contexts with particular people, subject to victims' limited understandings of what rights are and existing power relations as well as the cultural world in which victims live. Rights operate in contexts where they must compete with other normative frameworks and subject to a range of competing political agendas: there is ultimately a disjuncture between the universalist conception of human rights and the local scale upon which social actors use the concept.

In order for human rights ideas to be effective, they need to be translated into local terms and situated within local contexts of power and meaning. They need, in other words, to be remade in the vernacular. (Merry, 2006: 55)

This section aims to summarise more recent efforts to nuance the understanding of the practice of human rights work with an appreciation of context and of local and particular perspectives, notably those that engage with anthropological approaches and are largely discursive. Such approaches see human rights as constituted by the actions of actors in a context, rather than this being merely the site for the articulation of a universal concept (e.g. Baxi, 2002).

Conflict, and in particular the ethnic conflict that has characterised many of the wars of recent decades, has been driven by understandings of culture. Just as culture can serve to incite and prolong war so it plays a substantial role in defining the needs of its victims, even where this is seen not as something eternal and essentialised, but rather as contingent and constructed, often by the conflict itself (Nagel, 1994). Whilst this may be seen as reducing the contribution that can be made by a universal rights discourse, it has been suggested by rights scholars that culture can itself be an analytic

tool to “make sense of claims-making in the global context” (Cowan, Dembour and Wilson, 2001: 2), in which the pursuit of rights is seen as a cultural process. Whilst the cultural relativist critique sees rights *versus* culture, so anthropologists have added the perspective of rights as culture (ibid). This latter understanding suggests that rights in the real world in some sense can both compete with and complement local mores, dictating how violations are represented and constructing a particular subjectivity for victims. One aim of this study will be to test this understanding to see whether the culturally embedded expression of victims can use the rights discourse, or if rights actually compete with their own normative frameworks (see Section 2.2.2).

Rights scholars have addressed issues of rights in practice, and tried to relate the abstract concept of rights to their instantiation in culturally specific times and places. Such studies have used largely ethnographic methods to understand both the shape and impact of rights-based interventions in a number of contexts (Wilson and Mitchell, 2003; Cowan, Dembour and Wilson, 2001; Wilson, 1997; Malkki, 1995). Using such empirical and anthropological methods breaks the hold that law has traditionally had over rights scholarship, humanising it and allowing rights to be seen as one framework among many in which people approach their world. Such work reflects an epistemological challenge to a legally based human rights that has become hegemonic, claiming the contextual and the ethnographic to be not just relevant to the study of rights, but crucial. This underlies an approach that is also integral to this thesis, that effective and emancipatory rights practice demands not the traditional paradigmatic approach, but a synthetic approach derived from a base of evidence (Goodale, 2009).

Perhaps the most relevant ethnographic study in this context is Richard Wilson’s of the South African Truth and Reconciliation Commission (2001), in which the rhetoric of truth and reconciliation was confronted with an anthropological study of those on whom the process most impacted. The result is a critique of the South African process and of the use of rights more generally: “We must therefore be more cautious about what human rights can accomplish and give greater attention to what social institutions and social actors actually do with rights...” (Wilson, 2001: 224) This demonstrates how the understanding of the limits of rights is emerging from such scholarship, whilst the practice of rights in transition appears little informed by it. (See the rhetoric around the proposed TRC in Nepal for example, Sections 4.2 & 9.1.)

This thesis will engage with the discursive view of rights, seeing them as actively constructed by the actions of actors, both those seeking to assert them and others, in an environment containing a range of more or less competing normative frameworks. The rights discourse then becomes a tool as useful as it is effective, and where alternative approaches, such as the potential needs emphasis described here, are seen to be more empowering (Section 2.2.2) these can be used alongside rights.

### **2.2.2 Needs, rights and victim agency**

Agency is considered important because it reflects an ethical imperative: "The doctrine of action has become essential to our recognition of other people's humanity" (Asad, 1996: 272) Agency is understood primarily as the autonomy of the subject, both as individual and community: the sense in which victims are in control of their own destiny and are agents in processes to address their needs. Victims are subordinate not only because of their victimhood, but in many cases prior to their victimisation for reasons of marginalisation by poverty, gender or ethnicity. Their needs result from the confluence of long-term marginalisation and the violations of conflict; it is thus crucial that victims themselves have agency and voice in the process to address these impacts. What distinguishes rights from needs is that while both offer analyses of deficits that impact on human life, needs are a simple articulation of that deficit (see Section 2.2.4), while rights provide a tool for action. Rights are held by a particular individual subject and in exercising rights that subject asserts her claims, backed by obligations in law. Rights are asserted to empower their subjects (e.g. Donnelly, 1984) and since they are actively *claimed* they are understood to give victims agency (e.g. Ignatieff, 2003). This study can test the extent to which rights are seen to promote or ensure agency in those communities most in need of it, in societies where the rural people who were most likely to become victims of the conflict know little of rights (Section 9.1).

Critics of the rights discourse see it as constructing victims as subjects on the terms of the atrocities committed against them (Humphrey, 2005): victims are perceived as defined by their experience and its codification in law as, for example, 'families of the disappeared', in a way that denies them agency over their own identity. Scholars from post-colonial states have taken this critique further: Mutua (2001) uses the metaphor of 'saviours', in which those with access to the rights discourse intervene to redeem victims. The impact of this for the subject of rights, the victim, is that her subjectivity is constructed entirely upon the basis of this external discourse, serving to reduce agency.

Mamdani echoes this, seeing the rights discourse as representing victims as “wards needing Protection” (2009: 471), constituting “a depoliticizing discourse whose effect is to transfer agency from victims to their ‘protectors.’” (ibid). This study will serve to understand how victims see their own subjectivity, and the extent to which it overlaps with that constructed by the rights discourse.

The *practice* of human rights highlights the difference between rights on a conceptual level, the global and the universal idea that drives the discourse, and how they are instantiated in particular social settings, subject to the power relations that exist between the actors involved (e.g. Stammers, 1999). In the highly unequal societies studied here, rights constitute a discourse that is preferentially available to the powerful: rights are saturated with what Habermas described as a “technocratic consciousness” (1971: 112 - 113) and this serves to restrict access to such discourse, which can become a tool for power to be exercised, potentially denying the disempowered agency. Additionally, rights are mediated by the actors who articulate them: in an unequal society, as any other discourse, they may well become subject to existing power relations. This is a demonstration of the disjuncture between the epistemology of human rights and the social ontologies in which they are embedded (Goodale, 2007). Privileging discourse alien to victims, such as that of rights, can empower elites and outsiders at the expense of victims, particularly the most disempowered who have both the greatest need and least access to the language of rights. Chandler has connected rights and agency by describing rights that are constructed independently of their subjects as “fictitious [...] because there is a separation between the subjects of these rights and the political or social agency giving content to them.” (Chandler, 2009: 59). This is an articulation of the fact that in a state where only elites know what rights are, they can become something that are largely claimed *on behalf of* victims rather than by victims themselves. The result is that victims must be represented by human rights experts, substituting empowerment for passivity and dependence upon others:

Understood in this way the human rights discourse is actually often detrimental to the empowerment of victims as it produces a lack of agency (the notion that ‘victims’ or oppressed people cannot wage the struggle by and for themselves) and trusteeship (the idea that others must ‘represent’ or ‘take up the cause on behalf’ of ‘victims’) [...] Despite all the talk about victim empowerment then, the victim produced by transitional justice NGOs and others in the international human rights movement is a hapless, passive

victim dependent on NGOs and others to speak for her and argue her case.  
(Madlingozi, 2010: 6)

Whilst the rights discourse claims to address all rights equally, in practice civil and political rights are prioritised over others, notably the social, economic and cultural (e.g. Arbour, 2006; Aguirre, 2008; Pasipanodya, 2008), particularly after conflict. This is seen in many contexts where victims of conflict are cast as such, overshadowing the broader needs that both pre-existed the conflict and that are exacerbated by the impact of the violation. The effective hierarchy of rights, that subjugates victims' own perceptions of their priorities to an agenda that elevates civil and political rights, drives more legalistic approaches to transitional justice (McEvoy, 2008). Constraining victim identity to derive exclusively from the violence of conflict neglects the structural violence of poverty and marginalisation. There is evidence (e.g. Rubio-Marin, 2006) that many victims prioritise exactly the basic needs that are marginalised by the rights discourse after conflict. Thus, rights comes with its own priorities, which serve not only to reduce victim agency but to depoliticise the discussion of peacebuilding, marginalising agendas of social and economic justice in favour of a legalism that privileges the civil and political.

Rights are largely individual, reflecting what has been called the atomism of liberalism (Taylor, 1985), in contrast to anthropological understandings of the social nature of being and subjectivity as something constituted collectively. The methodological and ontological individualism of the rights discourse is an approach that fails to resonate with more traditional collective societies who see needs, desires and capacities as formed within, rather than outside or prior to, society (Cowan, Dembour and Wilson, 2001). The social nature of the impact of the violations studied demands a collective understanding of the lives of victims, which rights alone struggle to achieve.

This thesis empirically examines this range of critiques of rights as a discourse of empowerment, seeking to probe the relationship between rights and agency in a highly unequal society, and ask what role they play in constructing victims as subjects. It will ask how needs and rights emerge from victims' subjectivity and if prioritising needs over rights can better ensure victim agency in addressing the impacts of violations. The data of this thesis constitute a test of the hypothesis that because need is the direct and ongoing experience of the powerless it is the most natural way for them to express what they seek of any process (Section 9.1), potentially less easily instrumentalised as a tool of power than rights and more effective in mobilising the disempowered.

### 2.2.3 Needs versus rights?

The two vocabularies of needs and rights have long been in tension, with both theoretical and ideological debates around them (Waldron, 2000), but have run largely in parallel, with little intersection (Munro, 2007); the literature that explicitly contrasts or compares the two is thin. At one extreme the apparent conflict between the universalist discourse of human rights and poststructuralism led to the Critical Legal Studies movement which saw rights as not natural or inalienable, but historical creations of state and law (e.g. Douzinas, 2000; Kennedy, 2002) and rejected rights in favour of needs (e.g. Tushnet, 1984). At the other extreme is the approach that the vocabulary of rights is the only one required, because needs are assimilated into it and because needs do not have the authority of rights-based demands. This dismisses “needs-based arguments as paternalistic, based on charity and moralism, soft ground compared to legal obligations.” (Munro, 2007: 10). In practice there is a relationship between the concepts of needs and rights, indeed some theories of rights are based explicitly on human needs (Sen, 2004 and see below). Nussbaum draws distinctions between her concept of *capabilities* (essentially a contextualised theory of needs, Section 2.2.4) and rights, which clarify the rights-needs relationship. Appealing to rights communicates more than the appeal to needs, rights are a rhetorically direct way of emphasizing what is to be guaranteed by the state, and rights place value on individual choice and autonomy (Nussbaum, 2000).

The needs-rights debate has reflected an historical emphasis on needs in development, and on civil and political rights from the human rights perspective. Their overlap traditionally concerned the arena of the social and economic: in the 1970s development work was led by a “basic needs” approach, paralleled by the contemporaneous development of social and economic rights (International Covenant on Economic, Social and Cultural Rights, 1966). Some have attempted to refute that ‘positive’ social and economic rights are rights rather than merely needs, given that they have a cost attached in contrast to the largely ‘negative’ civil and political rights (Streeten, 1980). More broadly, the vocabulary of economic and social rights has been critiqued as overemphasising the role of states whereas in many societies it is less formal mechanisms, notably communities and families, who actually ensure subsistence for many. The basic needs approach in development has largely disappeared as it was seen to fail in addressing issues of agency, autonomy and power relations, explicitly lacking a social justice perspective. Contemporary development orthodoxy now emphasises ‘rights-based approaches’ (see below), incorporating the entire framework of

human rights instruments; civil, political, social, economic and cultural (e.g. UN Development Group, 2003). There is some congruence between the Covenant on Economic and Social Rights and a 'basic needs' approach, in particular concerning the rights to food, health, shelter, and education. There remains a difference between the concepts of rights and needs however: declaring basic needs as rights gives a moral and legal weight to their satisfaction, with political commitment and enforcement to their fulfilment, at least in principle. Regardless of the reality of this enforcement the human rights regime has largely failed to define what economic and social rights mean in terms of concrete indicators<sup>3</sup> and instead has emphasised the *instruments* of enforcing such rights, such as universal primary education or vaccination, and the *means*, by ensuring the broadest possible participation in social and economic activities. The Millennium Development Goals represent the latest global effort to provide such performance targets but largely dodges the setting of benchmarks through the use of relative goals, i.e. "Reduce by two thirds, between 1990 and 2015, the under-five mortality rate." (UN, 2010: MDG 4) The MDGs have been criticised for setting a lower standard of achievement than that stipulated in international human rights treaties and permitting states to "turn their back on their human rights obligations" (Symington, 2004: 16).

Whilst rights are universal, the *practice* of human rights remains far from it: 'on the ground' it is a discourse that must compete with local political and other imperatives. As a result, the study of the practice of human rights is necessarily discursive; to understand how the global rights discourse impacts in particular places upon human actors, given the webs of political and social relationships in which it must operate (Goodale, 2007). This thesis interrogates where and how the global discourse of human rights is constituted, and how the way these norms are constructed in practice relates to the needs of victims of conflict who are the notional target of that discourse. This highlights the difference between human rights on a conceptual level, the global and the universal idea that drives the transnational discourse, and how they are instantiated in particular social settings, subject to the power relations that exist between the actors involved (e.g. Stammers, 1999).

This thesis studies the boundary where the global rights discourse meets victims situated in a particular culture and expressing particular needs, and seeks to understand the impact of this confluence of global and local. The emphasis of donors, governments

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<sup>3</sup> See however: Apodaca (1998), Chapman (1996), and the discussion in Section 2.2.4.

and other actors on rights-based approaches impacts upon those who are the target of their actions: the fundamental question of this study is to interrogate how effective that global practice is in addressing local needs. In this study, the goal of a victim-centred approach (Section 3.2) drives the methodology. Victims themselves are invited to define and prioritise what action they seek in response to the violations to which they have been subject. The nature of the very open questions asked of victims, that do not presume a rights or needs oriented understanding, can be seen in Appendix II. Responses can and will include both basic needs (e.g. food, shelter, education and healthcare) as well as those needs that are traditionally addressed through the framework of civil and political rights, including rights to truth, restitution, reparation and non-repetition. In summary, the approach is not one of needs *or* rights, but needs *and* rights: the addressing of needs through any strategy, one important component of which will be a rights-based agenda.

### ***Participation and empowerment as tools of agency***

This thesis seeks to be driven by whatever demands victims make of a transitional process, whether these can best be characterised as needs or rights, or some combination of the two. The ultimate aim is to ensure victim agency. Historically, 'basic needs' approaches (Section 2.2.4) in development were abandoned due to the absence of a social justice perspective such as rights contains, and one result of this was the move towards 'rights-based approaches'. Rights-based approaches (RBAs) have been used in a very large number of areas, most visibly in development but no means restricted to it, and reflect a plurality of perspectives. Gready (2008) has defined RBAs in terms of core principles: *participation, accountability, equality and non-discrimination, transparency, and empowerment*. RBAs define poverty and other challenges as rights violations and seek to both address duty bearers, such as governments, and ensure that rights-holders themselves play a role in claiming their rights. RBAs have a *normative* justification, in that they put values and politics at the centre of practice and challenge the power relations that lead to rights violations:

[W]hereas a needs-based approach focuses on securing additional resources for delivery of services to particular groups, a rights-based approach calls for existing resources to be shared more equally and for assisting the marginalised people to assert their rights to those resources. (Cornwall and Nyamu-Nusembi, 2004: 1417)

RBA challenge the passivity of those practice seeks to benefit, by seeking to ensure the agency of rights-holders in claiming their rights: “poor people fulfil their individual needs by claiming or securing their human rights” (Action Aid, 2008: 4). They have been seen as explicitly referencing the addressing of marginalisation, i.e. not just the symptoms but the causes of violations, “promoting human dignity through the development of claims that seek to empower excluded groups” (Uvin, 2004: 163). Participatory approaches are not new, but RBAs represent the politicisation of such strategies following the instrumentalisation of such approaches in development in the 1990s (Cornwall and Nyamu-Nusembi, 2004).

The concept of agency, through processes of empowerment and participation, is central to RBAs and, in a transitional context, reveals a route to the addressing of victims’ demands that focuses as much on process as on goals. This discussion serves to shift the focus away from the tension between rights and needs and towards the processes through which agendas are articulated, rights claimed and needs addressed. Through the lens of participation, the critiques of the rights discourse made above can be seen as a comment on the “politics of location” (Cornwall and Nyamu-Nusembi, 2004: 1419). Processes of empowerment necessarily shift the context of rights-talk from the metropolis, where those most able to access the rights discourse are located, to the communities where violations occur. This is relevant both for the typical mechanisms of transitional justice, the trials and truth commissions physically located in capitals, and for those advocating for transitional justice process, who are often similarly positioned far from victims. This thesis will attempt to take the concepts of participation, accountability, transparency and empowerment, and understand their potential role in ensuring the agency of victims in processes to address their demands of transition.

To some extent this thesis can be said to represent a plea for a rights-based approach to transitional justice: despite transitional justice being a rights-driven discourse many of the elements that are considered central to RBAs remain largely absent from its practice. A rights-based approach to transitional justice would seek to address structural causes of violations as well as ensuring participation and empowerment of those most impacted by violations, both largely absent from current transitional justice practice. Victims may articulate agendas dominated by either needs or rights alone, or perceive rights as a way to address needs; it is also possible that victims construct their own contextualised politics that emerges from their everyday lives, using language and concepts that emerge from local culture and circumstance. Whatever

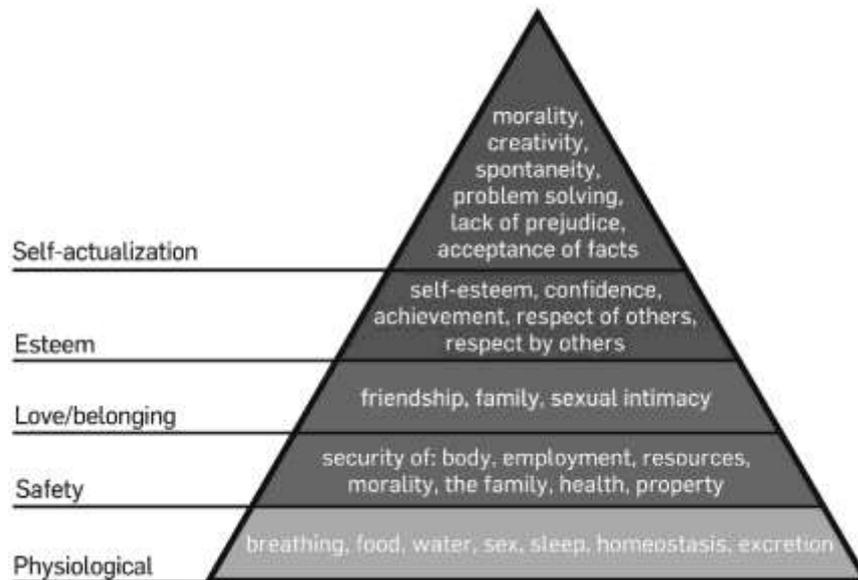
discourses victims choose to use, the methodology of this thesis will privilege them, seeing this as consistent with processes of empowerment that ensure agency. A significant project of this thesis is to forge emancipatory approaches to transitional justice, and it is hoped that victims themselves will demonstrate strategies to do this, and ensure that whether rights or needs (or both) are the basis for action, victims are empowered to play the largest possible role in any process.

#### **2.2.4 Theories of need**

Whilst theories of need have prompted far less scholarship than the rights framework, there is a significant body of work that attempts to theorise human needs. This is briefly summarised here to contextualise the efforts of this study to understand the needs of victims.

In the environment of humanitarian action, needs emphasise the urgent, i.e. those required for life. There is no shared definition of *humanitarian need*, but evidence of broad agreement around four 'core' elements: "the protection of life, health, subsistence and physical security." (Darcy and Hoffmann, 2003) For the victims met in this study needs include these and other 'higher' needs beyond the physiological that would traditionally be excluded by an emergency humanitarian approach. Here we discuss a hierarchy of needs where these include, but are not restricted to, these most urgent or basic needs.

The classic paper of Maslow (1943) presents a hierarchy of human needs, defining five levels of need (see Figure 1), beginning with physiological needs and ascending to needs which are psychological in nature. The bottom two levels of this hierarchy have been associated with basic needs. Maslow claimed that only when lower needs are satisfied will an individual seek to address the higher needs. Whilst this approach is not unchallenged it does allow us to provide a basis to assess the priorities of families of the Missing. Primary needs are likely to be physiological: to ensure that the family can continue to feed and shelter itself in the absence of the missing person, and this may translate into a desire to guarantee economic security. Safety needs are also likely to be important for those emerging from a situation of armed conflict: in some cases the fact that a family member is missing in a situation of conflict, perhaps arrested, may pose a genuine security risk to other family members.



**Figure 1 Maslow's hierarchy of needs (Maslow, 1943).<sup>4</sup>**

Maslow emphasises that for children safety includes enjoying a “normal family setup” (ibid: 7), and to avoid separation from parents. Health is also placed into this category by Maslow, and in those contexts where affected families are poor, a reduction in household income through loss of the missing person’s contribution will often impact through an inability to afford basic healthcare. Where physiological and safety needs are met the need for love becomes dominant. The absence of a spouse, a parent or a child, and resulting thwarting of such needs is at the core of “maladjustment and more severe psychopathology” (ibid: 9). The psychological need to know the truth about a missing person will be inextricably linked to basic needs for love and belonging. What Maslow called ‘esteem needs’ are hugely challenged by a relative being missing. This will include those impacts occurring in the social spaces of family and community, such as stigmatisation or exclusion, as well as perceptions that an authority, such as the state, is contemptuous of the family.

Maslow fails to consider the timescale on which needs remain unmet. Clearly the basic physiological needs cannot remain unmet in the long term, but it is the nature of the phenomenon of the Missing that the problems families face are *chronic* in nature. As a result, economic security can be precarious in the long-term. The nature of not knowing the fate of a missing person is that it continues indefinitely, and it is not being

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<sup>4</sup> Image taken from Wikipedia commons.

able to resolve the *ambiguity of the loss* of the loved one in the long term that most defines the particular psychological torment of families of the Missing (see Section 2.3).

Burton (1990) and others (Lederer, 1980; Galtung, 1980) have built upon Maslow's ideas to develop theories of human need. Burton posits the existence of certain universal needs that must be satisfied, and argues that conflict and instability in developing countries arise because people are denied not only their biological needs, but also psychological needs that relate to growth and development (1997). Burton, however, perceives human needs in a different way from Maslow, seeing them as a collection of requirements for human development which do not have a hierarchical order; rather, the addressing of all needs is sought simultaneously in an intense and relentless manner (Burton, 1990). The basic axioms of such a needs theory have been articulated as:

A need is a conscious or unconscious recognition of a lack of something 'indispensable' for a state of personal equilibrium, physically or emotionally. The indispensable something, the obtaining of which relieves the feeling, is a 'satisfier'. A need can be defined only as it is relieved by the specific satisfier. (Freidman, 1990: 257)

In the case of individual victims, this approach demands that we define a need in terms of what is required to address it. This theoretical approach then suggests a methodology in which needs are defined by those most able to define the relevant 'satisfier', i.e. the victims themselves. This suggests that a victim-centred methodology can most effectively understand such needs. The implications of Burton's approach are that:

...while basic human needs themselves are universal, transcending differences in class, gender, and culture, their satisfiers are culturally determined. [...] In absolutising basic human needs, John Burton and his fellow thinkers absolutely relativised their satisfiers. (Rubenstein, 2001)

This reflects the tension when attempting to understand needs empirically between the universalising tradition in both the rights discourse and development and an understanding, reinforced by the post-modern turn, that needs are highly relative. Policymakers ignore cultural projections of human needs at their peril (Douglas et al., 1998). Doyal and Gough (1991) have proposed a hierarchical theory of needs in a developmental context in which *universal goals* (avoidance of harm, participation) give

rise to *basic needs* (physical health, critical autonomy, autonomy of agency), also universal, distinguished from wants which are driven by personal preference and cultural environment. Basic needs then define *intermediate needs* which are satisfied in a culturally dependent way. An example would be the basic need for nutrition that is satisfied according to cultural norms by locally preferred and available food. However, Doyal and Gough posit that these satisfiers have *universal satisfier characteristics*; in this example the fact that foodstuff must satisfy a minimum daily calorific requirement. The result of their approach is a list of universal goals, basic needs and universal satisfier characteristics with claims to universality, but with a framework that understands the difference in the expression of need across contexts. This permits the possibility of a universalism around basic needs, but on the understanding that their expression and satisfaction will be local and contingent.

Sen and Nussbaum have developed another approach, formulated in terms of human *functional capabilities*, i.e. what people are actually able to be and to do. For Sen functionings “constitute a person’s being” (1992: 4-7) and since functionings are “intrinsically valuable” (ibid) they amount to states of well-being. Capabilities are the set of functionings that are feasible to a person, i.e. from which she can choose and which relate to needs but indirectly, since what any one individual can do with a certain resource is dependent upon their functioning. The capability approach demands an understanding of the needs individuals have for resources and their diverse abilities to convert resources into functioning. Nussbaum has formalised this approach in a style similar to Gough and Doyal, making a list of these capabilities (Nussbaum, 2000), in which all are considered equally fundamental. Nussbaum’s approach explicitly embraces universalism, critiquing a relativist approach. The language of rights can then use this list to draw basic normative conclusions: one defines a level of capability to function and aims to enforce that.

The resolution of the desire for a universal theory of needs, not least as a tool for practice, with acknowledgement of the reality of cultural difference has prompted much debate. Gough has written that:

There remains a deep contradiction between the domination of post-modernism and cultural relativism in intellectual life and the universalism and globalism dominant in the real world of institutions and politics. (Gough, 2002: 1)

This tension between the supposedly universal and the local is encompassed by this study. For Gough the solution is clear: needs are universal, but satisfiers are time and place specific (2002). In practice, in the development setting in which such theories arise, a universalist and prescriptive approach dominates as seen in the formulation of the Millennium Development Goals, Human Development Index etc. In transitional justice similarly prescriptive approaches have dominated and this thesis will argue that greater attention to the cultural context in which victims' needs develop is required for transitional justice mechanisms to be created which can address the needs of both individuals and communities.

That satisfiers are highly local leads to the expectation that the needs expressed, or at least the demands made in response to victimhood, are likely to also be local and contingent. This has methodological implications, in that acknowledging the importance of context implies that ethnographic methods should be privileged where possible. However, a strongly localist approach will challenge the ability of such studies to compare across contexts. In practice there is no simple conflict between the local and the global. Needs are constructed at many levels: individual, family, community, region and nation; the extent to which each is relevant can be explored in ethnographic research. It will be seen that in the victim communities studied here local factors and national constructs have a greater impact than the discourse of hegemonic globalisation allows. This thesis will attempt to understand needs in a context-specific way, as they are understood by those expressing them. It will also however seek phenomena and variables that are common across contexts, with the overarching aim of proposing policy and methodologies that can most effectively comprehend and address such needs across a wide range of contexts. This may arise from an understanding of what Doyal and Gough call 'intermediate needs' (1991), analogous in some cases to basic needs, that may be sufficiently common that they can constitute the foundation of a genuinely bottom-up universalism.

The idea of 'measuring' needs implicitly involves two elements: the application of relevant norms (such as would come from a benchmark established by a basic needs approach); and an assessment of how the reality differs. In this sense, needs assessment is concerned with identifying and measuring *deficits* and as such this study employs the traditional paradigm of humanitarian assistance as a deficit replacement approach. The novel element of the victim-centred approach (Section 3.2) used here is that victims themselves define those benchmarks.

Just as rights are presented by their advocates as apolitical, so humanitarians present needs as somehow beyond politics:

We get round the profoundly political nature of needs by saying instead that needs are basic, fundamental and just deeply human. Our humanitarian belief is - quite simply - that needs pre-exist politics and that meeting them should thus transcend particular political priorities and policies. (Slim, 2004: 3)

Those who seek to actively deny the addressing of needs are aware of their political uses: "Need is also a political instrument, meticulously prepared, calculated and used." (Foucault, 1977: 26) Fraser (1988) maintains that the politics of needs is characterised by actively appearing *non-political*, assuming that the interpretation of needs, and indeed who makes that interpretation, is unproblematic and that existing public discourse on needs is authoritative and fair. The fact that this is so often not the case drives the victim-centred approach, in which victims themselves interpret and articulate their needs. Throughout this study, an awareness of the politics of needs and of their addressing, in families, communities and states, is maintained through an emphasis on the discursive and an understanding that statements of needs are intrinsically political.

One critique of all these approaches to human needs is that they construct the person as fundamentally non-social (Douglas and Ney, 1998). With the exception of Maslow's discussion of love, belonging and esteem, theorists of need define humans as non-relational beings with individual needs. In practice, poverty itself is perceived as something relative, measured not in absolute terms but as a deficit in comparison with others. More general concerns about equity are excluded from the needs narrative, social justice is never touched upon. The economic approach of needs theories that claim universality is challenged by the data of this study that show that social structures and relationships with family, community and the broader society are a key component of how people perceive needs. Thus whilst the above theories will inform the understanding of this thesis, they will not constrain it.

## **2.3 Families of the Missing as victims and their needs**

This section explores the victimhood of families of the Missing, how this is defined and what its impact is. It surveys the literature on the needs of victims more generally and that which specifically impinges upon the needs of families of the Missing. How the

mechanisms of transitional justice can then address these needs is discussed in Section 3.1.

Whilst the Missing themselves are victims, the families they leave behind are also victims, as acknowledged in international law.<sup>5</sup>

‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. *International Convention on the Prevention of all Persons from Disappearance* (OHCHR, 2007)

In principle, a victim is defined as such by what has been done to them, with this codified in the violations defined by various bodies of law. In practice victimhood does not emerge naturally from the experience of being harmed, but is constructed socially and subjectively, with a range of factors determining who will be accorded victim status. Rombouts and Vandeginste call these “public recognition selection processes” (2000-2003:114) in which some “have the ‘power’ to enforce recognition (socially and legally)” (ibid). Most formally, bodies established to deal with victims, such as Truth Commissions or prosecutorial bodies, will determine who is considered a victim. More locally, in many contexts victims’ groups and NGOs will engage with victims and define criteria that may impact on understandings of victimhood within communities. These understandings may or may not coincide with those of victims themselves, usually being created by those with authority in the capital and remote from affected communities. A political agenda or a certain narrative of the conflict may privilege a particular conception of victimhood: victims constitute a part of the contested terrain of the memory of the conflict, at both national and local levels (Section 9.2), often creating a hierarchy of victimhood (Rombouts, 2002). The Truth Commission represents the formalisation of this process, in which victim memory is transformed into public knowledge (Humphrey, 2002), sanctioned by authority.

The language of victimisation remains potentially problematic, implying “an imbalance of strength and disequilibrium in the position of power: the strong, powerful

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<sup>5</sup> There are also very broad definitions of victim, explicitly including family members of direct victims, in The Declaration on the Right to Restitution for Victims of Gross Human Rights Violations (UN General Assembly, 2006), and The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly, 1985).

victimizer and the weak, helpless victim.” (Fattah, 1991:4). As a result the passive implications of the term ‘victim’ have been increasingly challenged through the use of terms perceived as positive and empowering, such as ‘survivor’, although this appears to have rarely been done on the terms of those being so renamed. The victim subject, particularly in developing world contexts such as are discussed here, has been essentialised as a disempowered brown (and often female) person dependent upon Western discourses such as feminism and human rights for their emancipation. This liberal discourse implies that being a victim and being an agent are mutually exclusive, reinforcing the lack of agency of the victim: human rights has been criticised as effecting the transfer of agency from victims to their ‘protectors’ (Section 2.2.2). Victims themselves may well find that victimhood serves as a basis for making claims on the state and others, and value that status. This study will attempt to privilege the language that victims use to describe themselves and explore the interaction between their self constructed subjectivity (in contrast to simply being the objects of violations) and that of others, notably elites and others using imported discourses, and the impact this has on victim agency.

Individual relatives of the Missing will be impacted by their victimhood according to their relationship to the missing person, mediated by the culture and society in which they live. Disappearance itself will often be contested, not just by those denying any violation, but by those not emotionally impacted by the phenomenon who believe it to be self evident that the Missing are dead. This demonstrates that the identity of a victim (in this case as wife or widow) can be contested at many levels, including within the community and family (see Section 6.2.3). The family will also be the principal coping mechanism and so the discussion of needs as well as responses will here emphasise the family as a unit, rather than the individual. Since a majority of the Missing in most contexts are men, those left behind will predominantly be women, often with children to support. As such, there are often explicit gender issues that impact upon the needs of families (see Section 6.2.3). Here, a contextual approach has been taken acknowledging that no victim, whether family or individual, is *only* a victim; victims are actors with roles in society and with both internal and external resources. It is likely that the most effective responses to needs will build on these resources.

### ***Needs of families of the Missing***

General theories of victim need have emerged in criminal justice and victimology (e.g. Fattah, 2000). Stauffer and Hamber (1996) define the core of victimisation as

'disconnectedness' and 'disempowerment', and thus see victims' needs as driven by what can address these feelings. Danieli (2006) has enlarged upon this with specific reference to victims of 'massive trauma', notably the Holocaust and the crimes of the military regimes in Argentina and Chile, to define victim needs as including:

- Reestablishment of the victim's equality of power: compensation, restitution, rehabilitation and commemoration;
- Relieving stigmatisation: commemoration, memorials, empowerment, education;
- Repairing the nation's ability to maintain equal value under the law, and justice: prosecution, apology.

For families of the Missing answers will always lie at the heart of what they seek: being able to tell the truth of disappearance is to refute the efforts of perpetrators to deny that anything untoward has happened. Whilst psychological needs may be extreme, and have received great attention from scholars, it is important not to neglect the practical needs of victims (Macguire, 1991), although for victims of rights violations generally there is lack of literature that discusses their impact on and contribution to poverty.

The majority of the literature discussed here comes from studies in societies that can generally be considered to share a culture with the West, with conclusions that are largely perceived as being universal and applying to victims generally or to families of the Missing everywhere. There is a dearth of efforts to understand needs of those from other cultures and to understand how cultural elements impact on needs of victims, and their addressing. The family that is the unit of analysis of this study is itself a concept that is culturally dependent, with families in the Asian contexts studied being largely patrilocal,<sup>6</sup> patriarchal (often highly so) and multi-generational. The functions of the family: sexual, economic, reproductive and educational (Georgas, 2006) are universal, but are expressed in such radically different ways across societies that it is inevitable that they will impact significantly on the needs that arise when a member of the family is missing. The literature review that follows thus comes with the caveat that its relevance to the families of Nepal and Timor-Leste may well be limited, particularly when discussing psychosocial impacts. This in itself demonstrates the need for studies such as this one in

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<sup>6</sup> *Patrilocal* refers to the fact that the majority of the world's families reside with or close to patrilineal kinsmen (Georgas, 2006), i.e. on marriage a woman will typically move into her husband's family, as seen in both Nepal and Timor.

what has been called the “majority world” (Kagitçibasi, 2007), as opposed to Western societies.

The net impact on families and individuals of having a missing relative will be the sum of the emotional, psychological, material, cultural and social effects, subject to the resources of individuals and communities to cope.<sup>7</sup> One lens through which to look at such impacts is that of human well-being, which has formed the basis for a number of projects in understanding human needs and their satisfaction (e.g. Gough and McGregor, 2007) and measuring the impact of poverty and development (Sen, 1993; Nussbaum, 2000). Definitions of well-being derive largely from utilitarian understandings, in traditional senses of utility in terms of both state of mind, and a state of the world (Griffin, 1986). Well-being is defined as “the state of being comfortable, healthy, or happy.” (OED, 2010) and this is why problems arise in defining well-being in terms that can escape cultural construction; a reprise of the discussion of the challenges in universalising needs in the face of local preference discussed in Section 2.2. Thus well-being encompasses both ‘objective’ and ‘subjective’ well-being, where the former is something “normatively endorsed” (Gasper, 2004) and the latter defined by the “feelings of the person whose wellbeing is being estimated” (ibid: 12). The approach of this study leans towards a subjective understanding, assuming that this largely encompasses objective considerations such as basic needs (Section 2.2). Where mental states (e.g. understanding pleasure and pain) drive approaches, ‘psychosocial well-being’ is often discussed, a concept that is preferred to narrower understandings of mental health by emphasising social and cultural (as well as psychological) influences on well-being (Psychosocial Working Group, 2003). As several scholars have pointed out, the experience of pain and suffering is also fundamentally social (Erikson, 1976; Good et al., 1994) and so it is understood that well-being is both relational and dynamic, a product of the social and cultural worlds in which people are immersed.

In summary, subjective well-being is an approach that drives the engagement of this research with victims’ needs. However, since well-being remains both contested and inexact, needs will be discussed divided into topics driven both by approaches from the literature and priorities identified by research subjects. This permits a direct

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<sup>7</sup> The International Committee of the Red Cross has made assessments of the needs of families of the Missing in a large number of contexts; the results of these are largely not publicly available, but some details can be found in ICRC Annual Reports (e.g. ICRC, 2010b).

understanding of the relevance of expressed needs to actual and potential transitional justice mechanisms.

### ***The fate of the Missing and the impact of ambiguous loss***

Studies have been made of both the general impact of war on civilians and of families of the disappeared in particular, dominated by approaches that privilege investigations of the psychological sequelae of trauma, and in particular posttraumatic stress disorder (PTSD) (American Psychiatric Association, 2000). Quirk and Casco (1994), for example, studied families of the disappeared in Central America and found that many of the indicators of PTSD (increased arousal, physiological reactions, stress symptoms) were elevated in families of the disappeared. There has however been a sustained critique of the relevance of trauma based approaches across cultures (e.g. Summerfield, 2004; Mezey and Robbins, 2001; von Peter, 2008), in favour of the privileging of context, indigenous understandings and interventions rooted in the affected community. An additional reason to query a trauma-centred approach to disappearance is evidence that the impact of disappearance is very different from that of a single, traumatising event, being of a chronic nature that has emotional, psychological, economic and social consequences (Blaauw and Lahteenmaki, 2002). Whilst mental health and potential posttraumatic stress symptoms are clearly an area of interest when attempting to understand the response of victims to disappearance, this must be placed in context through an understanding of the social ecology that can ameliorate or worsen emotional and mental responses to disappearance, i.e. an approach to psychosocial well-being (see Section 2.2). Disappearance leaves families with no certainty regarding the fate of loved ones, unsure if the Missing are alive or dead. This has led to efforts to consider the impact of disappearance as an interrupted grieving process (Pérez-Sales, Durán-Pérez and Herzfeld, 2002), while Blaauw and Lahteenmaki (2002) have reviewed the impact of disappearance across cultures in terms of the inability to mourn and conduct rituals, and the resulting psychological and emotional impacts.

Hunter (1983) has made a study of families of US servicemen missing in action in Vietnam that informs understanding of psychological impact. In the early stages after a family member goes missing, families will often assume their loved one is captive and alive. Studies of families of those held captive indicate that the ambiguity of the situation and its indeterminate duration induce feelings of helplessness and hopelessness (Hunter, 1983: 171). The uncertainty of the continuing absence of the missing person

can result in a breakdown of the family's ability to cope, resulting in: stagnation, self-enforced isolation, blaming (themselves and the victim), parental pressure and neglect. Hunter found that maintaining family rituals and actively seeking group support increased the ability of families to remain functional. Mothers were much less likely to believe that their sons were dead than others: "You wives can still have another life; he was my only son; I shall never have another. I shall always hope that someday he will come walking through that door." (Hunter, 1983: 177), a phenomenon that has been seen elsewhere in the world (e.g. Femenía, 1987, concerning mothers of the Argentinian *desaparecidos*).

One explicit aim of this study is to support appropriate intervention with families of the Missing, necessarily including those that emphasise the psychosocial. The ability of individuals to withstand the impact of traumatic events has been called *resilience*: "good outcomes in spite of serious threats to adaptation or development" (Masten, 2001: 2) and there is a large literature discussing resilience in the face of both conflict and bereavement (e.g. Bonanno, 2004, 2007). Any intervention should aim to work to support and promote the "ordinary magic" (Masten, 2001) of resilience. Interventions to support such families have few theoretical foundations; ambiguous loss is one of the few that may be relevant and as such is discussed in some detail here.

Ambiguous loss is "a situation of unclear loss resulting from not knowing whether a loved one is dead or alive, absent or present" (Boss, 2004: 554). Where a family member is absent in an unclear way, the lack of knowledge about the loved one gives rise to a challenge to transform the experience into one with which the family can live. Ambiguous loss occurs where a family member is psychologically present, but physically absent, as for families of the missing or disappeared in conflict, or victims of natural disasters. (Or where a family member is physically present but psychologically absent, as in cases of Alzheimer's disease or other chronic illness, Boss, 2006). Ambiguous loss is an explicitly relational perspective, which differs from individualised trauma approaches, such as that of PTSD, in that it characterises the stress as external and ongoing.

A range of studies (Boss, 2006, 2004, 1977) indicate that situations of ambiguous loss predict symptoms of depression, anxiety and family conflict. The literature reveals the need of families of the disappeared for closure to end the ambiguity of loss, but in most contexts this is something denied families. The ambiguous loss model confronts this perceived need for closure:

The goal is to find meaning in the situation despite the absence of information and persisting ambiguity. Here, resiliency means being able to live with unanswered questions. Instead of the usual epistemological question about truth, we ask, 'How do people manage to live well despite not knowing?'"(Boss, 2007: 106).

This directly contradicts conventional practice with families of the disappeared, where a demand for truth drives advocacy, notably that of the human rights community. Interventions based on an understanding of ambiguous loss offer a way forward for those families who may never receive an answer concerning the fate of their loved one, where the aim of intervention is to strengthen family resilience. The importance of peer support suggests that resilience is not simply intrinsic but is something that can be boosted (or indeed depleted) by all elements that impinge on an individuals' well-being, most notably social structures. Some studies have confirmed the importance of family to resilience and coping (Tol et al., 2008) while Hunter's studies demonstrate the value of support from other families in the same position (Hunter, 1983). A range of data indicates the value of professional therapeutic assistance to families. However, in the contexts studied here such support is largely not available.

Culture plays a major part in defining family composition and where family boundaries are placed and so cultural factors are a determinant in when ambiguous loss occurs and how it manifests itself. Almost all studies to date of ambiguous loss (Carroll, Olson and Buckmiller, 2007) have been made in a Western culture, largely in the United States among families who reflect contemporary North American social and cultural norms. This study represents the first to explicitly seek to test the ambiguous loss model in non Western contexts.

Trauma in traditional societies is understood through the lens of culture and as such the repeated dreams and other emotional impacts associated with trauma may be seen as evidence of the spirit of the Missing voicing their disquiet. Because traditional societies are so highly collective, trauma is manifested more communally than in individualistic Western societies (e.g. Igreja, 2003; Cole, 2004; Eppel, 2002). Western approaches to psychological trauma involve a 'coming to terms' through the revisiting of traumatic experience in a cathartic process of verbalization of the experience (e.g. Allan, 2000; Hamber, 2001), exactly the metaphor that drives the concept of the truth commission, critiqued in Section 8.2. In traditional contexts however there is evidence

that the trauma of conflict is best addressed non-discursively through ritual process and 'starting afresh', consciously avoiding the verbal or other recalling of traumatic experience (Marratto, 1996). In such societies a harmony is perceived to exist between humans, their environment and the ancestors: any disruption of this balance through an inappropriate treatment of a spirit jeopardizes the well-being of the community. The ill-health that results from having a missing relative is ascribed not to traumatic stress but to spiritual disharmony and the resulting 'treatment' is the correcting of the spiritual issues, i.e. burial of the body or other ritual. There is a significant literature discussing the role of the spirits of the dead both during and after conflict in traditional societies (Ellis, 1995 & 2001; Igreja, 2003; Eppel, 2002; Kwon, 2008). In some African conflicts of recent decades magical and spiritual aspects drove much of the behaviour of combatants and it has been common in such contexts for the impact of trauma to be understood collectively as the result of spiritual activity (Igreja, 2003; Baines, 2007). In the contexts discussed by Igreja and Baines (Mozambique and northern Uganda, respectively), recovery from the impact of the violence demanded that these spiritual deficits be addressed. Baines reports how the spirit of a young woman, missing by the definition used here, haunts her sister (2007): the solution to this haunting, and to the sickness it was perceived to have caused, was the performance of the ritual that the sister has long been denied.

The need of families of the Missing to end the ambiguity of loss is best addressed through the recovery and return of physical remains. The need for a body appears to be universal (Boss, 2004) serving several purposes (Boss, 2002):

- The evidence of a body, and the rituals that accompany mourning and disposal of remains break down the denial of death.
- Cognition and rationality demand a body: in its absence families cannot grieve or make decisions.
- The body allows family to say goodbye, and promotes detachment.
- The body allows rituals that are themselves comforting, and bring people around the family to support them.

This is supported by reports of families strongly expressing the need to perform the rituals appropriate to their culture:

For the Srebrenica survivors, and especially the women, the absence of bodies has robbed them not only of funerary ritual but of the visual cues that would help them to acknowledge the death of loved ones and to pass through the states of mourning and grief. (Stover and Shigekane, 2002: 860).

Sant Cassia describes the need of families of the Missing for remains of loved ones in terms of Freudian 'reality testing' (2005): the bones serve to discriminate the mental image of the missing person as alive somewhere from the reasonable expectation that he is dead. The demand for a body then becomes a validation in itself of suffering, with remains a prerequisite for 'normalcy' for families, its absence serving to underline their victimhood and justify their identity as victims. This is the foundation for the most negative form of coping, where the trauma of ambiguity itself becomes valorised and closing emotional wounds is perceived as betraying the Missing. In most cases, the only route to access remains of loved ones is through the painstaking process of exhumation and identification (Blaauw and Lahteenmaki, 2002). For families of the Missing a body is in some sense the 'best' truth, in that it most effectively informs the family of the fate of a loved one, but given that families living with ambiguity never cease to hope the Missing are alive it is also the 'worst' truth.

In some cases concerning persons missing in conflict it is possible to give families an answer, but not a body. This answer may be a death certificate, a document summarizing official information on the events leading to death or a statement of a perpetrator regarding death. Such symbols can be a way of 'permitting' families to begin mourning, without having them feel they are not being faithful to the pursuit of their loved one alive (Blaauw and Lahteenmaki, 2002). However, these abstract indications of "paper death" (Stover and Shigekane, 2002: 855) do not have the same impact on a family as the body, and the reasons given by Boss above shed light on this. A document cannot permit social rituals, such as burial, and above all a document does not answer the family's visceral need to know beyond any doubt that their loved one is dead, and have the physical evidence in front of them. There are instances where ritual can take place in the absence of a body: funerals were permitted by some religious leaders following the 9/11 attacks in New York, and the city offered both a 'certificate of presumed death' and an urn of ashes from 'ground zero' to all families of the Missing. "The brother of a missing man said, 'I choose to believe that part of my brother's body is in these ashes.'" (quoted in Boss, 2002: 16). Such rituals can address some of the needs

for the body even in its absence and can blur the boundary between a grave containing a body and a symbolic memorial.

### ***Truth, acknowledgement and justice***

Truth for families of the Missing is most immediately the truth about their loved one that ends ambiguity and that allows families to retrieve remains and perform ritual. In the theory and practice of transitional justice however truth is something that emerges from state sanctioned process such as trials and truth commissions. These two different understandings of truth can be considered in the light of Foucault's claim that power relations underlie the institutional production of knowledge (1980): not only must truth be sanctioned by the institutions of power for it to be 'true', but for the families of the Missing it is seen that the very definition of truth is something imposed on a context by those with the authority to do so that often diverges from their own understanding. The research of this study attempts to challenge this by allowing victims to articulate their own understandings of truth, and showing how truth is almost always partial, masking certain power relations. This issue is discussed further below and in Section 8.2.

Acknowledgement and truth are clearly linked, to the extent that truth becomes reparative when it is endorsed by authority: victims seek to use existing power relations to legitimate their experience. Thomas Nagel has said: "[Acknowledgement is] what happens [...] to knowledge when it is officially sanctioned, when it is made part of the public cognitive scene." (quoted in Govier, 2003: 67). This public sanctioning of victims' suffering is crucial to victims (Summerfield, 1995) and reparative:

The victims ... need to know that their society as a whole acknowledges what has happened to them... Truth means the end of denial and silence... Truth will be achieved only when literally everyone knows and acknowledges what happened during the military regime. ... Social reparation is thus... simultaneously a sociopolitical and a psychological process. (The Latin American Institute of Mental Health and Human Rights, quoted in Becker et. al, 1990: 147-8).

Wagner (2008) defines recognition for the families of the Srebrenica missing in three ways: attaching identity to mortal remains, recognising the Missing when presented with DNA (or other) evidence of their identity, and commemorative ceremonies held at the memorial site to the Missing. She defines the sum of these as "the restoration of

personhood” (ibid: 15), localising a loved one both geographically and giving them a fixed place in individual, family and national memory. In this sense there are two truths: the particular truth concerning a family member that is constituted by knowing the circumstances of disappearance and the location, retrieval and identification of remains; and the more general truth, i.e. the *fact* of disappearance that families seek acknowledged and remembered.

Many victims articulate a need for justice to be done, both in terms of prosecutions and as the emergence of truth. In many cases, victims are seen to interweave truth and justice as a single indivisible demand. In some cases, such as that of South Africa, victims’ poverty has been unchanged by transitional process and they articulate a desire for *social justice* (Wilson, 2001; Mamdani, 2000). Whilst one of the goals of the research of this study is to understand what justice means to families of the Missing, retributive justice is often a key demand of victims. The existing research base on the impact of trials on victims is summarised in Section 3.1.

## **2.4 Summary and conclusions**

This chapter has reviewed the literature on the needs of victims of conflict generally and on those of families of the Missing in particular, with an emphasis on the local and particular, and the fact that victims’ needs emerge from their everyday lives. In doing this it has focussed on the role victims play in post-conflict contexts and their potential importance to building a sustainable peace, and the fact that the needs arising from victimhood are contingent, rooted in context and circumstance.

Victims can play a crucial role in sustaining or ending cycles of conflict. They can be instrumentalised by conflict entrepreneurs who use victims’ ongoing suffering to mobilise communities to continue or restart conflict. The addressing of victims’ needs can undercut the claims of spoilers to represent them and their communities and support peacebuilding efforts. Sustainable peace can be contingent upon the legitimacy that is conferred on regimes through the addressing of victim needs, and the resulting perceptions of post-conflict governance. This understanding, as well as the normative and moral claims of victims, drive the focus of this study on the needs of victims. Rights are universal, which permits moral and legal claims on the states that purport to enforce them, but are remote from the daily experience of ordinary people. Needs, however, are expressed in terms rooted in the context in which victims live, constituting local and very

particular claims: because they emerge from victims' experience they ensure victim agency. This study navigates between the competing discourses of needs and rights, local and global, seeing how each is applied in the real world with the aim of using whatever has the greatest emancipatory potential to address victims' aspirations.

Theories of need have been reviewed and, despite efforts to universalise needs-based approaches, suggest needs are something that necessarily contain a component that is local and particular. The most complete theories imply that although *basic needs* may be universal, the way they are expressed is best understood in terms of their (local and particular) *satisfiers*, emphasising that those perceiving needs are best placed to articulate them. In the light of the critiques of rights reviewed here these reflections suggest that both needs and rights can be regarded as both local and global when perceived from the very human level of the victim. Whilst the rights discourse is universal, it reflects local power hierarchies in its expression in any concrete context; whilst needs are highly local, they have universal elements that may serve to drive a more general approach to addressing the needs of victims. The contingency of needs drives the victim-centred approach (Section 3.2). Whilst this will follow standard humanitarian practice of measuring deficits in needs against a benchmark, the novelty of this approach is that this benchmark is set by victims themselves.

The needs of victims emerge in the literature from understandings both from criminal justice and from the massive trauma of conflict and mass violence. This literature however focuses almost entirely upon victims in Western cultures; the impact of victimhood in other contexts is poorly documented. This is well demonstrated in the literature on the emotional and psychological impact of conflict, where medical approaches dominate, notably an emphasis on post-traumatic stress disorder which many consider to be a culturally based diagnosis. The alternative approach of ambiguous loss has been referenced as a model to understand the impact of disappearance, and this study will constitute a test of this in non-Western contexts.

There is a modest literature on the specific needs of families of the disappeared discussing the need to know the fate and to find the body of the disappeared and a larger literature that emerges from the human rights perspective with a more legal emphasis on truth and justice. This is the product of a rights discourse that has been the preferred lens through which to examine disappearance. In this study this will be contrasted with approaches rooted in needs and well-being that victims themselves

appear to prioritise. This leads to the inclusion of basic needs such as those for food, health and education in the responses that victims seek to violations, even though these are rarely discussed within a transitional justice framework. The following chapter engages with the discourse of transitional justice as it is currently instantiated and examines typical mechanisms in terms of their potential impact on the needs of families of the Missing.

## **Chapter 3 Transitional justice and the Missing**

This chapter discusses transitional justice as a means to address violent pasts and its explicit role in meeting the needs of families of the Missing. It summarises some of the substantial critiques of current praxis in transitional justice and conceptualises the victim-centred approach that will be taken here. The practice of transitional justice is examined with particular reference to mechanisms that have the capacity to address needs of families of the Missing, combined with a survey of how the discourse of transitional justice approaches victims of violations. Implicit here is a critique of such approaches in that they approach disappearance, as all violations, in a largely juridical way, being driven far more by normative considerations than an understanding of how people are impacted by such extreme phenomena in the real world. Here, an explicitly consequentialist approach has been taken to seek an understanding of both the demands that emerge from families with a missing relative and their implications for transitional justice praxis. These topics are returned to in the light of the data of this research in Chapter 8. One trenchant critique of both the theory and practice of transitional justice is that it is conceived to be a largely ‘top down’ exercise, failing to engage with victims of violations and promoting agendas that come from elites (McEvoy and McGregor, 2008). The data of this study aims to both test this hypothesis and to develop approaches that could drive a more inclusive transitional justice. This chapter includes a discussion of how victims’ agendas can be incorporated into transitional justice, and an articulation of the need for processes that place victims at their centre: the ‘victim-centred’ approach.

### **3.1 Transitional justice mechanisms as a means to address the needs of families of the Missing**

Following a discussion of the needs of families of the Missing in Chapter 1, this section will reflect on existing experience of the effectiveness of various transitional justice mechanisms to address those needs.

#### ***Exhumations and the truth about the fate of the Missing***

Where the Missing are confirmed dead, return of human remains is a priority of families (Section 2.3). However, the scale of the problem, the technical challenges and a lack of resources will often prevent significant action being taken towards identifying gravesites,

exhuming remains and identification. In some scenarios, bodies are not retrievable; in many cases efforts will have been made by perpetrators to prevent remains being exhumed.<sup>8</sup> Such challenges are additional to the political obstacles that must be overcome for such investigations to begin.

The very substantial resources devoted to prosecutions of violations, notably by the International Criminal Tribunal for Yugoslavia, have driven much of the work of exhumations of victims of conflict in recent years. In the decade of the 1990s, “134 anthropologists from 22 nations investigated nearly 1300 sites in 33 countries” (Steadman and Haglund, 2005: 1), in an attempt to retrieve remains of victims in connection with human rights investigations. Tensions have arisen between the legal and evidentiary needs of prosecution and the needs of families of victims, notably over the issue of individual identification, which is often unnecessary in a trial (Stover and Shigekane, 2002). Where exhumation and identification is driven by a humanitarian need to identify bodies, a process of collecting both *ante-mortem* and *post-mortem* data is required (Huffine et al., 2001). Where resources permit, in terms of both finance and expertise, DNA testing can be used to confirm matches made between ante and post-mortem data, and such a process has been widespread in the Balkans (Wagner, 2008). In many contexts however where families have a desperate desire to know the fate of missing relatives such resources to identify the Missing are not available.

Culture is a crucial factor in defining the needs of families of the Missing (Section 2.3) since Western concepts of trauma will often fail to resonate in traditional societies which will interpret the impact of loss and ambiguity in ways that derive from their own cultural traditions. Kwon (2008) describes how the ghosts of the Missing in Vietnam from the American war haunt survivors, urging them and aiding them to ensure that they are buried in ways which honour them appropriately. In Zimbabwe, victims of those killed in the Matabeleland violence of the 1980s saw their needs as driven by the ancestral spirits: the greatest issue was to give an appropriate funeral and other rituals to the dead which not been possible for the Missing. They were in graves considered unacceptable, which caused tremendous psychological suffering since the spirit of the dead could not return as an ancestor (Stover and Shigekane, 2002). Exhumations had no legal goal, but were done simply at the request of families:

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<sup>8</sup> An infamous example comes from Argentina’s ‘dirty war’ in the throwing of live, drugged detainees into the sea from aircraft, so-called ‘death flights’ (BBC, 2005).

[T]he process of exhumation and reburial does physically what psychotherapists in the west do metaphorically - it encourages people to explore their past and see the links with their current experiences. (Eppel, 2002)

This emphasises the extent to which humanitarian responses to the issue of Missing persons should ideally be driven by families and communities, and not be determined by outsiders' preconceptions. In some cases, the human rights discourse which drives much work around such crimes, despite its claims to universalism, privileges priorities rooted in cultures other than those in which victims live. This issue is discussed further in Section 9.3.

### ***Truth and acknowledgement***

After conflict, truth will emerge subject to both political agendas seeking to advance certain narratives and personal and collective memory, and in turn each will mediate the other. Truth Commissions represent an effort to formalise the construction of such narratives and have become the principal transitional justice mechanism tasked with delivering (or 'recovering') truth following conflict and political violence. These are bodies authorised by the state that focus on past events and investigate a pattern of abuse over some fixed time period (Hayner, 2011). The Truth Commission emerged as an alternative to trials in contexts where prosecutorial process was not (or not yet) possible due to limiting political factors and so represented: "principled compromises on the transitional justice issue of 'punishment or impunity'" (Teitel, 2000: 81). In practice, truth commissions are a way of mediating memory (Andrews, 2003), determining what should be remembered and what forgotten in the construction of a state's post-conflict identity. The early Truth Commissions were able to not only find evidence that a regime had committed violations, particularly concerning disappearance, as in Argentina and Chile, (Aguilar, 2002; Graham-Yooll, 2005), but to recover truths that previous regimes had sought to hide in such a way that society could be confronted with the reality of what had happened, and on that shared understanding move forward.

The linking of the Truth Commission to concepts of restorative justice (Section 1.2) and the emergence of a narrative of 'truth as healing' can be traced to the South African Truth and Reconciliation Commission (TRC) where amnesty was explicitly given to perpetrators in exchange for truth. As a result of the South African TRC truth and reconciliation and, more explicitly, truth as reconciliation, has become a dominant

narrative of transitional justice. This claims that the public telling of truth leads to healing for victims individually, and through the broader truths that emerge, healing and reconciliation for the nation as a whole: what has been called a ‘therapeutic ethic’ (Colvin, 2003). The TRC claimed to be ‘victim-centred’, as a result of this process being primarily performative, institutionalising the truth claims of victims through public truth-telling with the social goal of reconnecting victims and society (Humphrey, 2003). In addition to the *product*, i.e. its final report, the TRC emphasised the importance of the *process* of truth recovery. Trauma as the lens through which to understand societies emerging from mass violence has led to a medicalisation of the understanding of the impact of war on civilians (Summerfield, 2004), dominated by approaches that co-opt psychoanalytic concepts of cathartic release and apply them to societies as a collective. This entirely Western lens largely neglects indigenous or grassroots approaches to addressing the impact of conflict, privileging prescriptive solutions imported from a global discourse that “analyses political, economic and social issues in terms of cycles of emotional dysfunction” (Pupavac, 2004). The trope of truth as reconciliation underlies a broad range of recent transitional mechanisms and yet appears to be rooted in little empirically tested practice. The relevance to victims of a discourse of truth as healing is discussed in Section 8.2 in the light of the findings of this study, which represent an effort to empirically test the claims that, for victims, truth (and explicitly the truth of a Truth Commission) is healing. Beyond the claims of ‘healing’, Truth Commissions can potentially address the needs of families of the Missing in several ways:

- Acknowledging the fact of disappearance, and the responsibility for it;
- Learning the fate of the Missing;
- Instigating exhumations;
- Giving a public forum in which families can present their testimony;
- Initiating compensation and reparation schemes;
- Naming perpetrators and initiating prosecutions.

Despite the South African TRC having been the object of huge study rather little data is available about how its work is perceived by victims.<sup>9</sup> The most comprehensive study of victims’ responses to the TRC, by the Centre for the Study of Violence and Reconciliation (1998), suggested that victims wanted those perpetrators who had been amnestied to contribute to their reparation and rehabilitation. Victims expressed the view

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<sup>9</sup> See however the edited collection: Chapman and van der Merwe, 2008.

that their role in the TRC process was not sufficient, and that they would be interested to meet with perpetrators: an echo of the idea of *encounter* that is a pillar of restorative justice (Section 1.2). It has been suggested that exposure to discussion of trauma, and the potential retraumatisation, in such a forum can be damaging for victims (Silove et al., 2006; de Ridder, 1997). Many victims' families were angered by perpetrators walking free (Gibson and Gouws, 1999), but South Africans in general found amnesty to be unfair but necessary (ibid).

More recent truth commissions have reflected a growing global intolerance of impunity and typically have a connection to a prosecutorial mechanism. In most cases, a Truth Commission is not able itself to address the need for the truth about the fate of the Missing. Investigations, exhumations and identification require substantial dedicated resources, technical expertise and a long timescale, making the Truth Commission approach imperfect for the task. In practice, Truth Commissions have been able to demonstrate the fact of disappearances and to document representative cases. In the most successful contexts this has then served to initiate the action required to learn the fate of the Missing, and address other needs of families. The South African TRC was able to conclude from testimony that the state was centrally involved in sanctioning and planning disappearances (Republic of South Africa, 2003: Section 4:1). As a result, a number of exhumations were made by the TRC itself (ibid: Section 4:2) and, on its recommendation, a Missing Persons' Task Team created to make further investigations, to confer victim status on the disappeared, allow families access to reparations, identify gravesites and facilitate exhumations (EAAF, 2008; Republic of South Africa, 2008).

An alternative path to truth for families of the Missing is through a mechanism that explicitly engages with perpetrators of disappearances, using confidential channels to encourage disclosure on a humanitarian basis. Such mechanisms, typically called Missing Commissions or Working Groups, are generally established after conflict by the concerned state or states, often with an international or neutral third party presence:

The commission's mandate should be independent and humanitarian, focusing on the provision of remedies and information. It should be in contact and approachable by the families. Its first goal should be seeking to clarify the status of the missing. It should answer the question of whether someone is dead or alive, if dead the circumstances of the death and the location of the human remains. It should as well work on proper exhumation of the

human remains and on identification of the recovered remains. (Werntz, 2007, discussing the possibility of a Missing Commission in Nepal)

To function effectively such mechanisms have to engage with those persons, usually the political leadership of the parties to the conflict or their successors, who have access to the information needed to resolve the fate of the Missing. The element of engagement with perpetrators is crucial, and an inability to do this is the most frequent cause for the failure of such mechanisms, often exacerbated by the political use of the Missing issue. At their most successful, such mechanisms offer truth and the return of remains, but not prosecutorial justice. The Commission on Missing Persons in Cyprus (CMP), containing representatives of both main communities on the island, is leading a non-sectarian process that, after years of inactivity, has in recent years led to hundreds of exhumations and identifications of the Missing (Kovras, 2009). Following the Dayton Peace Accord of 1995, in Bosnia and Herzegovina a *Working Group on Persons Unaccounted for* brought together representatives of the Governments of Bosnia and Herzegovina from the three principal communities. Using information gained from the Working Group, and the identification technology of the Sarajevo based International Commission on Missing Persons (ICMP), the mortal remains of more than 5,500 persons have been returned to families (ICRC, 2008a).

### ***Reparations and memory***

Reparation refers to the obligation of a wrongdoing party to redress the damage caused to an injured party (Permanent Court of International Justice, 1928), and international law has established a 'right to reparations' (Joinet, 1997). Reparations encompass three main types of remedy: restitution, compensation and satisfaction. Restitution aims to restore the conditions that existed prior to a violation, something impossible of course where a missing person does not return, but where efforts can be made to address some of the impacts on a family. Compensation involves monetary payment for material or moral injury, while satisfaction addresses non-material injuries and may involve official apologies; assurances of non-repetition of the offence; judicial proceedings; and truth and reconciliation commissions (Bradley, 2006). In many transitional contexts, where justice is absent or incomplete, reparations may be the most tangible manifestation of the state addressing harms suffered by victims of conflict (de Grieff, 2008). Reparation also has a significant socio-political role, to impact on the broader society through the drawing of a line under past violations and the reinforcing of a commitment to the rule of

law. Indeed, it is seen that the reparative demands of victims often demand the changing of state behaviour.

Reparations are an approach to political violence that attempt to link the addressing of individual needs, emotional, psychological and livelihood related, with norm-setting processes in society that aid recovery. The victim-centred approach taken here will focus on the impact of reparations on victims, but will also consider implications for the broader community. Reparations are the one mechanism that should be intrinsically victim-centred and such efforts will fail to be reparative if victim needs are not considered. Yet very often reparation schemes fail to consider victims' wishes in their design and implementation (Waterhouse, 2007). The literature of reparation consistently blurs boundaries between the rights of victims as outlined in legal instruments and their needs as they express them (Cullinan, 2001). The Basic Principles (UN General Assembly, 2006) do not mention the word 'need', but state that "[r]eparation should be proportional to the gravity of the violations and the harm suffered" (7: IX, 15). This is an acknowledgement that needs must play a role, even though there is a reluctance for the rights vocabulary to accommodate such language on the understanding that it is the violation that creates a right to reparation and not the harm suffered (e.g. Mario-Rubin, 2008).

Reparation, whilst potentially providing material compensation to victims, is primarily about *acknowledgment* of what has happened and the responsibility for it, and is thus intimately linked to concepts of truth (see above); in some contexts victims seek that the state or perpetrators themselves provide such recognition. The financial component is a way of demonstrating this, and not an end in itself. Where reparations have been financial, putting a value on a life is problematic, and the families of some victims have rejected such payments (Femenia, 1987). Reparations can equally be symbolic, and involve the state supporting restorative processes such as death certificates to families of the Missing or the facilitation of exhumations. Symbolic or non-financial reparations can include formal acknowledgement of the truth regarding the Missing, official apologies, designating days of remembrance, granting the Missing an official legal status, construction of memorials and appropriate reburial services (Jelin, 2004). Thus, reparation can have a beneficial effect on victims as part of the rehabilitative process (El-Sarraj, 1995), although the impact of reparations on victims is little studied:

A major gap in the literature found to date is in the area of follow-up studies of survivors who have (or have not) received reparation. In the absence of studies into the effects of reparation, one is faced with speculation and generalizations. (Cullinan, 2001: 50)

One study with ex-political prisoners in the Czech Republic (David and Choi Yuk-ping, 2005) showed that only a minority of victims was satisfied with financial reparation, but that money increased access to rehabilitation and symbolised social acknowledgement and justice (ibid.). In South Africa, a study found that victims regarded reconciliation and reparation as linked, and were generally in favour of symbolic reparation (Centre for the Study of Violence and Reconciliation, 1998). A review of reparations processes (Waterhouse, 2007) suggests that reparation that prioritises action by perpetrators rather than the recovery of victims replicates the role of victims as passive objects: “programs that enable victims to play a part in critical societal institutions offer a more thorough remedy to past harms by fostering victims’ moral agency.” (ibid: 2).

Memory is the way in which truth is assimilated into narrative, both individual and collective (Assman, 2006). The literature of transitional justice however has little room for individual memories, focusing on collective memory and the impact of institutional processes, such as the reports of truth commissions and national memorials (e.g. Jelin, 2007; Hutchinson, 2009), rather than processes that are enacted in the social spaces of family and community. Even in societies where the spiritual is not greatly relevant, the Missing can be said to haunt the present, there but not there at both a personal and a political level:

A missing person is a human being without a body, a voice which cannot be heard, but is always there, a memory which refuses to go away. (From a leaflet of the Pancyprrian Committee of Relatives of Undeclared Prisoners and Missing Persons, Nicosia, Republic of Cyprus: Quoted in Sant Cassia, 2005: 83),

Whilst there is clearly a connection between a family’s traumatic memory of an individual disappearance and national schemes to remember the dead and the Missing (Bell, 2009), little has been written of how individual events of violence, and experience of them, are transformed by politics and power into formal memorialisation. Indeed, the focus of memory scholarship on events that collectively traumatised the West such as the first World War and the Holocaust appear to drive the study of such issues away

from the individual and towards an emphasis on scale and the collective (e.g. Winter, 2010). This study will take a converse view and study memories and the need for memorialisation within families and infer how processes of remembrance and institutions can serve these.

Memorialisation traditionally serves the powerful in society as part of the politics of a transitional process (Jelin, 2007) and as such is rarely done exclusively on the terms of victims. Sant Cassia (2005), for example, has written powerfully about how in Cyprus memories of the Missing have been manipulated by the state to reinforce certain narratives that directly impacted how families perceived the fate of missing relatives. This echoes the great distance between private memory and public representations found in the authoritarian societies where disappearances occur. However, memorials can also promote social repair through acknowledgement, and have the potential to be restorative (Barsalou and Baxter, 2007). For families of the Missing, where human remains may not be retrievable a memorial can be a space for mourning and remembrance while physically refuting the effort at disappearance. Pollack (2003) discusses the attitudes of the families of the Missing from the Srebrenica massacre, who believe that the memorial located at a mass burial site where killings occurred, takes precedence over individual identifications. As part of reparative process, a memorial can endorse and institutionalise those narratives regarding the past privileged by victims.

### ***Trials and judicial process***

It is almost universally presumed that prosecutions benefit victims and that impunity is in itself traumatic for survivors. Where no measures are taken against those who caused the injury; some authors (Edelman, 1996; Rauchfuss, 2008) contend that a life of repetition of the trauma is created and that impunity is devastating for the health of the survivor:

Impunity interrupts the normal process of healing of the survivor of repression, the grief of the families of disappeared victims, and the process of social reparation. Impunity prolongs the psychopathological consequences of repression, both in the individual and in the society. (Gurr and Quiroga, 2001: 27).

Despite these claims, there has been little empirical work on the issue of whether prosecutions of violators are of benefit to the victims of those tried. Indeed one of the

few scholars to address the issue calls this an “intellectual void” (O’Connell, 2005: 299). O’Connell interviewed therapists and human rights lawyers who had worked with victims of violations (largely in Argentina and Chile), to determine the effect trials had on victims. His conclusions are that impunity inflicts ‘psychological pain’ and that trials can be cathartic and provide acknowledgement through the breaking of social silence. However, trials could also retraumatise victims (see Section 5.3), and the pardoning of perpetrators was highly traumatic. Those victims who participated in trials, either as plaintiffs, witnesses or deponents, felt different effects. Relatives of the Missing describe the process as “validating”, with one saying power “flowed back from the accused to me” (Stover, 2004: 118-119). Others however deny that there is any therapeutic element for victims in trials (Fletcher and Weinstein, 2002), while Hamber claims that the context in which testimony is given is crucial and that a trial is often not the best environment (1996). O’Connell concludes that many victims are potentially damaged by giving testimony in an adversarial process, while some who had themselves fought for and found justice claimed that it changed them positively. He concludes that judicial action should not be considered a ‘healing’ experience for victims on the basis of current evidence, and that attention should be paid to non-judicial alternatives to address victims’ psychological needs.

Claims that judicial process is necessary for peace and enhances reconciliation (e.g. Goldstone, 1996) remain unproven: the little empirical evidence, from international tribunals, suggests it does not (Biro et al., 2004; Kerr, 2005). It has been claimed that the centrality of courts to narratives of the transformative potential of transitional justice are an example of ‘judicial romanticism’ (McMahon & Forsythe, 2008). Whilst this study cannot directly comment on the impact of trials on peacebuilding, it will attempt to understand their impact on victims of violations.

### ***Gender in transitional justice***

Disappearance is a violation that largely targets men and is overwhelmingly perpetrated by men. It is women however, notably the wives and mothers of the disappeared, who are the survivors most impacted by disappearance and are themselves its victims (Section 2.1). However, both the literature and practice around gender issues in transitional justice emphasise sexual violence against women, and more particularly judicial process to address such violations (e.g. Ayub, Kouvo and Sooka, 2009; Duggan, Bailey and Guillerot, 2008; Henry, 2009). This discourse reduces women to their injury in a violation and perpetrator centred way, rather than focussing on victims’ needs and

priorities. The focus on sexual violence allows the cultural and socioeconomic issues that often underlie disempowerment in traditional societies (and that facilitate sexual violence) to be neglected, and ignores the structural violence in many low income contexts where women are marginalised by poverty as well as gender. Such phenomena constitute both the root causes of such violence and amplify the impact of all violations, including disappearance. The psychosocial impact on female victims, mediated by patriarchal societies, will be both different and more extreme than that on men. Gender is always enmeshed in a nexus of discursive practices: legal, political and social. Transitional justice preferentially addresses the legal, but remains subject to the social, and this becomes most clear when women are victims.

Studies indicate that the demands expressed by victims are gendered, with women most strongly emphasising basic needs (Rubio-Marin, 2008). This is indicative not only of extreme needs, but also of the low awareness of rights that women have. It has been suggested that for women in low income states emerging from conflict the very idea that reparation can erase the impact of a violation should be abandoned (Bell and O'Rourke, 2007), in favour of simply trying to improve the situation of such women and support rehabilitation. The transition period, as a time of rupture, can also serve as a window of opportunity to empower women, promote gender equality, advance women's position in society, and bring wider benefits to many elements of society.

...feminist theory should focus on how transitional justice debates help or hinder broader projects of securing material gains for women through transition, rather than trying to fit a feminist notion of justice within transitional justice frameworks. (Bell, 2007: 23)

This coincides with the goal here of letting the demands of victims rather than prescribed frameworks define approaches to disappearance. The research of this thesis will focus particularly on understanding the needs of female relatives of the Missing and how the confluence of victimisation, gender and disempowerment determine the forms of intervention that such women seek. It will also attempt to enlarge the scope of transitional justice and understand how a broader agenda to advance the position of women can be integrated into responses to violations in general and disappearance in particular.

### ***Customary approaches and traditional justice***

While Western approaches seek to put restorative models of transitional justice into practice, a number of societies have customary practices that take a restorative approach. Many cultures have developed indigenous ways of resolving disputes and scholars looking for more relevant approaches to transitional justice have begun to turn to these. Such customary process can be more affordable, accessible and less intimidating than formal courts: they are necessarily embedded in the local and particular. One disadvantage of customary forms of justice is that they have been developed to deal within a community with minor offences, and questions have been raised about the extent to which they can be extended to cope with serious offences and years of conflict and oppression. There are also issues arising from the subordination of such processes to local power structures that may exclude women and other disempowered groups (e.g. Robins, 2009).

Perhaps the best known of these processes is *gacaca* in Rwanda, where the post-genocide government chose to adapt a customary process to deal with the massive number of persons accused in connection with the violence of 1994 (Longman, 2006). Gacaca has been criticised however for being largely a local retributive process, with little link to genuine tradition (Waldorf, 2006) and no restorative component beyond the public truth-telling in what is essentially a village based trial. In northern Uganda, as a part of an uncertain peace process, traditional *Acholi* restorative dispute resolution processes rooted in reconciliatory concepts have been proposed to address the return of fighters from the rebel Lord's Resistance Army to their communities. Whilst the principle of such processes is supported by local leaders (Liu Institute, 2005), many questions remain and the process is yet to be formally used. The most obvious critique of both these processes from a victims' view is that all decisions concerning the use of such traditional approaches were made by elites with little consultation with those most affected. In both cases it appears that expediency drove government policy, with the Rwandan legal system overwhelmed with defendants and the Ugandan authorities seeking to justify excluding LRA fighters from the formal justice system as an incentive for a peace deal. An alternative to attempting the use or adaptation of customary process for transitional justice is to establish mechanisms which include traditional elements, but which are part of a broader process. This was done in Timor-Leste as part of a truth commission where the Community Reconciliation Processes was created to deal with lesser crimes through an informal process that engaged with traditional practices (Babo-

Soares, 2004); this is discussed in Section 4.3.3. In none of these cases however has genuine local process that enjoys the approval of victims been supported by the authorities, but rather a decision has been imposed to co-opt traditional process for a role to which it is not necessarily well suited.

### **3.2 Conceptualising a victim-centred transitional justice**

The term 'victim-centred' has been used increasingly to describe transitional justice processes, most notably around the South African TRC (Republic of South Africa, 2003; Aldana, 2006; Lemman-Langlois, 2000) in an attempt to suggest that the process places the victim at its centre. This echoes restorative justice practice (Section 1.2) that aims to restore relationships between individuals and groups damaged by wrongdoing, and perpetrators. However, restorative justice in transitional contexts is poorly conceptualised and as a consequence it remains unclear what implications such a restorative approach has for a transitional justice process. In this section a victim-centred approach to transitional justice is defined and conceptualised in terms of both increasing victim agency in transitional justice processes and creating a new means for measuring their success. Whilst it refers to concepts of restoration, it seeks to go beyond a restorative-retributive dichotomy to build an approach that encompasses the complexities and tensions in victims' demands of transition. The victim-centred approach is driven by the demands that victims themselves make of the transition, and these are understood as needs that are conflated with the normative understanding of needs explored in Chapter 2: needs, rooted in satisfiers that emerge from local and particular circumstances, can best be articulated by the individuals who experience them. Needs are discriminated from wants by the understanding that a failure to satisfy them is personally or socially destructive (Rubenstein, 2001), including not just basic needs but also those for recognition and identity.

#### ***Defining victim-centred transitional justice process***

We can attempt to understand what restoration might mean for families of the Missing. In terms of relationships, the damaged relationship is most obviously that between the victim's family and the perpetrator, where the perpetrator in this situation is likely to be identified as the state, rather than an individual. This suggests that restorative justice attempts to repair the relationship between the family and the state, and presumably the community of the victim's family and the state, particularly where entire communities

were targeted. Since the relationship between the state and its victims is likely to traditionally have been a highly unequal one, restoration here would most certainly not mean returning to a situation that existed before the violation that defined the victim, but looking forward to addressing both the injustice of the violation and other injustices in the relations between victim and perpetrator: to restore an “ideal of right relationship” (Llewellyn, 2006: 93). Where the perpetrator is the state this suggests that restorative goals may be very broad indeed, including an addressing of issues of general social injustice and exclusion. The requirements of the victim, or the family or community of the victim, for restoration would then have to be defined, most obviously by the family and community themselves (Section 2.2.4). This would tend to suggest that the needs of victims, at an individual, group and community level define the primary goals of restoration.

The substantial literature on victim-centred process in criminal justice suggests that a victim-centred approach is *necessarily* restorative, in opposition to a retributive process (e.g., Braithwaite and Pettit, 1990; Wright, 1991). It is often seen however that victims seek a balance of restorative and retributive process, and particularly for serious offences both victims and society seek to see punishment of offenders, in contrast to the lesser offences from the addressing of which restorative criminal justice practice has evolved. Daly (2001) has described as a ‘myth’ the assumption that restorative justice is somehow the ‘opposite’ of retributive justice, referencing her experience that victims seek multiple justice aims that are restorative, rehabilitative and retributive (ibid). In the transitional context the experience from empirical work is that victims articulate exactly such mixed goals (e.g. Wilson, 2001; CSV, 1998; ICTJ and HRC Berkely, 2005; Vinck et al., 2007). This is consistent with restorative practice conceived of as being a ‘third way’ between the retributive and the rehabilitative (Daly, 1999), driven in this conceptualisation by the demands of victims. The crucial point of this approach is that it is victims who determine the balance between reparation and healing, on one side, and retribution on the other, rather than a norm-based system divorced from the political and other realities of the situation. The reference here to restorative process is also intended to emphasise community engagement and ownership in such process rather than exclusive ‘professional’ stewardship (McEvoy and Newburn, 2003).

The term ‘victim-centred’ will be used in the sense that it is referenced in criminal justice systems:

A victim-centered system is a change in perception from a case focus to a victim/survivor focus. Some professionals may fear that a shift to a victim-centered response calls for allowing the victim/survivor to make all the decisions about who does what and how it is done. This is not the case. Victim-centered denotes an awareness of the centrality of victims/survivors and their needs to the whole process. (SAIC, 2010, with reference to sexual assault in the criminal justice system)

Here, the term *victim-centred process* is defined as any transitional justice process that arises as a response to the explicit demands of victims. Such an approach abandons the dichotomy of retributive versus restorative process and instead allows the victim to define their preferred goals of the transitional justice process, likely to include both restorative and retributive elements. This does not imply that all goals of the process are made subservient to the agenda of victims, but that an awareness of the centrality of victims and their needs to the whole process drives it. External constraints, not least the political, as well as broader societal demands must be accommodated by any transitional process. A victim-centred approach implies that the agenda of victims is known and that victim goals constitute a key driver of the form that process takes. Here, a victim centred approach is used to advance specific ways of enhancing the quality of transitional process, namely: to challenge external and prescriptive approaches, to counter elite control of the transitional justice agenda, and to optimise the addressing of victim needs. A deeper conceptualisation of victim-centred approaches to transitional justice is made in the light of the data of this study in Section 10.2.

A victim-centred transitional process is one that is necessarily *emancipatory*. It empowers victims through their engagement with the process itself which serves to transfer agency that has traditionally lain with experts and national elites to the victims most impacted by legacies of violence. The result is that such processes, rooted in the lived experience of victims, serve to address the impacts of violations in ways that are transformative for victims. This echoes the language used to define *emancipatory* approaches to peacebuilding and as a result emerges as one potential constituent of such transformative processes:

In contrast with the prevailing orthodoxy, emancipatory perspectives are context-specific, driven by people's needs in post-conflict places and are evidentially-constructivist. This means that the political space involved is

reconstructed around the evidence of everyday lives and needs rather than the ideological fantasies of foreigners [...] accepting the subjective ontology of peace. (Roberts, 2011)

This thesis aims to be an articulation of that 'ontology of peace', evidence based and demonstrating that local understandings of justice and of the impact of violations will necessarily diverge from that of global discourses and that such knowledge is the most effective foundation for a process to address those impacts. Implicit in this approach is that such processes will be locally owned as far as is possible, suggesting that particularly in the poor and rural societies studied here they will necessarily be highly decentralised and involve the mobilisation of victims around their agendas. Such process will take seriously the lived realities and everyday struggles of ordinary people; this is the only way to ensure that impacts such as those linked to the spirits of Timor (Section 7.2.3) or the social stigmatisation of wives of the Missing in Nepal (Section 6.2.3) can be comprehended and addressed, alongside and as part of issues of truth, justice and reparation.

A victim-centred approach demands that transitional mechanisms be created in response to victim needs, and thus those needs must be known; this requires a process either of broad consultation among victims, or for victims and their representatives to be engaged at all levels of the planning and implementation of transitional process. This then makes the *process* of transitional justice as important as its outcome; this is discussed below. An evaluation of the effectiveness of a victim-centred transitional process must be measured, at least partly, in terms of its impact in addressing victims' needs, and this is also discussed below, providing the rationale for the test of contemporary approaches to transitional justice that this thesis adopts.

### ***Whose transitional justice?***

Despite a widespread understanding that it is the poor and disempowered who suffer most in conflict and who constitute most of its victims, a sustained engagement with such constituencies has not become part of mainstream transitional justice practice. Whilst the rhetoric of participation has become orthodox in post-war recovery, its practice still remains far from ideal:

In recent years greater attention has been paid to the issue of participation, but this has often taken the form of co-option of local people (often local

elites) into schemes that were inspired, funded and led by external interveners. (Barakat, 2005: 252)

In transitional justice this criticism remains even truer and whilst some literature is now emerging to challenge this deficit (McEvoy and McGregor, 2008) there remains a dearth of praxis that interrogates the idea of a transitional justice driven by the grassroots. In many contexts, conflict took a very local form, and addressing these from the capital without engaging victim communities marginalises the very people who are most in need of transitional process. Local visions of the future or local meanings of justice must inform the process to ensure that the contingencies of context are considered, challenging legalism and positivism in search of a ‘thicker’<sup>10</sup> transitional justice (McEvoy, 2008).

An issue that this thesis will address is that of *participation*, the only way in which victims can have agency in such a process, and this is likely to demand victim mobilisation (see Section 2.2.3). Victims’ groups have been seen to be crucial for victims of conflict, both in terms of being one of the very few mechanisms through which they can influence policy and in providing support for victims in their communities. Despite this, there are almost no published studies of the dynamics of such groups in post-conflict contexts. The only existing work is that of Hamber et al. (2000) which remains unpublished, and Madlingozi (2010), both of the Khulumani support group in South Africa. In many states emerging from conflict one can see substantial activity at the grassroots, through the mobilisation of victims and survivors, and groups at the community level organised to press for their interests. Often these activities will be invisible at the international level, and hard to discern at the national or Governmental level and for that reason may not be considered as relevant for a state-wide transitional justice process. In some cases the views and agenda of such groups have made themselves heard in the literature of transitional justice, (The Ardoyne Commemoration Project (Lundy and McGovern, 2006) is an example), but they remain largely submerged beneath discourses that come from various establishments. Rajagopal (2003) has engaged with this problem with regard to social movements, and in particular those that are ‘resistant’ to an increasingly hegemonic and globalising

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<sup>10</sup> This comes from the anthropological approaches of Geertz (1977), where the concept of ‘thick description’ implies scholarship that is complex, multi-layered and actor-oriented, in contrast to ‘thin’ approaches that are narrowly descriptive and positivistic.

framework of international law. This represents an attempt to introduce subaltern analyses (Spivak, 1988; Ludden, 2001), where the voices and agendas of the disempowered are taken as the basis for an alternative analysis to that provided by a hegemonic power structure: an approach 'from below'. An analysis of the victim as subaltern can both explore this relationship and provide new ways to inform practice, notably in acknowledging and incorporating such perspectives.

This thesis is premised on the idea that ordinary people, and in particular victims of conflict and their communities must play a role in determining the shape and form of transitional justice process if it is to have relevance in transforming societies towards sustainable peace. Theoretical understandings of this engagement are emerging in the literature: this study represents an effort to contribute to both the recognition of non-elite and victim perspectives in transitional process and to provide methods to understand these perspectives and incorporate them into the mechanisms of transitional justice. This study will attempt to understand how transitional justice is and, more importantly could be, qualitatively impacted through its engagement with victims.

### ***Evaluating transitional justice***

The theory and practice of transitional justice offer few tools that can serve to measure the effectiveness of a transitional process (and even to define what 'effective' means), or to permit comparison between different processes. The tradition of scholarship in transitional justice is of the study of transitional mechanisms through a largely descriptive approach, rather than through empirical research that uses observation to accumulate evidence for or against theory (van der Merwe, Baxter & Chapman, 2009). Efforts to evaluate transitional justice have centred on particular mechanisms' ability to address particular goals. A number of studies, largely focussed on South Africa, have attempted to answer the question as to the benefits for victims of such processes (Backer, 2004; Hamber, Nageng and O'Malley, 2000). Also in South Africa, Gibson (2004, 2006) used quantitative methodologies, extracting indicators for the abstract concepts that constituted the goals of the Truth and Reconciliation Commission (TRC) and demonstrating that, with a good understanding of context, one can measure even the least tangible goals of a truth process. A similar approach is used in Hamber and Kelly's study of reconciliation in Northern Ireland: reconciliation is defined in terms of five 'strands' that are probed through qualitative research with the communities concerned (2009). All these approaches however reinforce transitional justice as a 'top-down' process, with the goals to be evaluated defined by elites or outsiders. Studies that start

from the needs of transition of those most impacted by violations or of the general population offer the possibility to both construct and evaluate 'evidence-based transitional justice' (Pham and Vinck, 2007), using social science research methods to determine the attitudes of populations of states in transition as a tool to understand the efficacy of transitional processes. In addition to determining the effectiveness of a transitional process that is complete or underway, one can also determine the perception of a population as to their needs of transition before processes are initiated. In this sense it becomes a tool for making transitional process responsive to needs. This empirical approach has been pioneered by the Human Rights Centre at the University of California, Berkeley, using a mix of both qualitative and quantitative methods in several contexts (Biro et al., 2004; ICTJ and HRC Berkeley, 2004, Weinstein and Longman, 2004; ICTJ and HRC Berkeley, 2005; Vinck and Pham, 2010).

The *victim-centred* approach presents a natural framework for both steering the creation of appropriate mechanisms and evaluating the impact of the global transitional justice process. Rather than focussing on the effect of a single mechanism, the impact of the entire transitional justice process can be understood. Victims will themselves define their expectations of a process. Such studies demand research methodologies that can understand the highly local attitudes that drive victims' needs: i.e. empirical methodologies that can engage effectively with victims. This steers the ethnographic approach that has been used here.

### **3.3 Summary**

This chapter has reviewed the theory and practice of transitional justice as a response to legacies of conflict and political violence and the range of mechanisms that have been used, with an emphasis on those that can potentially impact upon the needs of families of the Missing, as discussed in Chapter 2. Transitional justice theory and practice, emerging as it does from a legalist paradigm, emphasises institutional approaches (McEvoy, 2008), and this leads to a significant literature on its principal mechanisms, namely trials and truth commissions. Despite this range of scholarship however there is little data on the impact such processes have on victims, with empirical approaches rare. Transitional justice scholarship seeks rather to use normative, mostly legal, frameworks to base studies, which remain largely descriptive, offering little potential for objective or comparative evaluation of particular processes. The principal critiques of contemporary transitional justice process have been discussed, with an emphasis on those that

perceive transitional justice as prescriptive and elite-driven and part of a liberal approach to post-conflict societies. These are seen to emphasise a liberal institutionalism that neglects issues of poverty, social exclusion and a lack of development that often drive conflict.

The chapter has argued that whilst transitional justice has internalised a rhetoric of restorative justice that can complement retributive process, that process will be of only limited value to victims as long as it is not steered by their needs and perspectives. It has proposed a *victim-centred* approach, defined by the prioritising of the needs of victims as defined on victims' terms. Such an approach goes beyond the dichotomy of retributive and restorative approaches to steer transitional justice process rooted in the communities that are most impacted by the legacy of conflict. The rest of this study will elaborate this approach and implement studies of victims' needs in two contexts.

# Chapter 4 Nepal and Timor-Leste: The politics of transition

## 4.1 Low income states in transition

This thesis aims to make an ethnographic study of families of the Missing in two low income states emerging from conflict: one context where no significant transitional process has yet occurred and one where the mechanisms of transitional justice are well advanced. The fact that the two contexts share a number of important characteristics but are dissimilar in the variable(s) of interest, here the transitional process itself, enables the study to also have a comparative element. Nepal and Timor-Leste are both small Asian states with dispersed rural and agricultural populations of great ethnic diversity, living in joint families as part of larger clan structures. The people of both states have a traditional spiritual outlook that has been influenced by faiths that have arrived in recent centuries. The populations of both Nepal and Timor-Leste were touched by colonialism, but most only lightly. Both states are emerging from conflicts driven by alienation from their rulers and at the time of the research they had almost identical per capita GDP.<sup>11</sup> There are however clear divergences in the experiences of the populations of the two states; one conflict was essentially a struggle for national liberation and the other an ideologically driven effort to seize state power. Were this a study of the mechanics of political change, such variables would be crucial; for the families of the Missing however it will be seen that from the viewpoint of the marginalised rural people who constitute most victims in both contexts, the two conflicts looked remarkably similar. Clearly, not all the variables that impact on perceived needs of families of the Missing converge in the two contexts. Efforts will be made to test the dependence of needs in both contexts on variables such as gender, wealth, urban against rural populations etc., permitting the influence of such variables to be understood. The form that transition took in the two states has been quite different: Timor-Leste has been subject to the full machinery of liberal peace and statebuilding, including a hybrid judicial process and two truth commissions; in contrast Nepal has resisted internationalisation of the transition and elites continue to oppose even domestic judicial process and truth-telling mechanisms.

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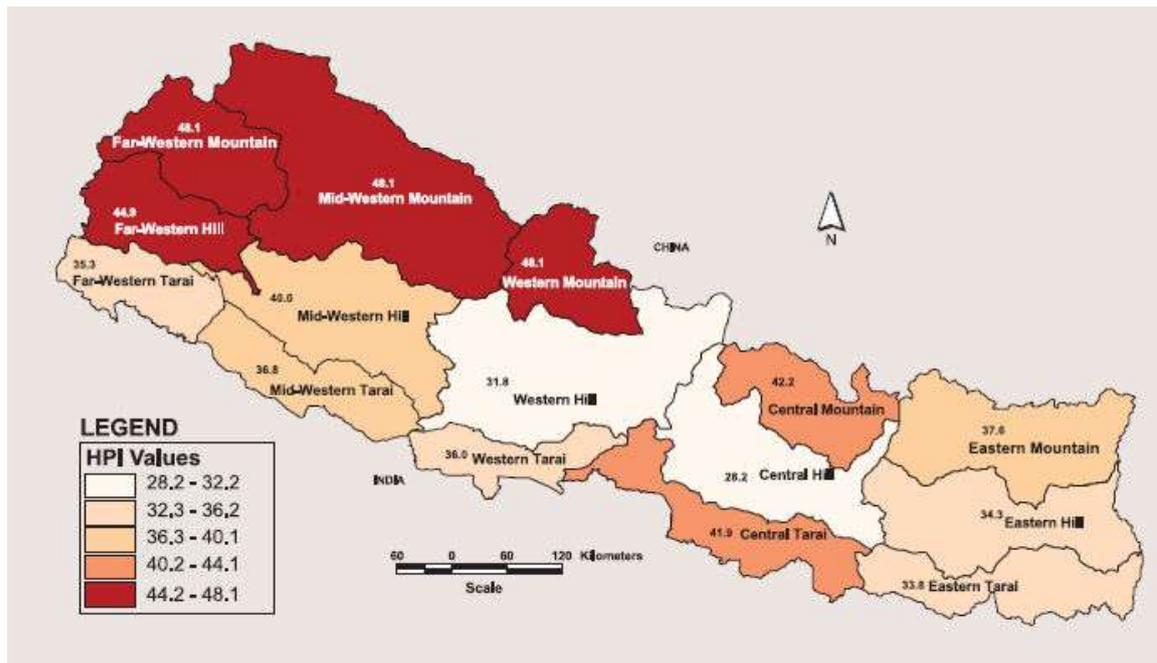
<sup>11</sup> Annual per capita GDP, 2008: Timor-Leste \$461; Nepal \$435 (World Bank, 2010).

This chapter addresses Nepal and Timor-Leste in turn, discussing the relevant cultural aspects and a history of the conflict in each context. This section introduces the cultural and social world in which families live and in which violations occurred. To root a response to gross violations in the experience of those most affected demands an empirical and an ethnographic approach to reach a holistic understanding of the transformations wrought by conflict. Such an approach demands an understanding of the role of the social structures, including family and community in which people's lives are embedded, and that hold the key to recovery from such extreme events. As such, this chapter will survey all those elements, cultural, social, economic and political, that impact on families' responses to disappearance and their resources to cope with its impact. The state of the transitional process in each context is then discussed and a final section compares the two contexts in terms of their transitional processes, and the relative experience of victims.

## **4.2 Nepal**

### **4.2.1 Conflict analysis: the People's War**

Nepal's Maoist insurgency was driven by a legacy of centuries of feudalism in a Hindu kingdom built on a codified framework of social and economic exclusion that marginalised indigenous people, lower castes and women. The impact of the state in many parts of rural Nepal has long been negligible, with central leaders traditionally using local proxies and few services delivered to the population. Structural factors that led to the conflict include social exclusion, extreme poverty, particularly in the remote Mid-west where the conflict began (see Figure 2), the absence of the state in many areas and the lack and unevenness of development. These horizontal inequalities (Murshed and Gates, 2005) give support to a grievance interpretation as a significant cause of the conflict. Indeed, in some areas of the Midwest, the Maoist insurgency either encompassed or paralleled a separate conflict between indigenous tenant farmers and landlords.



**Figure 2** A map of Nepal, showing regions shaded according to their Human Poverty Index, darker being poorer (UNDP, 2009). The Maoist insurgency began in the Mid-western hills.

The first democratic elections were held in 1991, following a popularly supported but elite led ‘People’s Movement’ and elected Governments’ failure to address any of the substantive issues of poverty, social exclusion, or the violence implicit in many economic relations was the greatest proximate cause of the conflict. With the onset of democracy local elites had learnt to run political parties in their areas as machines of patronage and in many areas the rich and powerful were able to ensure that their chosen candidates won elections. Whilst there existed significant ‘constitutional’ Marxist parties (i.e. prepared to participate in elections), who assumed power in coalition in 1994, their disunity and opportunism guaranteed their inability to address the fundamental grievances of the people (Lieten, 2002). Policies of the early 1990s that followed the first democratic elections saw economic reforms that succeeded in raising GDP but unevenly, with a greater fraction arising in urban areas (Deraniyagala, 2006), increasing rural-urban differences. Expectations of various elements of society, notably educated youth, had been raised by the arrival of democracy, as well as by the promises of politicians (Thapa and Sijapati, 2003). These far outpaced the realities of their country’s development. Many of the earliest recruits to the insurgency were educated youth with some experience of urban life.

From the backdrop of an active left in rural Nepal and violent suppression of communists in the Rapti hills of the Midwest (Battachan, 2000) the Communist Party of

Nepal (Maoist) [CPN-M] emerged with an explicit Maoist agenda, a commitment to use violence and a leadership with the charisma and intent to attract recruits (de Blicek, 2006). The CPN-M used the objective complaints of rural western Nepalis to mobilise them, primarily youth, against the regime. Despite democracy, the CPN-M was able to portray a feudal system, with the king at its head, as being solely responsible for the lack of development and ethnic and caste based exclusion in rural areas. The CPN-M undertook campaigns that emphasised gender equality and the rights of minority ethnicities and the lower castes, explicitly acknowledging the importance of both the economic/social agenda and the issue of the 'oppression' of the indigenous ethnicities and lower castes (Prachanda, undated). The insurgency began on February 13<sup>th</sup> 1996, when Maoists attacked a police post in a remote area of Rolpa district and seized weapons. A senior Maoist has reported that at this time the CPN-M nationally had 60 full time workers, and about 500 other supporters.<sup>12</sup> The conflict escalated to the point where, at the time of the ceasefire in April 2006, the Maoists had effective control of 80% of the territory of the state and an army of perhaps 20,000.

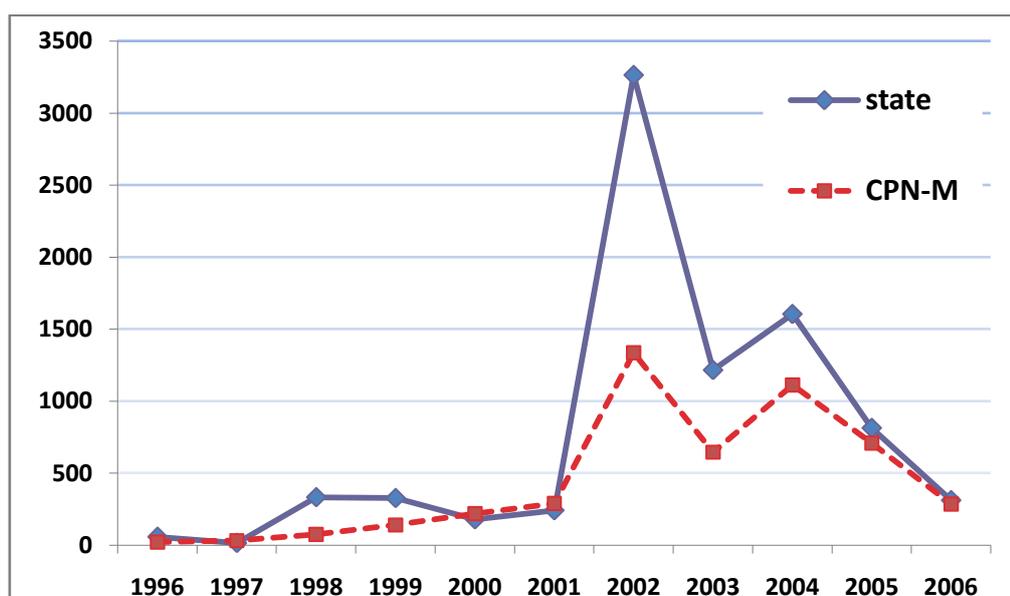
Initially the state responded to the rebellion as a law and order issue, using the modestly armed police force to combat the Maoists. Disappearances perpetrated by the state, which had begun even before the formal start of the conflict (Sapkota, 2007) began to increase. As support for the insurgency grew, and the Maoist People's Liberation Army (PLA) was able to bring significant numbers of troops to bear in the field, the state created a paramilitary Armed Police Force, to enable heavier weapons to be used. Amnesty International (2002a, 2002b) has reported that a pattern of disappearances and long-term unacknowledged detention by the state began from May 1998 when the police launched "intensified security mobilisation" operations. The Maoist forces themselves decided to bring the Royal Nepal Army (RNA) into the conflict, through an audacious attack on a barracks in Dang, in the Midwestern Terai, in November 2001. This represented a calculated attempt to target an army under the direct command of the king, and to escalate the conflict (Gersony, 2003). At the same time the Government declared a state of emergency and issued the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance* (known as TADO) (TADO, 2001), which gave sweeping powers to the security forces, including the ability to detain in protective custody for up to one year without trial, on the authority of the Chief District

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<sup>12</sup> Narendra Jung Pitar, personal communication.

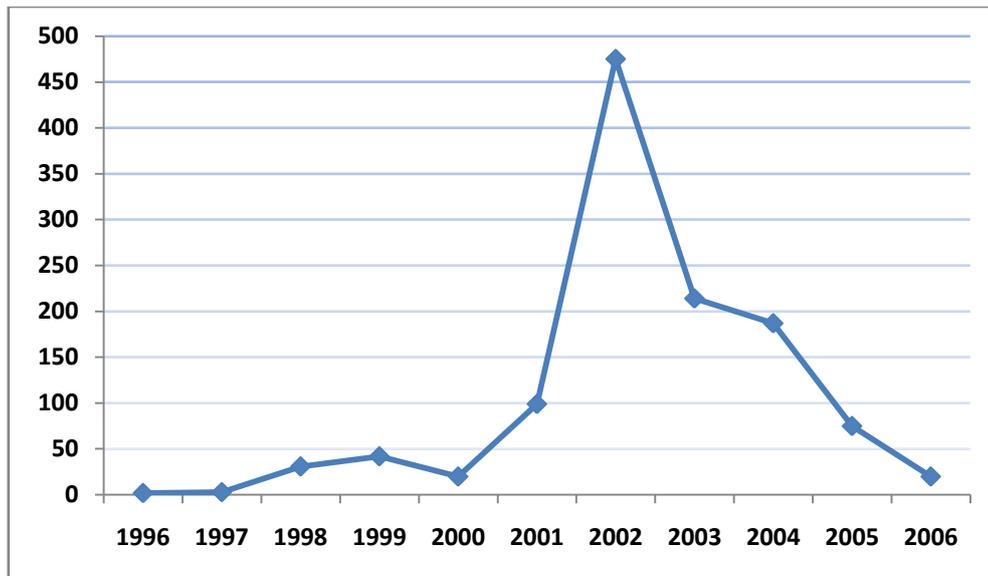
Officer. In 2002 the king seized power from the elected Government and the army continued to be under his direct command.

Where the Maoists had control, they imposed their own governance, through 'People's Governments', which divided their territory into ethnically defined 'autonomous republics', and taxed or extorted the population to fund the insurgency. In areas under their control, CPN-M forces were able to take persons into their custody and many of those missing at the hands of the Maoists disappeared in this way. The response of the RNA to Maoist control took the form either of raids on foot (given the absence of roads), or attacks on Maoist bases from the air. In both cases, civilians were often the victims in attacks that served to strengthen Maoist support (Gersony, 2003). Certainly the RNA's involvement significantly increased total casualties in the conflict (see Figure 3). From the end of 2001, with the involvement of the RNA, violations of the laws of armed conflict by the state were seen to have increased dramatically, according to human rights agencies (INSEC, 2007).



**Figure 3 Total numbers killed during the conflict by year, by the state and CPN-M (INSEC, 2007).**

Many of the missing cases also arise from this period of intense conflict. Figure 4 shows the pattern of persons becoming missing as a function of time, showing that, as for killings, disappearances also peaked between 2001 and 2004.



**Figure 4 Persons becoming missing in Nepal by year. (ICRC, 2008).**

Whilst both parties to the conflict perpetrated disappearances, the vast majority were the responsibility of the forces of the state, apparently as a deliberate strategy of war by military commanders at several levels in the hierarchy (OHCHR, 2006a & 2008). One motivation was the elimination of those perceived to be part of the Maoist threat, and this drove the disappearance and apparent extra-judicial execution of students and Maoist activists. In rural areas there were additional dynamics that encouraged disappearance linked to the traditional power structures of caste, class and ethnicity that were the underlying cause of the conflict. In Bardiya for example, the district worst affected by disappearance with 272 recorded as missing,<sup>13</sup> the People's War was perceived by many as the continuation of a long running conflict over land between the majority indigenous Tharu community and high caste landlords who had established control of much agricultural land over recent decades. In addition to disposing of Tharu activists, the RNA leadership in the region had an interest in enforcing traditional power relations, and the wave of disappearances that followed the declaration of the state of emergency in 2001 achieved this. In Bardiya, the arrest of victims from their homes at night, in many cases by forces acting on information from informers, was in the tradition of authoritarian regimes deliberately creating an atmosphere of terror in communities perceived as being loyal to insurgency. Elsewhere, one of the most well known cases of disappearance in Nepal concerns a fifteen year old girl from a *dalit* community who was

<sup>13</sup> ICRC Kathmandu, private communication: the ICRC list is being constantly updated, this represented the number missing in Bardiya in February 2011.

arrested by RNA troops, tortured to death and buried at an army camp (OHCHR, 2006; Advocacy Forum, 2010). The same group of soldiers had earlier raped and killed other teenagers from the community, putting issues of caste and gender at the heart of the violations.

The end of the conflict came due largely to the lack of judgement of King Gyanendra. The CPN-M appeared to have realised that the international community, i.e. India and the US, would never tolerate a Maoist state in Nepal, and that they were militarily unable to take Kathmandu and the district headquarters that constituted the 20% of the state's territory that the Government still controlled. Once King Gyanendra seized absolute power in 2005, he drove the political parties who had previously run the war towards alliance with the Maoists against his autocracy. India brokered talks between the CPN-M and the political parties and it was this unity between the Maoists and protestors led by political parties that resulted in the 'People's Movement' (*Jana Andolan*) of April 2006. This ended the King's absolute power and led to the restoration of parliament and the consequent peace process.

#### **4.2.2 Cultural aspects: a history of poverty and exclusion**

Nepal is the poorest country in Asia and the 8<sup>th</sup> poorest in the world, with income per capita of \$435 per year; 55% of the population lives on less than \$1.25 per day (World Bank, 2010). The vast majority - between 85 and 90% - of the population lives in rural areas and are dependent upon agriculture for their livelihood (Seddon and Hussein, 2002). The feudal social relations that have persisted into modern times impact upon these livelihoods, with a significant fraction of the rural population being landless and a lack of access to land the dominant cause of rural poverty (Deraniyagala, 2006). 10% of the rural population is absolutely landless and 58% functionally landless, with holdings too small for subsistence; 30% of rural households are unregistered tenants and 60% of the country's productive labour works under some type of tenancy arrangement (Uprety, Rai and Sedhain, 2005). For many in Nepal, livelihoods are never less than precarious, with only about 20% of rural populations, the rural upper classes, generally secure (Blaikie et al., 2002). Of the remaining 80%, half are largely self-reliant, often with income sources additional to agriculture, such as remittances or seasonal employment. The poorest third of the population live in poverty and livelihoods are a constant struggle, with precarious daily labour or small retail activities supplementing what little land they might have access to (Seddon and Hussein, 2002). The lives and livelihoods of girls and

women are generally more precarious in terms of access to resources, earning opportunities and – as a result - quality of life and wellbeing. Infant mortality among girls and maternal mortality are high; many children and the aged live in poverty and insecurity (ibid). The cost of health care is a major factor in increasing household poverty and insecurity, particularly in a time of conflict. Poverty is however a social phenomenon:

The livelihoods of the poor are largely determined by the ways in which and the extent to which their lives are intertwined with those of the rich and powerful – through various forms of economic, social, cultural and political interaction. These are the relationships of class and caste, which provide the basis and the ideological justification for exploitation and oppression, for social discrimination and exclusion, for degradation and deprivation, for bondage and indebtedness, as well as for employment and patronage, for social integration and the maintenance of the social order, for reverence and respect, and social identity. (ibid: 10)

Nepal is a mosaic of ethnicities, languages and castes, having a unique and complex ethnic geography. The kingdom of Nepal was unified in the 18<sup>th</sup> century, under a dynasty that migrated from India in the centuries before. The many other ethnicities in Nepal, notably the indigenous people of mongoloid origin (*Janajati*) and more recent immigrants to the plains of the Terai from neighbouring Indian states (*Madeshi*), have been systematically excluded from the very idea of the Nepali nation, with many traditionally being denied citizenship (Hachhethu, 2003; Tiwari, 2007). The Janajati were traditionally Buddhist or animist in their belief systems, but have been ‘Hinduised’ through exposure to a hegemonic Hindu culture that has been characterised as Nepali (Sharma, 2004). As a result many of the indigenous peoples of Nepal now consider themselves Hindu, but continue to practice many non-Hindu traditions. The Hindu caste system formalised discrimination against indigenous groups as well as against those who share ethnicity with the ruling Brahmin and Chhetri castes, but are considered of lower standing (Höfer, 1979). In Bardiya, for example, the district most impacted by disappearance (OHCHR, 2008) where 90% of victims are indigenous Tharu, indicators of exclusion can be seen in literacy rates which for the Tharu are half (17.5%) the rate among non-Tharu (Chhetri, 2005). The Tharu, as many indigenous groups in Nepal, have seen their livelihoods impacted in recent decades by dispossession from their historic lands by Hindu caste settlers, leaving many landless or enslaved as bonded labourers (Cox, 1990; Chhetri, 2005). Indigenous people and the lowest castes face life

expectancy, literacy and income far below the nation's meagre average (UNDP, 2009). The net result is that the majority of the population is excluded from certain parts of the economy and from politics. At the start of the 21<sup>st</sup> century the Brahmin and Chhetri castes, which constitute some 30% of the population of Nepal made up 87% of civil service staff (Battachan, 2006; see Table 20).

In all communities women are further excluded increasing their vulnerability in all ethnic and caste groups. Land and property inheritance is patrilineal, women live with their husband's family and early marriage is common. Women's status in the family is traditionally subservient and can be precarious; they are expected to work and to produce sons and their value to the family lies largely in this. Women consistently fall behind men in educational achievement and skill development, often leaving them with few livelihood opportunities. Whilst when a husband dies in some indigenous groups it is traditional for a woman to marry her husband's younger brother, in high caste Hindu tradition, which has become a model for all ethnicities, remarriage brings shame to the family and is thus highly stigmatised: widowhood is considered "a state of social death" (Chakravarti, 2006: 82). As girls are considered an economic burden for whom a dowry will eventually have to be found, so boys and men are economic assets for a family and the greatest insurance for the future support of the old. The impacts of losing a member of the household in the conflict can thus not only have potentially devastating impacts socially and personally but for the poor may be a critical blow economically, if that person was a major contributor to the household's livelihood. The limited literature discussing the impacts of Nepal's conflict on its victims is discussed in Section 4.2.4.

### ***Mourning and death rituals in Nepal***

While most of the Missing are Hindu, minorities are Buddhist, Muslim and from 'Hinduised' indigenous groups with animist traditions, notably the Tharu (see Table 1, p.157). Religious attitudes and ritual obligations shape views of death and the importance of human remains to families. Because of the diverse cultures in Nepal, there can be no single understanding of the mourning process; it will be a function of ethnicity, caste, economic and educational status, as well as the attitude of the concerned family and the circumstances of the disappearance. While death rituals vary from caste to caste, and from region to region, there are some fundamental common customs and beliefs for which there will be few exceptions.

Most people in Nepal, as Hindus, burn the bodies of the dead. However, certain minorities such as Buddhists as well as some Janajati groups (including the Tharu), Muslims and Christians generally follow the ritual of burial. For many of the Janajati groups rituals will be a synthesis of tradition and mainstream Hindu belief which has been learnt in recent decades as the presence of the Nepali state and its Hindu culture has eroded traditional cultural approaches (Sharma, 1978). For example, in Tharu society whether a family will burn or bury the body of a relative is a function of their attitude to Hindu Nepali culture, which may be seen as modern and positive, or alien and colonising.<sup>14</sup>

For Hindu Nepalis, the ritual of burning the body is a process which gives liberty to the soul and facilitates its passing to heaven (or hell): without the ritual the soul will wander, possibly as a ghost (Bennett, 1983). While it is vital to perform these rituals for the dead, it is crucial that the person be dead beyond a shadow of a doubt before the rituals are done. If the person later returns alive, that person and the family will not easily be accepted in society. The other reason that death rituals are not observed merely upon receiving news of the death, is that if at some point later, the body is retrieved, the rituals can never be repeated for the same person. For this reason, only in cases where the news of death is absolutely certain, and it is known that the body will never be retrieved, is the *kus* ritual performed. This entails making an effigy of kus grass and burning it with some personal belongings of the dead person such as clothes or shoes. An example of such a case would be if the family themselves, or someone they trusted, witnessed the body burned in a fire, or eaten by a wild animal, and all hope of one day getting part of the body back had gone. A Tharu community leader said during this study that for his community the kus ceremony could be performed only where a witness to the death was present; in this case the kus effigy would be buried according to traditional Tharu practice.<sup>15</sup> Where there is no confirmation of death, Nepali law states that death will be presumed after 12 years of disappearance, based upon Hindu tradition.

In Hindu tradition if the death has left a widow, older widows take the bangles from the newly widowed woman's arms, the glass beads from her neck, the *mangalsutra*, a black pearl on a thread around her neck, and smash them on a stone. They wash the

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<sup>14</sup> Krishna Chaudhary, Founder of Conflict Victims' Committee, Bardiya (Personal communication).

<sup>15</sup> Ibid.

red *tika* and *sindhur* (vermillion powder) from her forehead, which have defined her as a married woman, and thus begins her widowhood.

The emotional and psychological impact of death and other impacts of the conflict in Nepal are perceived in the framework of traditional understandings. Nepali thinking distinguishes between the *man* (heart-mind) associated with emotional response, and *dimaag* (brain-mind), associated with thought (Kohrt and Harper, 2008). A dysfunction of the *man* is not stigmatised, whereas a problem with *dimaag* indicates that someone is irrational or crazy and brings shame and loss of status to both individual and family. A psychosocial intervention will address the *man*, and a psychiatric one the *dimaag*. The majority of the population however has no access to any mental health facility: Kohrt and Harper (2008) report 1 clinical psychologist per 4.5 million population. Most Nepalis rely on traditional healers who are the most accessible of therapists and work according to local spiritual traditions.

#### **4.2.3 Nepal's still-born transition and the Missing**

The *Jana Andolan* of April 2006 led to a cessation of hostilities between the CPN-M and the Nepali state as the king reinstated parliament, returning it to the control of the political parties, under Prime Minister G.P. Koirala. Direct talks followed between Koirala and Maoist leader Prachanda. In November 2006 the CPN-M and the Government signed a Comprehensive Peace Agreement (CPA) formally ending the 10 year insurgency. Throughout this process the king remained sidelined, his power formally removed by parliament, and his popularity diminished by his efforts to crush the April movement. The CPN-M agreed to join an interim Government, and CPN-M fighters assembled in cantonments; a UN mission (United Nations Mission in Nepal, UNMIN) arrived in Nepal to monitor the arms and armies of both parties, and to assist in preparation for elections.

In April 2007, the Maoists joined the interim Government, while elections foreseen for May were postponed as the terms of the transition were negotiated between the CPN-M leadership and the traditional parties. In December 2007, in an atmosphere of increasing ethnic violence in the country, the parliament agreed to abolish the monarchy and the Maoists rejoined the interim Government. Following two postponements, elections to the Constituent Assembly (CA) were eventually held in April 2008 leading to the CPN-M becoming the largest party in the CA, forming a coalition Government with smaller parties with Prachanda, the Maoist leader, Prime Minister. In

May 2008 the CA declared Nepal a republic, and in July the first President was elected. The CA, which has a 2 year term, is both the parliament of Nepal and the body tasked with writing a new constitution. The Nepal field work of this study was undertaken during this year of Maoist government. One year later, in May 2009, the Maoist Government fell following the declaration by the President that its sacking of the army chief was unconstitutional. A coalition led by the two traditional parties who had led governments that fought the insurgency, the Nepali Congress (NC) and the Communist Party of Nepal - Unified Marxist Leninist (UML) emerged. Since then the transition and the peace process have been frozen with the legislature blocked by a stand-off between the Government and the CPN-M, who remain the largest party.

The subtext of the entire transition is that of challenging the power of a narrow ethnic and caste elite, who defined Nepali identity in their own image for centuries. The concept of an inclusive 'new Nepal', with institutions that represent all Nepalis, has become part of political consensus. However, there remain challenges to the transition and one of the greatest is that of justice for crimes committed during the conflict. Both parties to the conflict have been responsible for violations of humanitarian and human rights law (including perpetrating disappearances), and it seems likely that responsibility for these offences lies at the very highest levels of the political and military structures of both the state and the CPN-M. Since the transition is being led by the very same people who are likely to be targeted by a judicial process (80% of CA members come from the three largest parties that fought the People's War), this will remain the greatest challenge of the transition. The Maoist-led Government published draft bills creating both a Truth and Reconciliation Commission (TRC) and a Disappearance Commission and began modest public consultations on these mechanisms, but no progress has been made in the creation of these bodies, even some three years later.

The only significant action that has been taken concerning disappearances has been the payment of Rs. 100,000 (approximately US\$1,360) to families of the disappeared as 'interim relief', spurred by judgements of a Supreme Court that has asserted its independence and confirmed the role of the state in disappearances (Advocacy Forum, 2010a).<sup>16</sup>

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<sup>16</sup> Interim relief payments were initiated by a February 2008 cabinet decision of the Maoist led Government (International Crisis Group, 2010).

### ***The Missing and the transition***

The issue of the Missing has assumed a central role in discussions of Nepal's transition. This is partly as a natural result of the very high emotions the phenomenon creates, but also because the Maoists, in the ascendant following the CA elections, see it as *their* issue: a majority of those missing (around 80%, see Section 6.1) were taken by the state, and the families of most of these are supporters of the CPN-M.

Official rhetoric has acknowledged the missing issue since the start of the transition: the ceasefire code of conduct prepared by the seven party alliance (SPA) of constitutional parties and the CPN-M in May 2006 included a commitment to “..disclose, as soon as possible, the whereabouts of the citizens who have been disappeared” (Govt. of Nepal, 2006a: 17). In June 2006 a one-man commission was formed to inquire into the status of 776 disappeared persons under a senior official of the Home Ministry, and this reported in July. Whilst it was claimed that over 100 persons were confirmed ‘released’ or ‘killed in crossfire’, the Nepal Army declined to cooperate and the major conclusion was that an ‘all powerful commission’ was required to address the issue (Kantipur, 2006). The instruments of the peace agreement and interim constitution of 2007 all include commitments to form a commission to investigate disappearances, identify perpetrators and provide relief to families of the disappeared (Govt. of Nepal, 2006b, Govt. of Nepal, 2006c, Govt. of Nepal, 2007). The interim constitution of January 2007 also made an apparent provision for pardon that represented the first evidence that those driving the transition were aware that judicial procedure may ultimately result.

In August 2006 the Supreme Court took a stand on the issue and ordered a taskforce to investigate the disappearance of those detained by the state. This taskforce reported in March 2007 (Supreme Court of Nepal, 2007a) and was followed by a strong decision on a group of 76 *habeas corpus* cases concerning the Missing (Supreme Court of Nepal, 2007b). For the first time an arm of the state confirmed that “arbitrary arrests, torture, killings and systematic and widespread disappearances were general practice” (ibid.) by the security forces during the conflict. The Court demanded that an ‘Investigation Commission’ be created, that disappearance be criminalised and ordered that relief of Rs. 100,000 be paid to the families of those disappeared who were the subject of the decision.

In August 2008 the Government published a draft bill to create a Truth and Reconciliation Commission (Government of Nepal, 2008). This provoked criticism from a

range of Nepali and international human rights actors who saw it as sanctioning amnesty and compromising the independence of the Commission (e.g. ICTJ, 2007). The bill had also been drawn up with minimal consultation with victims. It appears the mention of a TRC in the documents of the peace process was the result of the engagement of international actors, rather than having an indigenous origin,<sup>17</sup> and it is not clear if there is political support for a TRC among the parties leading the transition. It would be unsurprising if support for a process that could lead to prosecutions was limited given that senior figures in the army, the traditional political parties and both the military and political hierarchy of the CPN-M are implicated in violations of the conflict. In November 2008 the Government prepared and circulated a draft Act on Disappearance (Govt. of Nepal, 2008a). There was little consultation with victims over the content of the bill which criminalises disappearance retrospectively and creates a Disappearance Commission tasked with the job of investigating disappearances and determining guilt: cases will be referred by the Commission to the Attorney General. This bill is discussed in the light of the findings of this study in Chapter 6. The greatest obstacle to any action on the missing issue is the complete absence of political will among the parties leading the transition, all of which have either connections to military actors (namely the RNA and PLA) or political responsibility for actions that led to disappearances. Whilst their political agendas are entirely divergent, those most responsible for the violations discussed here, commanders of the RNA and PLA and their political masters during the conflict, have since early in the transition shared a commitment to impunity that is threatened by any action to investigate the violations of the conflict.<sup>18</sup>

Civil society in Nepal has been active on the issue of disappearances as well as other violations committed during the conflict, led by a small group of national human rights agencies. The advocacy of such groups emphasises the ending of impunity through judicial process against perpetrators. Whilst such groups have had contact with families of the Missing in most cases such efforts are Kathmandu centred with victims playing little role.

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<sup>17</sup> Personal communication, international actor engaged in peace process.

<sup>18</sup> One international actor involved in talks between the RNA and PLA immediately after the signing of the CPA confirmed that once it was clear that both parties shared a commitment to impunity, talks were able to continue without suspicion.

Families close to the CPN-M first established an association of families of the disappeared in Kathmandu during the conflict, with the support of the party. This group, known as Sofad (Society for the families of those disappeared by the state) brought together families to campaign for the state to inform them of the whereabouts of relatives and to release them. Sofad also acted as a channel for economic support from the CPN-M to victim families. Soon after the end of the conflict family associations were established in other parts of the country, often independent of any political party and trying to represent the victims of both sides. These were typically established by victims themselves, usually without any political agenda to both provide peer support and to advocate for action to address their demands. A typical example is that of the Conflict Victims' Committee (CVC), established in Bardiya - the district worst affected by disappearances - in 2006 by a local schoolteacher. With some modest support from international and national NGOs CVC succeeded in mobilising almost all the families of the Missing in the district, organising protests and engaging with civil society in Kathmandu. Whilst all associations emphasise a campaigning agenda one of their most important roles has been to bring families with similar experiences together. In this way the family associations offer emotional and psychological support services to families of the disappeared. The family associations became a crucial platform for the participatory methodology of the study (see Chapter 5).

As a Hindu state, with an emphasis on cremation on death, there is little tradition of exhumation or excavation of human remains, and no legal framework for such procedures. Despite this, some 29 exhumations of human remains have been made both during and after the conflict, organised by the Nepal Human Rights Commission (NHRC) and other agencies, but all using the same technical experts (Wasti et al., 2011). These have included the exhumation of 19 individuals, members of the CPN-M, allegedly killed in Dorombha in an 'encounter' with the RNA in 2003 that ended ongoing peace talks. On exhumation, victims were found to have been shot and killed while handcuffed. Other high profile cases where exhumation was made have included a 15 year old girl apparently tortured to death inside an RNA camp (OHCHR, 2006: Advocacy Forum, 2010), a journalist killed by the PLA while being detained and a group of five young men in Dhanusa district. NHRC has reportedly received a number of requests from families seeking assistance in investigating grave sites, but do not have the resources to do so. There remains no capacity within Nepal to either perform exhumations on a large scale or to perform DNA testing. Samples have been sent to India at a cost of INRs. 44,000

(approximately US\$900) per test. NHRC is also beginning the collection of ante-mortem data for disappearance cases.

#### **4.2.4 A review of literature on Nepal's transition**

There is rather little academic literature concerning Nepal's transitional process. Both Pasipanodya (2008) and Aguirre and Pietropaoli (2008) have written about the importance of ensuring that the delivery of economic and social justice as part of the transitional justice process, highlighting the rights of women and challenging an emphasis on civil and political rights. A large amount of 'grey' literature has emerged from the human rights community as both international and local agencies report on violations that occurred during the conflict, advocate for process, primarily judicial, to address them and critique proposals from the authorities (e.g. Advocacy Forum and Human Rights Watch, 2008; ICTJ, 2007; OHCHR, 2007a). These have included explicit discussions of disappearances (e.g. INSEC, 2008; ICJ, 2009), but these emphasise judicial process to address the crime of disappearance and engage minimally with victims. An exception is a report by OHCHR (OHCHR, 2008) on disappearances in Bardiya district that discusses the socioeconomic impact on families of the violation.

The most relevant literature for this study has come from agencies making empirical studies with victims and communities to understand their views of transition. One such study used largely quantitative methods to: "[u]nderstand the immediate needs and concerns of victims" and "[c]apture opinions and attitudes about specific transitional-justice mechanisms" (ICTJ and Advocacy Forum, 2008). This suggests that punishing perpetrators was considered a priority by only 3% of respondents, while others prioritised compensation, education, basic need, health and employment. This study has however been criticised for using methodologies that reflect an external agenda of retributive justice, and emphasising civil and political rights over victims' priorities in terms of basic needs (Robins, 2009a). The issue of the relevance to victims in Nepal of the agenda articulated by human rights agencies is discussed in Section 9.1.

Some literature has emerged discussing the impacts of the conflict on its victims, dominated by studies of the mental health impacts of violence (Tol et al., 2010), and notably with regard to specific populations (Shakya, 2011; Thapa and Hauff, 2005). Rather little has emerged that discusses victims' perceptions of the impact of conflict, however.

## 4.3 Timor-Leste

### 4.3.1 Conflict analysis

Timor-Leste (officially the Democratic Republic of Timor-Leste) comprises the eastern half of the island of Timor and Oecussi-Ambeno, an exclave on the north-western side of the island, entirely bounded by Indonesian West Timor. The nation's borders were defined by its past as a colony of Portugal from the 16<sup>th</sup> century.



**Figure 5 A map of Timor-Leste showing its 13 districts.**

A disorderly end to Portuguese colonisation resulted from an effective abandonment of Timor by the Portuguese in 1975. Two major political parties emerged at this time: Fretilin (Frente Revolucionária de Timor-Leste Independente), a socialist and nationalist party that had established strong support in rural areas, and UDT (União Democrática Timorense), the party of the traditional elites who originally sought to remain a part of Portugal (Dunn, 1983). Following efforts by Fretilin to seize power in the Oecusse enclave in June, in August 1975 UDT attempted a coup in an effort to frustrate increasing support for Fretilin (ibid). Tens of Fretilin leaders were arrested and dozens killed, resulting in a 3 week conflict between UDT cadres and Fretilin commanded Timorese troops of the Portuguese army. By the end of September UDT was defeated and thousands fled to West Timor, leaving Fretilin in control. Total casualties in the

conflict were in the low thousands (Turner, 1992), and the first cases of persons missing in conflict and disappearances of those arrested by Fretilin and held in official prisons date from this period.

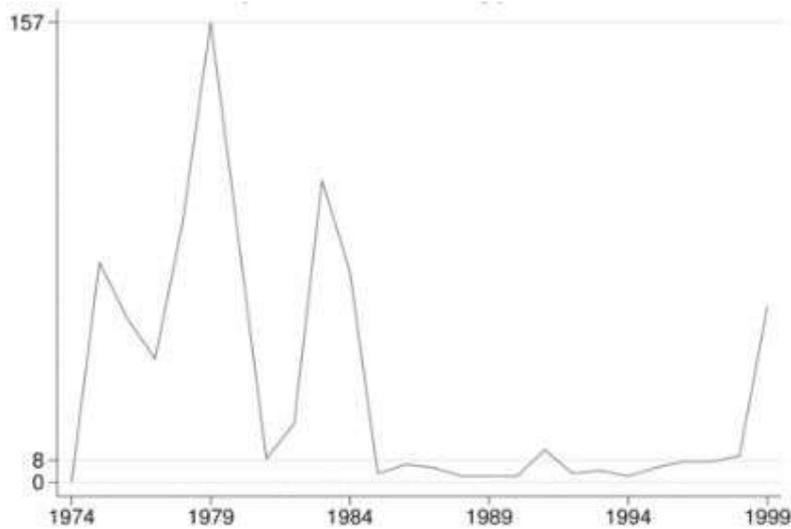
On November 28 1975 Fretilin made a unilateral declaration of independence of the Democratic Republic of Timor-Leste (Jolliffe, 1978) that was recognised by a handful of other nations but not by the important local players of Indonesia, Portugal or Australia. Indonesia responded by having UDT and other party leaders sign a declaration calling for integration with Indonesia. Indonesian forces invaded on 7 December 1975, bombarding the capital Dili, and fighting street battles with fighters of Falintil (Forças Armadas da Libertação Nacional de Timor-Leste), Fretilin's armed wing. By the end of the year there were 30,000 Indonesian troops in the country, and Fretilin / Falintil had fled to the hills from where they conducted guerrilla operations. Indonesia formalised its control, installing a provisional Government, followed by an 'act of integration' in which Timor-Leste became the 27<sup>th</sup> province of the Republic of Indonesia. Whilst at this time Fretilin controlled much of the territory, over the next two years the use of aircraft and defoliants broke the back of the resistance, notably an Indonesian campaign of 'encirclement and annihilation' in 1977 - 78 (Schwarz, 1994; CAVR, 2005: 3.12). Hundreds of thousands of civilians were forced into camps where they risked starvation, to deprive the fighters of logistical support (Taylor, 1991). During this time many of those Timorese who actively supported Fretilin were living in remote hill areas to escape Indonesian forces and Fretilin was forcing the population to move away from lowland areas controlled by the Indonesians. The Indonesian campaign dispersed families and led to many deaths from illness and hunger: many of those missing from this time died in this way rather than through direct military action. During this period there are also a significant number of cases of young children, particularly those of Falintil fighters, being taken by military personnel and other Indonesian officials and adopted into their families. Armed resistance continued over the next two decades but at a much reduced level. By the 1990s only a few hundred fighters remained, and the struggle for independence had become a clandestine movement based largely in urban areas. Throughout this period however the movement was targeted by Indonesian security forces, with regular arrests and disappearances from detention occurring (e.g. ETHRC, 1998). The Santa Cruz massacre, where several hundred were killed at a funeral at a Dili church in 1991 (CAVR, 2006) is one example: the bodies of those who died were taken away by the security forces, and the families have no knowledge of what happened to their loved ones.

Suharto was forced from power in Indonesia in 1998 and in May 1999, following strong international pressure, Indonesia and Portugal announced a vote by the people of Timor-Leste, to be supervised by the UN, to choose between autonomy within Indonesia or independence. Whilst the referendum itself, on 30 August 1999, was generally calm, chaos erupted when the result, 78.5% in favour of independence, was reported (BBC, 1999). Pro-Indonesian militias began attacking people in Dili and massacres were reported around the country, including the infamous church massacres in Liquiça and Suai, each resulting in the death of up to 200 people (OHCHR, 2000). In the latter case 26 bodies were recovered and identified from a gravesite over the border in West Timor, but it is assumed that many more than this died but they remain missing. Some 300,000, around 30% of the population, were forced into camps in West Timor and around 75% of the population displaced. The violence was ended by the arrival of an Australian led international peace-keeping force on 20 September. A total of around 1,400 people are estimated to have been killed in the violence, and some 200 bodies recovered and identified: the remainder remain missing.<sup>19</sup>

The Missing in Timor-Leste thus derive from three very distinct periods of violence: the internal conflict between Timorese political parties in 1975, the Indonesian invasion and occupation (and resistance to it) from 1975 to 1999, and the spasm of violence inspired by the Indonesian military both before and after the referendum of 1999. The circumstances in which people went missing during the conflict of the Indonesian occupation are such that the total number missing remains unclear. The CAVR (Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste, see Section 4.3.3) has estimated that between 1975 and 1999, some 18,600 were killed, and more than 100,000 died of hunger and illness, above the peacetime baseline, with many of these deaths occurring between 1975 and 1979 (CAVR, 2005: 7.2). The Missing will be found in both categories. A total of 835 disappearances were reported to CAVR during its data collection, and these are shown as a function of time in Figure 6. Whilst these are likely to represent only a small fraction of disappearances during the conflict, they show the pattern over time, with peaks in the first 10 years of the occupation and another in 1999.

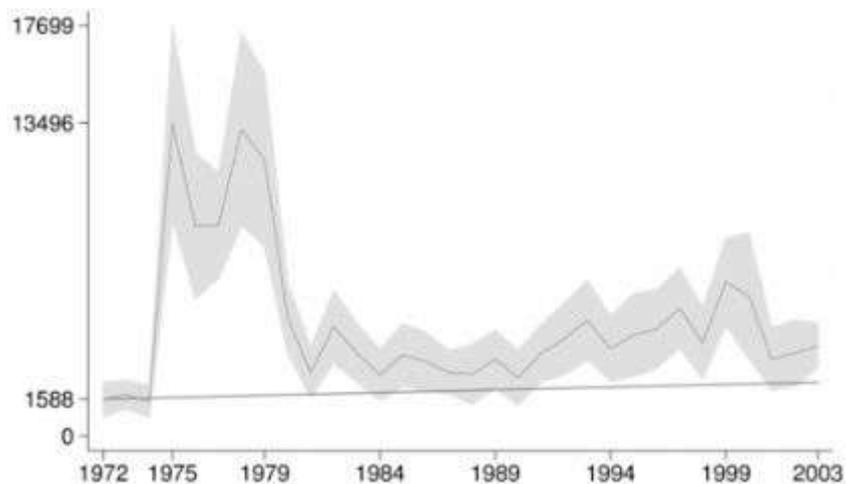
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<sup>19</sup> Serious Crimes Investigation Team, 2009; personal communication.



**Figure 6 Number of acts of disappearance reported to CAVR (Silva and Ball, 2006)**

However, these data exclude all those missing as a result of death through illness or hunger after separation from family members, which is likely to far outnumber disappearances following arrest: one study suggests in excess of 160,000 deaths from hunger and illness over the entire period of conflict (Figure 7, Silva and Ball, 2006).



**Figure 7 Estimated total number of deaths due to hunger and illness in Timor-Leste: data from CAVR Retrospective Mortality Survey. (Silva and Ball, 2006; the shaded line shows the margin of error, and the straight line an extrapolation from death rates in 1972-4.)**

An estimate made by cross-referencing the ICRC list of the Missing (see Section 7.1) used as a sampling frame for this study with other sources suggest that tens of thousands are missing. As such, the missing phenomenon represents one of the principal continuing impacts of the years of conflict for the nation as a whole.

Several victims' groups have been initiated in Timor-Leste for victims of the 1999 violence, with an emphasis on the wives and mothers of the Missing and the dead. These groups serve to bring women together for support and to advocate for their needs. A group in Bobonaro district has small premises from where women run a business selling used clothes, providing both livelihood and a place where women can gather on a daily basis. In Dili, the 12 November Committee represents the families of those, mostly young men, missing from the Santa Cruz massacre of 1991. This group has good connection to political leaders and has sufficient resources to support a volunteer staff. They have led efforts to exhume the bodies of the Missing, with the first victims of the Santa Cruz massacre recovered and identified in 2009 (Blau and Fondebrider, 2010).

#### **4.3.2 Cultural aspects: Families, communities and spirits**

Timor-Leste's population stands at a little over 1 million (Govt. of Timor-Leste, 2010): 72% of these live in rural areas, working largely in subsistence agriculture: around 80% of crop production is for self consumption (World Bank, 2010). More than a third of the population is desperately poor: 37% have an income below \$1.25 per day including almost half of those living in rural areas (UNDP, 2006) and this has worsened since 2001 (UN, 2009). Malnutrition remains a problem, with 43% of children under five underweight and 20% chronically malnourished (UNDP, 2006); a third of adult women are malnourished (UNICEF, 2003). In terms of human development, Timor-Leste ranks as the 'worst performer' in East Asia and the Pacific, a direct result of more than two decades of Indonesian occupation. Food security remains a huge challenge, with many going short of food between November and February: 64% of families report food insecurity (UNDP, 2006). The poorest are households that have small landholdings and few or no livestock, and those with many children or elderly or other dependent relatives (ibid). The poorest half of the population has access to an average of less than 0.22 hectares of land. One of the most important differences in human development achievement is that seen between men and women: earned income is estimated to be only one eighth that of men and 10% of households are female headed, partly as a result of the history of conflict (UNDP, 2002). Many widows however move to live with their husband's family as a way to ensure survival. Women have fewer opportunities to earn their own income, two-thirds are illiterate, only a minority participate in the labour force and they have little voice in their communities. Inequality remains high in Timor-Leste in comparison with neighbouring provinces of Indonesia, driven by the urban-rural divide: income in the poorest district, Lautem, is almost half that of the capital, Dili (ibid). Poverty

remains not just an impact of decades of conflict but the potential cause of future violence and instability (UN, 2006).

The Timorese consist of a number of distinct ethnic groups, most of which are of mixed Malayo-Polynesian and Melanesian/Papuan descent, as well as small Chinese and Muslim communities. The diversity of the population is seen in the large number of languages spoken, in excess of 30 (Fox, 2001). As a result of the Portuguese presence a population of mixed Portuguese-Timorese origin exists, known as *mestiços*, who formed a traditional elite close to the colonial power (Weatherbee, 1966). The huge variety of Timor-Leste, ethnically, linguistically and culturally make it difficult to generalise, but efforts will be made here to identify the most general features of Timorese society. The traditional beliefs of the people of Timor are animistic, and many of these traditions remain, having implications for attitudes towards death and the rituals associated with it:

Among the Timorese, this real life/non-physical life is translated into their view of the world, their cosmology and the world where they live [...], whereby the secular is inhabited by living things and the cosmos by the spirit and the ancestors. (Babo-Soares, 2004: 22).

Since the Portuguese presence however, Timor-Leste has been nominally Roman Catholic and the role of the Church in the resistance to the Indonesian occupation strengthened its position. Timorese responses to issues that impact on both the sacred and the profane are now driven by a syncretised understanding of the world that mixes the Catholic and the animist (see below).

Most Timorese live in villages, where traditional structures remain relevant to their lives. Those entrusted with spiritual matters, the *lia nain*, literally the 'culture speakers', come from specific families and are in contact with the ancestors (Hohe and Nixon, 2003): they maintain ritual authority, including over the *liurai*, traditional former kings who maintain some political power. The structure of local secular and sacred hierarchies and the network of obligations between and within families creates a unified structure that traditionally represented both local governance and law (ibid.). In this sense structures of both governance and justice are "socio-cosmic" (ibid: 11), deeply embedded in the form that communities take and in shared beliefs of spiritual understandings arising from the importance of acting in accordance with the wishes of the ancestors. The most important part of local social organisation is the *uma lulik*

(sacred house), which links an individual to his extended family and his ancestors (Hicks, 2004). Socio-cultural aspects of Timorese societies are interdependent, refuting efforts to separate the profane and the sacred, the legal and the social. A council of elders will traditionally have been chosen on the basis of a mix of hereditary rights and selection by senior male members of the community. Such hierarchies were used by both the Community Reconciliation Process of Timor-Leste's Truth Commission (see Section 4.3.3) and in informal reconciliation efforts at village level (Babo-Soares, 2004).

Timor-Leste remains a highly patriarchal society, reflected most visibly in the widespread practice of polygamy, and the fact that on marriage a woman moves into the home of her husband's family. Despite a constitution that guarantees women's rights and equality in all spheres, traditionally only men can own property and this culture persists in rural areas, ensuring that women remain dependent on men. Illiteracy is widespread, particularly among women of whom it is estimated 70% are illiterate. The family is at the heart of life in Timor, with strong networks among families that can be highly supportive. Marriage is the relationship not just between two individuals but between two families (Hohe and Nixon, 2003). The family can offer support, emotionally and financially, to women whose husbands are dead or missing. However, some families remain dysfunctional and domestic violence continues at high levels: a 2002 survey found that 43% of women respondents had experienced some form of domestic violence in the previous year (Ward, 2005).

Limited studies have been made of the mental health of the population of Timor-Leste, which is presumed to be highly impacted by the high levels of violence over 24 years. A study in 2000 found a prevalence of PTSD of 34% (Modvig et al., 2000), while one in 2008 found levels of 1.5% and noted that single, unemployed women are at a higher risk of PTSD (Silove et al., 2008). While there is a Government mental health service operating at some level in every district centre, in practice this is difficult for many in rural areas to access, and even in Dili services remain limited.

With estimates that as many as one third of Timor-Leste's population has died since the Indonesian invasion (Kiernan, 2003; Staveteig, 2007), for many Timorese death has become something with which they have too often been confronted. Whilst 90% of East Timorese claim to be Catholic, almost all continue to hold traditional beliefs, including that a spirit must be laid to rest after death, through burial or the offering of sacrifices; otherwise it may become a 'wandering soul' (Hicks, 2004). Where someone

has died a 'bad death', i.e. an unnatural one, the spirit will seek vengeance on the family and the village: in this sense the issue is one for the community and not just the relatives of the dead:

A society, either an individual or a community, is required to recognise its *hun*, its forebears, its lineage and its clan's origin, because these elements represent the 'source', the trunk of life. [...] It is a concept that embraces *maun-alin* (elder-younger siblings), lineage, clan, kin; *rai*; the land one stands on; *uma*, the house one lives in; *mouris* (life), the future one seeks to achieve; and *rate*, the graveyard of one's kin. (Babo-Soares, 2004: 22-23)

During the 24 years of terror under the Indonesians, large numbers of the dead were not put to rest according to tradition (Rawnsley, 2004): in some cases bodies were taken by those responsible for killings, in many others people died while they were in the mountains and separated from families. Following the end of the conflict, at all levels of society families sought to retrieve remains of relatives to make appropriate ritual, in some cases exhuming bodies where they had been buried by comrades or family members.<sup>20</sup> President (then Foreign Minister) Jose Ramos Horta exhumed the body of one of four sisters who died during the violence of the occupation in 2002:

We knew where she had been buried. The local people buried her. When they saw her killed they knew it was my sister. They wrapped her properly, dressed her and ever since they have kept a guard on her grave. (Ramos-Horta, quoted in The Press, 2008)

Two of his brothers remain missing:

We still don't know where they are. We don't know where they were killed, how they were killed. We know they were killed in 1977. (ibid)

In the years since independence bodies of victims of the conflict have continued to be discovered, both by accident and design: in some neighbourhoods of Dili construction invariably reveals the corpses of such victims (e.g. Associated Press, 2010).

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<sup>20</sup> F-FDTL, the Timorese armed forces and successor to the Falintil resistance made efforts to exhume known resistance dead soon after its formation for reburial in a martyrs' cemetery (Private communication, F-FDTL officers.).

CAVR confirmed “a cause of continuing deep anguish to relatives and friends is that the victim’s remains have never been recovered” (CAVR, 2005: 7.2: 9). The dilemmas faced by the families of the Missing are illustrated by the story of a veteran of the Falintil resistance movement, Lu-Olo, whose family assumed he was dead since they hadn’t seen him for 24 years and held a funeral rite. When he returned in 1999 they assumed he was a ‘wandering spirit’ and found it hard to reconcile his presence among them (Rawnsley, 2004). For the women of the group *Rate Laek* (‘no grave’) whose husbands were taken during the violence of 1999, they have little doubt their husbands are dead, but the fact that they have no bodies to bury and have been unable to perform the rituals their culture requires is a great sorrow (da Silva, 2002):

[W]e cannot begin to inquire into the truth of what happened until the mourning is finished. And mourning does not end until the bodies are properly buried and the spirits of the dead are able to be at rest. Now in East Timor we have passed the initial time of mourning; some refugees need to bring home the bodies of their dead to their traditional places. (Isabel Amaral-Guterres, quoted in Rawnsley, 2004: 13)

Beyond those whose fate or grave is unknown, are those who are buried but away from traditional burial grounds where family members cannot visit. In such cases arising from the conflict exhumation and secondary burial has become common, such that relatives can have ‘proper’ graves (Field, 2005).

#### **4.3.3 Transitional justice in Timor-Leste: Looking forward or looking back?**

Whilst initially put in place by the international community, the development of transitional justice mechanisms in Timor-Leste have occurred subject to the tension of two divergent agendas. The leadership of the country, composed largely of those who led the resistance to Indonesia, has emphasised reconciliation, ‘social justice’ and development over judicial process, with the overriding priority of ensuring good relations with Indonesia:

We have to see what we can do, not what we wish to do. Now we need reconciliation and we have to think of socio-economic rather than formal justice. That is our priority. (Xanana Gusmão, while President, 16 December 2005.)

The country's security will be shaken if an international tribunal is going to be established in the country and the relationship between Indonesia and Timor-Leste will be distanced. (President Jose Ramos Horta, Radio Timor-Leste, 12 April 2010).

Gusmão has stated that a widened program of prosecutions could take years, cause violence in Timor-Leste and set back democratic consolidation in both Timor-Leste and Indonesia (ICG, 2006). He has also said that he is concerned by the “non-critical absorption of (universal) standards” (Gusmão, 2000) by the nation; an explicit assertion that local needs trump such global standards. In contrast, the human rights community, both within Timor-Leste and outside, have insisted on the need for an international judicial mechanism to counter perceived commitments to maintaining impunity:

The best alternative to a revived and strengthened serious crimes process would be for the Security Council to implement the recommendation of the CoE report - to create an ad hoc international criminal tribunal for Timor-Leste, to be located in a third State. [...] This position is widely supported by Timor-Leste's citizens, especially by the Church, several political parties and civil society. (International Federation for East Timor, letter to the UN Security Council, Feb. 18<sup>th</sup> 2009.)

Assertions from both the leadership and the human rights community that the people of Timor-Leste are in agreement with their respective positions appear to be unsupported, and remarkably little empirical work has been done to understand victims' needs of transition.

Transitional mechanisms in Timor-Leste were created with little consultation with ordinary people or with victims of the 24 year conflict. Both the serious crimes process and CAVR were created by a UN administration with no democratic mandate and accommodated in Constitutional arrangements once a Timorese Government was formed.<sup>21</sup> The goals of the process appear to have reflected a global discourse of truth

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<sup>21</sup> The establishment of CAVR was preceded by a 'national consultation' exercise that targeted community representatives, NGOs, and other actors, including political parties and groups involved with justice and reconciliation issues, but this was limited in scale and scope and made no effort to meet ordinary victims of conflict.

and reconciliation, with a role in principle for judicial process alongside it. In practice, judicial process has been extremely limited, with no effort made to prosecute those responsible for violations committed before 1999. Judicial process has been restricted to the hybrid UN Special Panels for Serious Crimes (Katzenstein, 2003) that have convicted 84 persons of offences related to the violence of 1999 (ICTJ, 2006), but has seen those most culpable seek refuge in Indonesia. In recent years Presidential pardons and commutations of sentences have seen almost all those convicted and jailed by the Special Panels released (SSR Monitor, 2011). In Indonesia an Ad Hoc Human Rights Court for East Timor has been widely seen as a device to avoid genuine process (Sarmiento, 2005), and has not led to convictions.

The CAVR was established by UNTAET (UN Transitional Administration in East Timor) in January 2002. The name of the commission reflected its three roles: the search for truth, reconciliation and the return from Indonesia of those displaced following the violence of 1999. Its remit covered the entire conflict period beginning with the Portuguese revolution of April 1974 and ending in October 1999. CAVR submitted its report ("*Chega!*"; CAVR, 2005) in October 2005, having collected 7,669 statements, and conducted more than 1,000 interviews (ibid: 20) in an effort to write a history of the conflict. The principal avenue for CAVR to promote reconciliation was through the Community Reconciliation Process (CRP), which aimed to address less serious crimes through a grassroots process that adapted restorative indigenous practice. Community hearings were led by a panel of community leaders in which victims and perpetrators spoke about the events and the panel brokered an agreement that would lead to reconciliation (Babo-Soares, 2004). This could involve community service, apologies or reparations. The CRP dealt only with non serious crimes, emphasising those from 1999, and offers a model for a restorative transitional justice that is rooted in the communities it aims to serve. Whilst CAVR conducted a very modest urgent reparations programme on the basis of aiding the most vulnerable, its broader proposals for reparations remain unimplemented. In January 2006 then President Xanana Gusmão publicly rejected the CAVR recommendations that the investigation of crimes against humanity in Timor-Leste continue and for a broader serious crimes investigation to cover 1974-1999. Since the CAVR's report was submitted to the Parliament in late 2005, Parliament has declined either to debate it, or act on its recommendations.

The Commission of Truth and Friendship Indonesia-Timor-Leste (CTF) was created in August 2005 by the Governments of Indonesia and Timor-Leste with a

mandate to find the 'conclusive truth' (CTF Final Report, 2008), of the events of 1999. It was widely perceived as an effort by both Governments to address the many criticisms of continuing impunity for perpetrators of violations (ICTJ, 2008), without challenging their shared political aims of avoiding prosecutions. The CTF, the world's first bi-national truth commission, reported in March 2008, but its findings had little impact on victims since it had no participatory elements and little outreach.

Little discussed in the literature is the 'valorisation' programme that has led to tens of thousands of veterans of the liberation struggle, both military and civilian, receiving medals since late 2006 (World Bank, 2007), making it the one transitional mechanism that has directly impacted the greatest number of people. Smaller numbers have received compensation payments and generous pensions. Despite the position of the nation's leaders, issues of social justice and development have constituted only a marginal part of the agenda of the formal mechanisms of transitional justice.

#### **4.3.4 A review of the literature on Timor-Leste's transition**

The transition in Timor-Leste has produced a substantial literature, with a large number of studies focussing on the transitional justice process, and CAVR in particular. The range of literature well represents current perspectives and approaches to transitional justice, with few empirical studies or approaches that engage directly with victims. Most studies use methodologies that are based either on the literature that has emerged from the transition (such as the CAVR report), or on direct personal experience of the transitional mechanisms by practitioners. Much of the literature explores the balance between prosecutorial justice and reconciliation, and implications for state building (e.g. Kingston, 2006; Huang and Gunn, 2004). Typically they laud the truth-telling process as necessary and mourn the lack of accountability mechanisms, while some have noted the lack of interaction with ordinary Timorese that efforts at statebuilding have had (Brown, 2009).

CAVR has been the topic of many studies, the majority authored by those who worked with the Commission (e.g. Ximenes, 2004; Babo-Soares, 2004; Larke, 2009; Kent, 2005; Schenk, 2005). Much of the literature focuses on the potential of CAVR for healing and reconciliation, for victims and others, to emerge from the truth-telling process and this is often generalised to a healing of the nation that fosters state building (Huang and Gunn, 2004). This emphasis leads to a focus in the literature on the CRP as the restorative component of CAVR, providing both truth and reconciliation at the community

level. However, the one study that has investigated the healing impact of CAVR on victims (Silove and Zwi, 2006) describes claims of both personal and social healing as 'contentious', while another concludes that it is impunity that most threatens personal healing (Le Touze, Silove and Zwi, 2005). Both studies collected data from CAVR personnel rather than from victims directly. The broader literature from other contexts provides evidence that such "exposure therapy" (Silove and Zwi, 2006: 1223; Kaminer et al., 2001) is largely not an important part of healing. The only literature on CAVR that comes from Timorese who did not work with the Commission is from *La'ó Hamutuk*, a Timorese NGO (La'ó Hamutuk, 2003). It is perhaps the only source that clearly states the CAVR model of truth and reconciliation as foreign in origin: "many key staff, all funding, and the basic structure and methodology come from overseas. [...] it has relied heavily on international consultants, advisors, and leadership." (ibid: 1) Despite the cooption of elements of indigenous process in the CRP, the basic philosophy of the Commission was imported, a fact that is either ignored or denied in much literature.

A number of studies have reviewed the judicial processes that have occurred to address the crimes of Timor's conflict, much of it highly critical, notably of the serious crimes process (Cohen, 2006; Reiger and Wierda, 2006). The weakness of accountability for serious crimes during Timor-Leste's conflict has prompted a range of literature from rights agencies (Amnesty International, 2009; JSMP, 2002; La'ó Hamutuk, 2009), critiquing the limited process in Timor and the almost complete lack of it in Indonesia. Some have engaged with the very divergent views of justice held at the grassroots in Timor, notably arising from indigenous forms of justice, and encouraging that this be considered in any judicial or statebuilding process (Grenfell, 2009; Hohe, 2003; Senier, 2008).

Empirical studies of Timor's transition have been rare, and none has sampled either victims or the general population to allow a representative study. Pigou (2004) used semi-structured focus group discussions in several districts of the country to understand views of the transition, including with purposively sampled victims active in local associations. The conclusions of the study were that participants prioritised truth and prosecutions of perpetrators, an agenda that coincides with that of the agency that funded the study. Devereux and Kent (2008), who also worked with CAVR, evaluate the performance of the CRP as well as the process and product (i.e. the report) of the Commission. They confirm that victims of serious crimes remain dissatisfied by the lack of any process relevant to their cases and make the valuable point that victims continue

to emphasise economic issues and so reparations must remain on the agenda if a “survivor centred approach” (Hamber, 1996) is to be claimed. The most extensive empirical studies with victims have been those made by Kent (2004, 2008), who also worked with CAVR, of the CRP and the broader transitional process. These involved interviews with those who had engaged in the CRP, both perpetrators and victims, and others, and is notably more critical of the process than authors who viewed it solely from their positions as staff of CAVR. Kent’s most recent work (2010) represents an effort to create a ‘thicker’ understanding (McEvoy, 2008) of the dynamics of transition in Timor-Leste, exploring the political nature of the narratives that are elaborated and constructed as part of a transitional justice process and their impact on ordinary Timorese victims. It does this by linking such everyday perspectives to the national and international actors steering that process, and can be considered a major contribution to a victim-centred approach to transition, both in Timor and beyond.

Whilst there has been a range of studies of Timor-Leste’s transition, the vast majority constrain the scope of investigation to the stated aims of the mechanisms created and investigate the impact of those mechanisms on the individuals who have interacted with them. Such studies are unable to challenge the goals of transition with perspectives from non-elites or make any statement about the views of the majority of the population, or of victims, who have not interacted with either CAVR or other mechanisms. Few are able to adopt the cultural and social viewpoint of ordinary Timorese or to query the relevance of the concept of a truth commission. The communal violence of 2006 that saw the disintegration of much of the security forces (UN, 2006), and the continuing instability that has followed, is evidence that statebuilding has failed in important aspects. This has largely not yet been addressed in the transitional justice literature despite statebuilding and peacebuilding being explicit aims of the mechanisms created over the last decade. This study aims to address this deficit, taking a victim oriented view of the process and not presupposing that the goals set for the process coincide with the priorities of victims.

#### **4.4 Nepal and Timor-Leste: Comparing the two contexts**

Whilst superficially the two contexts appear rather different in terms of history and the status of their transitional justice processes, in terms of the situation of victims there are remarkable similarities. Here, those correspondences are reviewed, considering both the political level and the everyday worlds of victims.

In this chapter the two contexts have been discussed in terms of the socio-economic and cultural background in which conflict and disappearance occurred. Both Nepal and Timor-Leste are characterised by poverty and marginalisation which served to both provoke and prolong conflict and exacerbated the impact of violations. In both contexts traditional understandings, of religion and spirituality, of family dynamics and the subservience of women play a role in how communities respond to the impact of political violence. In Nepal longstanding exclusion on the basis of ethnicity and caste has both defined the nation's social and economic dynamics and exacerbated the violence, both structural and direct, to which the marginalised have been subject. The response to the histories of violence in the two states has been similar: elite led processes reference a global discourse of rights, but political agendas that seek to minimise prosecutorial process determine how that process unfolds. In Timor-Leste a ten year transition has been a laboratory for contemporary concepts of transitional justice, led by a truth commission that put the metaphor of truth as healing, in the tradition of the South African TRC, at the heart of its work and referenced traditional restorative process. In Nepal the same universalist discourse has been frustrated by political stalemate and a desire for politicians and senior combatants on both sides to minimise the chance of any retributive process. In both contexts political expediency has driven which mechanisms are created and, in Nepal's case, has ensured no significant process at all. Victims' agendas remain as marginalised as victims themselves in both contexts, largely unheard in the vigorous debate between rights organisations and politicians.

The ten years of transition in Timor-Leste have led to a small number of prosecutions, a much vaunted truth and reconciliation process and the world's first bi-national truth commission. That the transition has taken this course is a result of the decisions of the small number of persons who constitute the leadership of the state, supported by an array of international advisors. They determined that a broad process of prosecutions, inevitably targeting those at senior levels of the Indonesian Government and security forces, would not be in the best interests of Timor-Leste. (It is also possible that those close to Fretilin and Falintil during the conflict are concerned that judicial process may also target them and their erstwhile colleagues, many now in senior roles.) This position is contested by those articulating the global human rights discourse, who argue that retributive justice and an end to impunity are essential for the country to move beyond its violent past. This remains however a normative statement, with little evidence to support it and no empirical data to confirm assertions that victims or the general population do indeed prioritise judicial process. Transitional process in Timor-Leste is not

evidence-based, but has been driven by largely political decisions of the leadership, with little mandate for such action.

That a process emphasising reconciliation was prioritised in Timor-Leste was justified by a need to go beyond the purely retributive, and the leadership has emphasised development, social justice and 'looking to the future'. This approach chimes with restorative approaches that have increasingly become part of transitional justice (Leebaw, 2003; Llewellyn and Howse, 1999) and the Community Reconciliation Process has been lauded as both restorative and based in indigenous tradition (Babo-Soares, 2004; Zifcak, 2005; Ximenes, 2004). It seems likely however that reconciliation as a goal, and perhaps as the principal goal, of Timor-Leste's transitional justice process is prompted less as a considered position of the Timorese leadership than a convenience that coincides with and justifies their pragmatic approach to avoiding prosecutions.

In Nepal, the transition is being led by those who fought the war, with the traditional parties and the Maoists alternating in coalition Governments since the 2008 elections and both aware of their unreformed military constituencies (the Nepal Army and the People's Liberation Army, respectively). As such there is a quite explicit constraint on the process that militates against prosecutions in the short term. In Nepal one sees the same polarisation of attitudes toward transitional process as in Timor-Leste, with the authorities choosing to emphasise compensation over judicial process, and a human rights community with many allies internationally demanding that retribution provide the driving logic of the process. This sterile debate has resulted in no process at all in the five years since the end of Nepal's conflict, abetted by a political stand-off that threatens the entire peace process. The presence in Nepal of a vigorous civil society and a powerful donor community that has put human rights and accountability high on its agenda has prevented political elites from proposing the reconciliation led process that has unfolded in Timor. From the perspective of the current political impasse it is difficult to see a way forward that both satisfies the expectations of those supporting the rights-based development of the 'new Nepal' and avoids legislators and ministers condemning themselves to prosecution. Nepal is a classic test of the utility of the discourse of transitional justice in advancing peace and justice (in its broadest understanding), without violating the norms that a global rights regime imposes. It can thus be seen that the political constraints on the two processes have different sources. In Timor-Leste the domestic leadership seeks to avoid antagonising a powerful neighbour, while in Nepal

there is tension between an elite instinct for self-preservation (on both sides of the conflict) and the expectations of the human rights agenda. The net result of these constraints is similar however: as in Timor-Leste, there is unlikely to be a broad process of prosecutions in Nepal in the short or even medium term and any truth process is likely to be highly constrained.

### ***Beyond elite agendas***

Even though the two transitions studies here played out in very different ways, the processes that occurred have one very clear similarity: all come exclusively from elites. In Timor-Leste, the 'statebuilding' process that drove the creation of the UN courts and CAVR was a UN-led process:

The UN Administrator is nominated by the Secretary- General with little or no consultation with those who are to be administered. [...] The question remains open how the UN can exercise fair governance with absolute powers in societies recovering from war and oppression. (Sergio Vieira de Mello, quoted in Beauvais, 2001: 1101)

The UN administration's nod to political participation was through the creation of a 15 person National Consultative Council containing the leaders of the resistance, other political parties and a representative of the Church, later expanded to a 36 person East Timorese National Council. It will be argued here that in addition to the explicitly UN driven processes, such as the Serious Crimes Process, CAVR was itself both created according to an imported model and steered by foreigners and consultation with non-elites was minimal (Section 7.5).

In Nepal, the discourse of transitional justice is driven by external donors and rights agencies, national and international: this study will determine what resonance there is between this agenda, largely ignored by Government, and that of victims. Consultation with victims and the general population has taken the form of donor-supported visits of Ministry of Peace and Reconstruction personnel, constituting meetings of a few hours, to a handful of regional headquarters (UN General Assembly, 2009). Human rights agencies have also organised their own consultations (e.g. ICTJ and Advocacy Forum, 2008), but these appear to have had little impact on policymakers. The limited process that has occurred has been determined by the succession of governments since 2008, led by the parties to the conflict. These have attempting to

prioritise those efforts that can serve as instruments of political patronage, such as relief payments (Advocacy Forum, 2010A) and postpone or abandon those elements linked to truth and justice that might compromise the impunity of those in Government. The lack of investigation has been explicitly linked to political power:

Such failures are due at least in part to the continued sway of the army and Maoist forces, and to police knowledge that the Nepal army (NA) and political party officials, including Maoist officials, are unlikely to co-operate with investigations. (The Guardian, 2010).

The political constraints that limit transitional process arise because those in power are able to impose their own agenda. Likewise those who articulate the rights discourse are largely indigenous elites, who have benefitted from the education that gives access to it, or foreigners. Thus, the entire debate around transitional justice is one conducted among elites that excludes ordinary people, particularly the rural majority in both states. This study is premised on the assumption that victims have a particular stake in transitional justice processes and post-conflict recovery more generally (see Section 2.1). Yet, in the decade of process in Timor-Leste, neither victims nor the population have been consulted at any level concerning their goals for transition. Similarly, in Nepal, consultation with victims has to date been cursory. It remains the most common practice globally that such process is elite led and this has led to a narrowing of the transitional agenda, creating process that is violation and perpetrator centred, rather than victim-centred.

The impact in Timor-Leste of the decade of transitional process on victims generally and families of the Missing in particular remains unclear. This study seeks to use empirical data from both contexts to understand what victim goals for transitional process are, and in Timor-Leste to understand the extent to which the mechanisms that have constituted the transitional justice process have satisfied those goals. This research is premised on learning from the ten year transitional justice process in Timor-Leste in ways that can inform the development of a victim-centred approach to addressing the issue of missing persons in Nepal and in other contexts. The methodology through which this is done is outlined in the following chapter.

## **Chapter 5 Research methodology: A critically engaged research**

This chapter describes the methodology of this study which builds on an *Action Research* modality, aiming to constitute not just an academic inquiry but a process that impacts on both the community of victims who are its collaborators and on decision makers in the concerned contexts. For the victims of conflict whose organisations drive the research the study aims to be empowering, providing a route for the agenda of the otherwise marginalised to reach the authorities in their respective states. The study also aims to be emancipatory in the sense that the research provides a tool, the report of the research findings, around which victims and their associations can mobilise, supporting victim agency. The study aims to challenge thinking on the addressing of legacies of violence that originates with global elites by making visible perspectives that come from below, from those most impacted by that violence. It seeks to let families of the Missing define their priorities in their preferred language and compares and contrasts that agenda with the discourses that drive current global practice.

This chapter begins with a discussion of the dearth of empiricism in contemporary research and practice in transitional justice and the limited efforts to engage with those most impacted by political violence. Participatory approaches are briefly reviewed and the critical ethnography of this study introduced, with an emphasis on the participatory research design that drives it. The research design and more formal elements are then discussed, including the research methods used. The ethical considerations of a study working with a highly vulnerable population are reviewed and then an overview presented of the implementation of the study in the two research contexts.

### **5.1 Participatory ethnography as a tool for change**

To see responses to gross violations driven by the expectations of those most affected by them demands an empirical and an ethnographic approach to reach an understanding of how victims and communities are changed by conflict. Such an approach necessitates empirical work of a highly interdisciplinary nature and an understanding of the role of the so-called 'primary' institutions of the family and community that hold the key to recovery from such extreme events. Ethnography provides the best route to accessing insider perspectives and "permits us to transcend some of the parochialism inherent in our

ostensibly universal theories” (Schatzberg, 2009: 183). Ethnography necessarily emphasises the local and the particular, revealing the empirical complexity that can demonstrate the inadequacy of approaches that seek to be global in their scope. The human rights community interprets responses to gross violations through a predominantly legal lens, and so has developed methodologies for collecting victim and witness testimony (e.g. OHCHR, 2008a), but has neglected ways of understanding the broader impact on and needs of affected communities and individual victims. Indeed, in post-conflict contexts the assertion of a rights-based agenda has often taken precedence over needs that victims may articulate that fall outside the typical remit of a human rights response. In the development context participatory approaches have been successful in not only understanding phenomena (and human needs) from a grassroots viewpoint, but in developing solutions to address them (e.g. Chambers, 1994): such approaches have not however been widely used in conflict and post-conflict contexts.

Here, a methodology is presented that allows a comprehensive approach to the needs of victims of conflict and through them an understanding of the global impact of conflict on a population or particular subset of a population. In this study that subset is a group of victims of a particular violation, disappearance. This methodology allows the researcher to work with victims to understand their needs holistically, contextualised in everyday life, and issues arising in families and communities that can have a huge impact on victims, but fall beyond the remit of a rights driven transitional justice approach. Above all, it allows the voices of victims to contribute to the debate about dealing with the past in post-conflict contexts. Scott has written of the ‘hidden transcripts’ (1990) that the weak use beyond direct observation by those with power: it is the aim of this research to access such marginal discourses. The research is necessarily consultative, but aims more than this to be *participatory*. Whilst the methodology presented here certainly does not replace the mobilisation of victims to represent themselves (Section 10.2), it does allow for a process that engages victims and their organisations in a way that not only allows their voices to be heard and identifies local resources, but gives those organisations a concrete advocacy tool to increase their effectiveness. From an ethical perspective, this approach to research not only accesses victims in highly appropriate ways, but seeks to ‘leave something behind’ in terms of fostering action that can address victim needs.

In development, both in research and practice, participatory approaches have become increasingly orthodox. They aim not only to understand development issues

from the viewpoint of those most affected but also to develop responses from within affected communities:

[P]articipatory research focuses on a process of sequential reflection and action, carried out with and by local people rather than on them. Local knowledge and perspectives are not only acknowledged but form the basis for research and planning. (Cornwall and Jewkes, 1995: 1667)

Participatory research aims to shift the locus of power from the researcher towards the researched. Whilst participatory research can be merely consultative, in its deeper form it involves the researcher and the researched working together in a process of mutual learning. Participation has been framed as part of 'rights-based approaches', where participation itself is seen as a right, and participatory process as restoring agency to the traditionally disempowered (e.g. DFID, 2002; Cornwall, 2002). Such thinking, about rights rather than needs, demands that one consider who is included and excluded from such participatory processes and can challenge traditional hierarchies within communities to tackle social exclusion. These participatory processes however tend to confine the role of the research subjects to the generation of data, following the research design with which they are presented: the extent of the agency of the research subjects in the research project is highly constrained. Action Research approaches can address this issue, by allowing the researcher to be a facilitator, rather than a director of the research. Such participation thus echoes the need for transitional process to be more inclusive and can act to initiate such modes of action.

In post-conflict contexts, there are many barriers to effective research: potential research subjects are traumatised, physical access can be compromised, and sampling strategies complicated. Fear and suspicion make the gaining of the trust of respondents potentially problematic. Divided societies complicate "emotional access", that is "...the ability of the researcher to gain social acceptance within the community and gain access to the rich data that the respondents themselves hold." (Bowd, 2008: 129). One way to address these challenges is through a "composite approach" (Barakat et al., 2002): using a combination of methods including the ethnographic, participatory rural appraisal (PRA), observation and surveys to overcome the constraints of research in a conflict or post-conflict environment. However, using participatory methods such as PRA in a highly divided society is problematic: 'community' can often be held together by the weakest of ties and subject to the divisions of the conflict, and social structures damaged by

violence. In contrast to the development context, in human rights and transitional justice participatory methods are problematic in an environment where rights are being violated, since this can create security risks for those victims seen to speak out. As such human rights work in conflict has largely remained something that is done by specialists on behalf of victims. In contexts where security issues are less salient, a strategy of *mobilisation* is often employed where victims themselves organise, or are organised, for advocacy: this study will discuss the possibilities of mobilisation as a tactic to permit victims' perspectives to impact on transitional justice processes and as part of a research methodology.

Significant empirical work has been done with populations affected by conflict and violations, including the exploration of relevant methodologies, from a transitional justice viewpoint. Pham and Vinck have proposed an "evidence based transitional justice" (2007: 231), developing what aims to be a comprehensive approach to empirical research with populations emerging from conflict. This has the express intention of impacting the development and assessment of transitional justice mechanisms, derived from the significant practical experience of the Human Rights Centre at the University of California, Berkeley.<sup>22</sup> Pham and Vinck have identified participation of the community being researched as essential, both in order to challenge international prescriptive tendencies and to ensure that voices from the grassroots are heard. Such consultative processes are the first step towards challenging top-down process with perspectives 'from below'. Such an approach has been articulated as "transitional justice from the bottom up" (McEvoy and McGregor, 2008) and a need to "...explore ways in which [...] institutions of transitional justice can broaden *ownership* and encourage the *participation* of those who have been most directly affected by the conflict". (McEvoy and McGregor, 2008: 5, emphasis in original) The participatory methodology used here aims to also provide support to mobilisation of victims that can sustain victim input to such process and lead to a *victim-centred* transitional justice (Section 3.2). The frame for most studies that have emerged from the transitional justice discourse is to understand what a society can do in response to crimes of the past, rather than asking victims what their needs are of a transitional process. Recovery from conflict and social reconstruction are only possible if the transformative impact of conflict on those most affected can be understood: this demands a broader approach. Here, I aim to avoid imposing any

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<sup>22</sup> See the numerous surveys conducted by the Human Rights Center and the International Center for Transitional Justice. See also Biro et al. (2004); Vinck and Pham (2010).

external agenda on the research, but to let those most affected by conflict and violations define their own needs as individuals and as communities.

The ethnography of this study aims not just to understand victim perspectives but also to produce knowledge that can serve those victims by providing tools around which they can mobilise and that can be used to advocate for the addressing of their needs. It is political in that it seeks to challenge approaches to victims that emerge from narrow and unrepresentative elites, either national or international, that marginalise the views of those most affected. It thus seeks to be a critical ethnography, that is a “conventional ethnography with a political purpose” (Thomas, 1993: 4). An explicit aim of the research is to empower victims, and this drives the Action Research component. This study thus aims not to be a dispassionate study of a disempowered group in the anthropological tradition, but to actively engage with the ‘subjects’ of the research (Scheper-Hughes, 1995). This is a natural reprise of a previous role of the researcher when working with these communities, and seeks to place the research in the young tradition of “critically engaged activist research” (Speed, 2006). The research seeks to contribute by addressing the politics of knowledge production in post-conflict societies and to “decolonise” (ibid.) the relationship between the research and the researched. Rather than seeking to avoid the tensions inherent in ethnographic research on human rights, such collaborative research merges activism and cultural critique, making them a productive part of the process. I begin from the understanding both that there is no such thing as “human rights ‘in the abstract’” (Goodale, 2007: 25), and that “non-elites [...] are very often important human rights theorists” (ibid). A component of this is to give weight to indigenous concepts of importance to ordinary victims, even where they fail to find resonance in the normative frameworks of rights or law that transitional justice traditionally seeks to use. The research is intended wherever possible as an exercise in knowledge production on the terms of the researched, with victims and their organisations determining what was studied, and how, and what was done with the output. As an activist collaborator and facilitator, the researcher can enable the research, ensure it is disseminated to decision makers locally and use the data collected for his own academic purposes. Whilst an unequal power relationship between the researcher and researched persists, and ethical dilemmas remain (Section 5.3), the process aims to serve victims on their own terms. The long-term relationship between the researcher and victims’ associations amounted to a prolonged process of negotiation of the obligations of the researcher, in analogy to the concept of “iterative consent” (Mackenzie et al., 2007), ensuring accountability to the researched.

The research agenda articulated here emerged from years of direct contact with victims, and a desire to see victims contribute to the transitional agenda. In both research contexts, since the end of the conflict victims, often from marginalised communities in rural areas, have become increasingly frustrated at their inability to influence the transitional agenda and at being represented by elites from the capital remote from their own lives. This research aims to exploit the mutuality of the research agenda and the desire of victims for dissemination of their needs. This co-dependence allows a deep understanding of both the problems victims face, and their resources and strengths.

The study was rooted in a participatory Action Research approach (Rappaport, 1970; Rhaman, 1993) with associations of families of the Missing. These associations represent victims, most often on a local district basis; they are known and trusted by the families of the Missing, and thus constitute a route to engagement with victims and an understanding of their agendas. The family associations are groups of victims with relatives disappeared by the state or other parties to conflict who have come together to support each-other and to advocate for an addressing of the needs that arise as a result of having a missing family member. The research agenda is driven by the concept that victims best know their needs and how they should be articulated. As such, the research design and conceptualisation process was executed in a participatory way with associations of families of the Missing in Nepal and Timor-Leste. The associations, together with individual families who are their members, determined the goals of the research process and the methodology. This was done over a period of several months in both research contexts through a process of continuous interaction with family associations. The association leadership led the process but involved ordinary members of the association, both in their offices and through trips to the field made by the researcher with association leaders. This was essentially an emancipatory approach to participation, with the research driven by the researched. In Timor-Leste the fact that few victims' groups exist reduced the interactivity of the research process with a smaller number of victims and associations steering the participatory element of the study.

The output of this process of consultation with victims was that the research would have a significant advocacy dimension, would be ethnographic, and that the family would be the unit of analysis. Families wanted their needs to be communicated to authorities and advocacy can attempt to do this. Ethically, this engagement with family associations helped to address many issues (see Section 5.3) and facilitated access to

families, through the construction of an ethical relationship with research subjects. The advocacy approach allows the addressing of the issue of consent, by ensuring that families are supportive of the research and can potentially benefit from it. The associations participated in the research as a community of victims and following finalisation of the research design were partners in its implementation with the associations, their leadership and members acting as gatekeepers and mediators with families (Section 5.2.3). They briefed family members on the nature of the research and assisted in the building of trust between the researcher and the researched.

The family is the unit of analysis: the nature of disappearance is such that it impacts families, rather than communities or individuals alone. In both Nepal and Timor the family is the principal unit of social organisation and is the most natural way to approach the issue. It was decided that whilst a qualitative methodology would be used, efforts would be made to ensure that the sampling was representative of all victims to validate the advocacy component and permit quantitative statements. The study emphasised the *goals* of transition, rather than the specific *mechanisms* (such as trials, Truth Commissions etc.), motivated by the lack of knowledge of potential mechanisms by victims and by the philosophy of the study that individual families would determine their own priorities in terms of needs. It was however possible to test attitudes to particular approaches, such as compensation, prosecutions and amnesty.

At the completion of the research the results were discussed with victims and associations, both to demonstrate that their goals for the study had been met and also as a member checking (Cresswell and Miller, 2000) exercise (Section A4.5). The final research reports, produced together with the associations, allowed the dissemination of the results as a tool of advocacy. In both contexts the research results were published in relevant local languages by the International Committee of the Red Cross (ICRC) and publicly launched in conjunction with senior members of the Government (Section A4.5) in the presence of family associations (NepalNews, 2009; AlertNet, 2010). The collaboration with the ICRC brought several benefits to the research in addition to permitting publication of the results and allowing access to elites in Government and civil society. The additional resources that became available to what was otherwise a graduate degree study were invaluable, including use of vehicles that provided access to remote areas that would otherwise not have been reached. This is essential to the sampling strategy of the study, in which a random sample is chosen: without having access to all families such an approach is compromised. Emotional access (see above)

was also eased through the association with ICRC, since it was known by a significant fraction of families met as perhaps the only actor that has maintained direct contact with victims since the time of the violation (in many cases) up to the present day.

## **5.2 Research methods and implementation**

### **5.2.1 Research methods**

The research methods used in this investigation were chosen to optimise the utility of the data collected, and in particular to mix methods to increase the possibility of effective triangulation, given the various challenges to reliability and validity that may be present. As a result a range of different methods were used and these are described here. All these methods describe data collection from families of the Missing, since most data was in this category. The final section discusses data collection from elites. Details of interviews and focus groups are tabulated in Appendix III.

#### ***Semi-structured interviews***

Interviews provide the opportunity for subjects to present information on their own terms: an interview combines structure with flexibility. For a study such as this one it is an ideal technique to allow families of the disappeared to tell their stories and articulate their needs on their own terms. The interview is semi-structured, following a format prepared iteratively with family associations during the first weeks of the collaboration. The iterative process is crucial to ensuring that the priorities of families are prominent in the interview and that culturally specific elements, often initially invisible to outsiders, are included. The 'script' for this interview was used as a guideline: the course of questioning was determined by the responses of the interviewee, and this used as a framework upon which a discussion with the families was hung, with the family determining the issues of greatest interest to them. A typical interview lasted around 90 minutes. The interview began with a general discussion of the circumstances of the family, the role of the disappeared person within it, and the nature of the disappearance. Families were then asked an open question: "What action would you like to see taken in response to the disappearance?" This allowed families to identify what they saw as their priorities, whether it be an answer concerning the fate, economic support, prosecution or something else. More detailed questioning concerning the various potential needs of families then followed this. Interviews often became a discussion with the entire extended family. This was positive, not only for the support it offers during what might be

an upsetting discussion, but also because it gives an insight into family dynamics, much like a focus group. The perception of needs has gender dependence: women will very often be most sensitive to economic needs, and needs of children, while men will be more likely to articulate political needs. Within a 'family focus group' these dynamics can be explicitly probed. Traditional hierarchies would often mean that a certain member of the family (typically the father or the eldest son) would be presented as the principal interviewee. Since wives, particularly younger ones, were most likely to be impacted by social stigma where possible they were spoken to in private or with other wives of the disappeared, so as to best understand the social and family pressures to which they may be subject.

### ***Focus group discussions***

A focus group is essentially a group interview, with each participant given the chance to express himself or herself, but with the additional dynamic of inter-group discussion. The questions used to initiate discussion were very open, inviting participants to choose, and then discuss, the greatest problems they were facing as a result of the disappearance of their relative, with the ensuing discussion permitting detailed attitudes to emerge. The same script as used for the interviews drove such discussions. For individuals who may feel vulnerable a focus group can create an environment that is more secure for the expression of feelings, particularly where all members feel some solidarity. The most striking success of this technique was when wives of the disappeared in Nepal were invited to discuss their problems, and chose issues in the family and community that have not previously been widely articulated by conflict victims, and that were not heard in mixed or family groups (Section 6.2.3).

### ***Participant observation***

The traditional ethnographic method of participant observation was also used throughout the contact the researcher had with families of the disappeared. Given that in the two contexts the researcher met more than 300 families over a period of 2 years, as well as leaders of family associations repeatedly, there was an opportunity to collect a large volume of data. In particular, participant observation was an additional tool for triangulation, since it allowed the possibility to confirm or refute the verbal data gathered in interviews and focus groups discussions. During interviews, focus groups and throughout field visits field notes were taken of observations of participants and their environment that formed part of the data analysed.

### ***Understanding elite attitudes***

In both contexts, elite attitudes to transitional justice processes are a matter of public record. In Timor-Leste mechanisms are largely complete and there is both extensive documentation of those processes through the CAVR and CTF reports and trial records as well as an extensive commentary from the media, academics and concerned national and international agencies. The attitudes of public figures, such as the Prime Minister and the President, are also widely recorded. As such, in Timor-Leste there was little need to meet such figures to understand motivations and perceptions in relation to transitional justice process, and as a result few interviews were made. Most references in this thesis will thus be to publicly available documents.

In Nepal the situation is more complex since there has been no process of substance. Whilst political parties have committed themselves to the documents of the peace process (that include explicit transitional justice mechanisms) in practice all political actors are choosing either to distance themselves from those commitments or decline to discuss them publicly. As such, there was some value in meeting senior political actors to understand their perspectives. It was also necessary to understand what drives advocates of the rights discourse whose emphasis was hugely divergent from the priorities of the victim families met in this research. As a result senior figures from national and international rights agencies were met in Kathmandu and asked to comment on the results of this study in relation to their agency's priorities. This drove the analysis of Section 9.1. Political figures were also met to understand their rationale and perspectives concerning transitional justice processes. The Action Research outlook in both contexts also demanded that contact with political and rights actors was used as an opportunity to disseminate the results of this study (even while it was ongoing) and to encourage these decision makers to consider the attitudes of victims.

### ***Validity***

Whilst validity has traditionally been discussed with reference to quantitative analyses, it remains a relevant measure with which to understand the extent to which qualitative research is plausible, credible and trustworthy (Johnson, 1997). A significant literature has discussed the controversies arising (e.g. Whitemore, Chase & Mandle, 2001) even though many qualitative researchers perceive understandings of validity to be inherently positivist (Golafshani, 2003). In this study a range of approaches are taken to ensure validity and these include the use of low-inference descriptors (most notably direct

quotes from participants), both data and method triangulation, participatory methods and participant feedback after initial analysis. Underlying all of these approaches is a desire to maintain a commitment to reflexivity, “an awareness of the researcher's contribution to the construction of meanings throughout the research process” (Nightingale and Cromby, 1999: 228). Issues of both personal and epistemological reflexivity are eased considerably by the methodology foregrounding the views of victims, which encourages the researcher to background his own personal views. This approach appears vindicated since, despite the researcher's long engagement with both contexts, in both case studies extremely important new priorities were revealed by the methodology here that had remained unexposed by the less rigorous approaches that defined his previous work with families of the Missing.

The *descriptive validity* (Maxwell, 1992) of the data, the extent to which it truly represents what was said by participants, is confirmed here through the extensive use of verbatim quotations from the data. *Interpretive validity* (Johnson, 1997), in which one seeks to demonstrate that the meanings assigned to the words of participants are accurate, is confirmed in this study through not just the feedback of participants, but through their active participation in the presentation of results. When the data were published in the two contexts, families of the Missing were involved and enthusiastically welcomed the published reports as representative of their own needs.

Issues of *internal validity* refer to the degree to which any observed relationship is causal. In this study such issues are minimised since it implicitly assumes a *causal* relationship between the transitional process and the addressing of needs: everything that impacts upon the addressing of family needs is considered part of the ‘transitional process’, and so the causal relationship is *necessarily* true. In practice, data collection will demand a study of all factors and if one that is not traditionally part of transitional mechanisms becomes important this can be flagged. This will be particularly relevant where there are variables present in one context that impact on the analysis that are absent in the other.

*External validity* refers to the extent to which studies in any one case study are generalisable (or transferable) to others. Because the generalisation here will be analytical (i.e. through theory) rather than statistical, the limits of this will to some extent become apparent in the data. For example, the needs of families (theoretical proposition one, Section 1.4) will never be identical in different contexts, due to cultural artefacts, but

if they are very similar, then the generalisation of the proposition is favoured. Similarly, in the more difficult generalisation concerning proposition three, given that the transitional mechanisms concerned will be very different in each individual case study, the replication logic will be less compelling. Again however, the data should be able to reveal how and why needs were addressed in one case and not the other: this should inform the extent to which what we are seeing is an intrinsic consequence of the mechanisms concerned, or deriving from other variables.

### **5.2.2 Sampling and representation**

Different perceived needs exist in rural and urban, rich and poor families, and between families with significant contact with human rights agencies and those without. As such a sampling procedure was developed to reduce biases from preferential selection of certain types of victim. The aim was to ensure a *representative* sample of victims was met, constituting the use of a quantitative strategy within a qualitative analysis: emblematic of a 'composite approach' (Barakat et al., 2002). The sampling frame used for the study, in both contexts, is the list of persons missing as a result of the conflict, drawn up by the International Committee of the Red Cross (ICRC). In both Nepal and Timor, the ICRC has been working in a neutral and independent fashion to protect and assist victims of conflict since the early years of the conflicts and has enjoyed unprecedented access to all areas.<sup>23</sup> The lists used had been compiled both during the conflicts and in the years following their end, when a systematic effort had been made to collect all cases of missing persons. A selection of districts in each context was made that permitted the worst affected districts to be included, whilst also ensuring a spread by region, geography, ethnicity and perpetrator. Within these districts a random selection was made, using a random number generator to choose entries in the district wise lists. 150 and 160 families of the Missing were met in Timor-Leste and Nepal respectively, corresponding to 6% and 13% of listed missing persons. Details of the sampling and a profile of the respondents are summarised in Section 6.1 (Nepal) and Section 7.1 (Timor-Leste).

To minimise bias in the sampling it was clear that families must be visited, rather than allowing some self-selection by research subjects through an invitation to a meeting. This is in contrast to the typical sampling strategies of human rights oriented

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<sup>23</sup> In Timor-Leste, ICRC was working from 1981 and in Nepal from 1999.

studies, where purposive sampling is most often used to select victims who are accessible, such as in capitals or other urban centres, or who are mobilised and thus known to rights agencies (e.g. Pigou, 2004; Advocacy Forum and Human Rights Watch, 2008). Such strategies are highly unrepresentative and thus biasing (Robins, 2009a). The extent of the resulting bias is shown by the variation in attitudes (and expressed needs) between such groups and typical victims from rural areas (Sections 6.2 and 7.2). In each district where data was gathered 40 missing persons were selected from the ICRC list. As many of these were then visited for interview as was possible in the time available for data collection; in most cases significantly less than 40 were collected. Cases were typically collected in a group of villages (VDCs in Nepal<sup>24</sup>, *sukus* in Timor-Leste), such that the cases taken came from a range of environments in terms of remoteness, minimising the bias arising from choosing certain areas within a district over any others. In practice it was found that family needs within a district were a far stronger function of the type of case (in terms of perpetrator, date of disappearance, family member missing etc) than they were on which village or group of villages the case occurred in.

Focus group participants were selected by the family associations or community leaders who had organised them and as such were not representative: as a result focus group data are not used to make quantitative statements. This did allow however the construction of groups of peers and enabled the creation of an environment where the disempowered, notably women, felt free to talk.

### **5.2.3 Implementation**

In both contexts the research was carried out in similar fashion, with a period of developing an interview instrument in an iterative way with family associations, followed by months of data gathering. The participatory element was integrated from the start of the research, with contact being made with family associations and efforts made to determine how they felt the research could aid them. In both cases, advocacy with the authorities was identified as the families' priority and from that point the researcher worked with associations to advance that goal, with the research a collaborative exercise.

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<sup>24</sup> Village Development Committees.

Families were met for interview, most often with a member of a family association. The aim of the research, and in particular its advocacy goal, was explained to families with the assistance of the family association members, and their consent sought for participation in and recording of the interview and focus groups, subject to the maintenance of the confidentiality of the participants. Consent to record was refused on two occasions, where notes were taken by hand. In only two cases did families decline to be interviewed.<sup>25</sup> The recording of the interview or focus group discussion was then translated into English from the original language by a research assistant and transcribed for analysis. The texts emerging from the translation and transcription process were analysed together with the researcher's field notes of all interviews and focus groups, by the researcher himself. These texts were iteratively coded for analysis by both frequency of topic data and for selection of relevant text segments. Some months after the research, the report of the findings was published and the results taken back to family associations for discussion. The impact of the research on policy in the two states is discussed in Section A4.5.

The collaboration with the ICRC was valuable in terms of aiding access to victims, both physical and otherwise, and in permitting an outlet for dissemination of the research findings that satisfied victims' desire to see the authorities informed of their needs. The ICRC provided vehicles for field work and financial support that allowed this project to have a far greater scope than would have otherwise been possible. Use of the ICRC lists and access to the most remote parts of the two contexts permitted a representative sample of victims to be met. The ICRC gave additional credibility to efforts to advocate with the authorities on the basis of the research results, far beyond that of a graduate student; as an institution the ICRC took on board the implications of the data in those contexts studied and more broadly for its work with the Missing.

## ***Nepal***

Following the 2-month participatory research design phase, data collection took place over a 4-month period (June – September) in 2008. The vast majority of families were visited in their homes, and some (in Kathmandu) at their work places. The logistical challenges were considerable: in some areas families could only be reached by walking

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<sup>25</sup> These two families were in Dili, Timor-Leste, with relatives missing from the violence of 1999. They had been repeatedly interviewed by rights agencies seeking their testimony and were frustrated at the lack of results of this contact.

for days, or by travelling by motorbike or bicycle. The researcher led all interviews and focus groups. A research assistant, whose role was to interpret both linguistically and culturally, accompanied the researcher in almost all interviews. Interviews were conducted in Nepali, Tharu and Maithili<sup>26</sup> languages, and so assistants were drawn from the appropriate communities, with women used where possible. All focus groups contained or were accompanied by a member of the family association that had assisted in its organisation, and a minority of interviews with families also included a family association representative.

The ICRC report was published in Nepali and English in May 2009 (ICRC, 2009) and launched in a ceremony in Kathmandu in which the Chair of the Constituent Assembly Human Rights Committee formally received the report on behalf of the Government (NepalNews, 2009). Representatives of all family associations who had taken part in the research joined the ceremony and gave moving testimony on the impact of disappearance on them and their families.

### ***Timor-Leste***

The research was conducted over a 5 month period (May – September, 2009). The study was somewhat less participatory than that in Nepal as a result of the fact that only two of the districts visited had an active Family Association. Families were largely visited in their homes, and focus groups organised by both the family associations and local community leaders in highly impacted areas. Interviews were conducted in Tetun (the most widely spoken language of the country, spoken by the researcher), Portuguese and Fatuluku (the language of the eastern district of Los Palos), with a female research assistant whose brother had been missing since 1983 following arrest by Indonesian authorities. Most interviews were made without the presence of a family association representative.

The ICRC report of the research findings was published in May 2010 in English, Tetun, Indonesian and Portuguese (ICRC, 2010a), with the report presented to the Foreign Minister of Timor-Leste in a public launch ceremony that was also attended by

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<sup>26</sup> Tharu is the language of the indigenous Tharu people who constitute the largest single indigenous group in the plains of Nepal; Maithili is one of the languages of the Madeshi community of the plains, people considered to be of recent Indian origin.

the Chair of the Parliamentary committee drafting legislation to address the Missing issue (see Appendix IV).

### **5.3 Ethical issues**

Despite populations in both the developing world and in regions affected by conflict having increasingly been the subject of social science research there remains a perception that ethical issues of such research remain under explored (e.g. Jacobsen and Landau, 2003). A suggestion has been made that research into others' suffering can only be justified if alleviating that suffering is an explicit objective (Turton, 1996). In most cases of research in and after conflict this will not be the case and researchers must seek justifications for their work from the wider context. Here a general discussion of the ethics of this study will be made, and justifications sought for the methodologies chosen in terms of their being no negative impact on the subjects of the study. In most cases respondents are poor, of low formal educational attainment, often women and from socially marginalised ethnic or caste groups. They are also people who have survived the traumatising effect of conflict, live in an environment that may still be highly divided and are being questioned about the traumatic issue of a missing relative. Such research subjects are vulnerable in many ways, and there are significant ethical issues to be addressed. The reactions of families to the study, which reveal their understanding of the ethical and practical context of the research, are discussed in the relevant analysis chapters.

The most immediate concern in areas emerging from conflict is the physical security of those being interviewed. In an area of contested control (e.g. in areas of rural Nepal that remain under de facto Maoist control) it can be potentially compromising for someone to be seen even talking to a foreigner, so such issues must be understood even before moving to the field. The engagement with family associations permitted the situation in any area to be understood and precautions taken, such as inviting a family member to be interviewed outside their community.

Social science research demands that subjects understand the terms in which they participate in research and that they give informed consent to those terms. However, in contexts in conflict in developing states, relationships between the researcher and the researched are likely to be asymmetric (Long and Long, 1992). To find what have been called "routes to accountability" (Brown et al., 2004), the

consideration of ethics thus has to go beyond the terrain of confidentiality, consent, and risk/benefit considerations: in these cases, ethics is as much about being attentive to a collective morality that resonates in the context as to do with respect for the individual rights of the subject. As such, the best approach is one that prioritises an understanding of the context and its local mores, and one which attempts to be as participatory as possible, in the sense that local people, and the peers of those being researched wherever possible, provide the logic for the form of contact with subjects. In this research the main tool to ensure an informed and participatory approach is the relationship that was built with associations of families of the Missing. As self-organised groups of families, these associations are able to provide introductions to research subjects and to act as a mediator between the researcher and the researched. Those leading family associations share culture and status, in almost all its forms (economic, ethnic, caste, social) with their members, but are often somewhat better educated. They are thus able to understand the nature of the research and the demands made on the researched in a way that places them well to explain it to other families. The concrete issues to be understood and consented to by all subjects include confidentiality and the anonymous transmission of statements they give. It also had to be understood that the research did not aim to benefit its subjects, other than through the advocacy that will result. In practice subjects were told that the interview was being conducted and recorded such that 'their words can be taken to those in Government and their needs made clear'. This was effective shorthand for the process of research and advocacy and was understood and consented to by all respondents, with the exception of two who did not consent to the interview being recorded.

Interviewing those who have lived through conflict about their experiences is necessarily highly invasive. This is particularly true where, as in this study, the psychological impact of events is under explicit investigation. Whilst there is a literature on working with traumatised victims of conflict from a therapeutic viewpoint, there is little written on how researchers without an agenda to intervene therapeutically should proceed. Some researchers "believe that with skilful and sensitive interviewing, subjects actually benefit from talking openly about their experiences" (Bell, 2001: 185), and there is some quantitative data to support this (Newman and Kaloupek, 2004), largely regarding the emergence of new insights as a result of subjects' participation. Negative effects of trauma victims participating in research have also been found: there is a danger that having reopened the trauma, the researcher can cause emotional distress

and then leave the subject in an environment that is unsympathetic (Bell, 2001; Newman and Kaloupek, 2004):

This second injury occurs when the victim perceives rejection or a lack of anticipated support from his/her family or society which leads to the sense of helplessness. Another component of second traumatisation is the failure to allow the telling of the story, the giving of testimony, which leads to the failure to recognise one's own strengths and restore a sense of control over one's own life. (Ilic, 2004: 380)

However, most literature emphasises the retraumatisation potential of *public* truth telling (e.g. Broneus, 2008; Ilic, 2004), particularly in judicial settings, a very different experience from this research. Retraumatisation is most likely to occur in those persons showing symptoms of post-traumatic stress disorder (PTSD) (Kammerer and Mazelis, 2006), but it is important to understand that having a disappeared relative is not a pathology (Boss, 2004), and that the vast majority of families live with no clinical symptoms of PTSD.

Smyth (2001) draws attention to the timing of interventions with the traumatised: meeting subjects too soon after traumatic experience may report early shock and denial, in contrast to the true impact of trauma. In this study the most recent violations occurred at least 2 years previous to contact with victims and the vast majority significantly before this (see Figure 4 and Figure 10). Bell (2001) suggests that interviews should be made in the company of peers and that efforts should be made to provide support for subjects following interviews. In the contexts of this research however little professional therapeutic service is available and peer support must be relied on. Efforts were therefore made to create the most supportive environment possible for those telling their stories. Wherever possible, interviews were made either in a family context or in a group of peers. Those individuals and families being interviewed were met only after confirming with the family association that they were not considered to be psychologically vulnerable. On the basis of the experience of the research it is believed that, using the protocols described for selecting participants and conducting interviews, the emotional distress experienced by participants during this research is *minimal risk*.<sup>27</sup>

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<sup>27</sup> Minimal risk is defined as the probability that harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the

Social science research has traditionally adopted a very Northern 'primacy of the individual' approach and considered the individual as the most appropriate unit of study. This focus has practical implications for researchers when seeking informed consent from individuals located in traditional and highly deferential communities. In this study these problems will be lessened somewhat by the fact that the *family* is the unit of study, itself a more natural approach in these contexts. It became clear during data collection that hierarchy within the family impacts on the ability of some, notably women and especially wives of the Missing, to talk freely. In response to this wherever possible women were met in peer groups and focus groups with other women. The quality of the data gained in such environments reveal the need to create space for the disempowered to talk freely, independent of the constraints of local and traditional hierarchy.

A challenge to researchers working with poor and vulnerable populations is ensuring that the relationship between subject and researcher is understood. There are many contexts in which a researcher may seek to reward research subjects or try to 'give something back' to those assisting the research. This has clear dangers: research will always be transactional in some sense, and if there is ambiguity about what research subjects receive in exchange for participation this can lead to unrealistic expectations and disillusion, and potential bias. Most foreigners meeting conflict victims are working for aid agencies and as such, despite efforts to ensure his role is understood, a researcher may be thought of in the same terms. The greatest defence against this was ensuring that those leading Associations of Families of the Missing are able to explain to families the exact role and limitations of the research. The advocacy approach taken in collaboration with family associations allows a clear understanding of the role of the researcher to be communicated to research subjects.

The emancipatory component of the research sought to enhance victim agency in a range of arenas, from the household to national policy level, in an effort to ensure that the entire research exercise was characterised by an empowerment agenda. This is a natural ethical aim of the study given that it is driven by a perception that victim agency is both deprioritised in most transitional justice processes. The greatest potential for

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performance of routine physical or psychological examinations and tests (National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1978).

empowerment lay with those most marginalised, most often women. At the village level, the research represented the first time that some wives of the Missing had been spoken to by an outsider, reflecting patriarchal imperatives that a male head of household will always represent a victim family. The empowering aspect of such contact should not be over-estimated, but permitting such a woman to make contact with a family association and to assert her independence from her father-in-law for example, can be transformative. In some communities groups of women were found who had forged solidarity through regular contact and sharing of their issues, but had no outlet or means to address these: the research served to connect such women to a family association and potentially to the broader community of victims. Similarly, bringing together women in a community on the basis of their shared victimhood who had not either perceived or exercised that solidarity is a route to both empowerment and mobilisation. The importance of such collective action was seen in Timor, where the difference emotionally and psychologically between organised female victims and those who remained isolated was extreme (Section 7.3). In Nepal one consequence of the close work in some districts with the family associations was that the male leadership was confronted, through the interviews of the study, with the issue of the lack of women's representation. At the national level, the study sought explicitly to increase victim agency through empowerment of the family associations. In both contexts, the published reports were intended to be a tool that family associations could use to assert an agenda that deviated from that of the agencies that purported to represent victims, while the launch of the study was a rare opportunity for victims to speak on their own terms to a national audience (including the media). Reflections on the overall impact of the study, including empowerment perspectives, are made in Section A4.5.

## **5.4 Summary**

The research methodology allows the needs of families of the Missing to be understood in a contextually rooted way, whilst simultaneously serving families and their organisations. The participatory element that drove the interaction with families, in Nepal more than in Timor-Leste, permitted a relationship to be built with the family associations over a period of months. This both created trust with families and their organisations and as a result increased the quality of the data collected. More than this, the participatory approach was empowering for family associations, giving access to the expertise of the researcher, without which it would have remained a challenge for families to produce a

study of their needs that would carry weight with the authorities and potential donors. The resulting reports, published in a range of local languages in both contexts, are something around which families and their associations have been able to advocate. This study has begun to allow rights agencies and the authorities in the concerned states to appreciate a victims' agenda that has for the years since the end of conflict remained largely invisible.



## **Chapter 6 Needs of families of the Missing in Nepal: Still seeking a process**

For victims' views to be considered in the formulation of policies to address the legacy of past violence requires an engagement with victims. Here, the understanding of the needs of families of the Missing in Nepal that emerged from the participatory research process described in Chapter 5 is discussed. The chapter begins with a profile of the victims met for the study and then both qualitatively and quantitatively the results of the research are summarised in terms of the needs of families, according to the priorities defined by families themselves. The agenda of victims is then compared with the process and mechanisms envisaged by the Government, although in practice this process remains largely stalled. The implications of these needs for transitional justice mechanisms, and peacebuilding more generally, in Nepal and elsewhere are addressed in Chapter 8 and Chapter 9.

### **6.1 A profile of the victims**

This study aims to understand the needs of families of the Missing in Nepal as they themselves perceive them some 2 years after the end of armed conflict. The sampling frame used for this study is a list drawn up by the International Committee of the Red Cross (ICRC) of 1,227 persons missing as a result of the conflict (ICRC, 2008), compiled during ICRC's presence in Nepal since 1998, through visits to rural communities and from statements made by families who visited ICRC's offices. A selection of 10 of Nepal's 75 districts was made that enabled the worst affected districts to be included, whilst also ensuring a spread by region, geography (plains, hills, mountains), ethnicity and alleged perpetrator (state, Maoist).<sup>28</sup> These 10 districts account for 43% of those on the ICRC list. Within these districts a random selection was made, and families visited in their homes.

Eighty-six families were interviewed, the vast majority with the family as a unit. Younger wives of the Missing were met alone or in peer groups so as to understand potentially problematic gender dynamics within families and communities. Interviews typically lasted around 90 minutes and were semi-structured, based on a 7 page script

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<sup>28</sup> The 10 districts visited were: Banke, Bardiya, Bhaktapur, Dhading, Dhanusa, Gorkha, Kathmandu, Lalitpur, Rolpa and Siraha.

that had been developed in conjunction with family associations over a 2 month period prior to the research (Appendix I). Families were invited to prioritise needs relating to the disappearance through a series of open questions, and then probed about specific elements of those needs. Additionally, 10 focus groups containing a total of 74 relatives of the Missing were conducted with peer groups selected by family associations; these included groups of wives of the Missing, members of particular ethnic groups, and groups defined by the perpetrator of disappearance. The research was conducted over a six month period two years after the end of the conflict in a period (April - September 2008) when a Maoist led Government was in office. Disappearances discussed here took place between two and twelve years prior to the study, and on average five years before (see Figure 4).

A minority of the Missing are educated and urban (a significant number of students are among those missing) but most come from rural peasant backgrounds. As a result, many families of the Missing are of low educational level, illiterate and poor. The Missing are predominantly younger males (see Table 3 and Figure 8) with the result that families have been deprived of breadwinners and women of husbands, often with young children to support, reducing economic security. The *janajati*, peoples considered indigenous to Nepal, were successfully mobilised by the Maoists and thus became more vulnerable to becoming casualties of the conflict. The *janajati* of both the hills and Terai are among the most excluded and poorest of the people of Nepal and the conflict reduced further their ability to cope both as communities and as individual victims of the conflict. In the Terai, the Tharu (see Section 4.2) were victimised by the forces of the state to the extent that in Bardiya district they constitute approximately 80% of those Missing (CVC, 2007), despite barely being a majority in the district. In the central and eastern Terai the Madeshi population<sup>29</sup> constitutes a majority of the Missing. As a result of the ethnic and gender composition of the Missing, the typical interviewee is a rural woman of low educational level from an indigenous ethnic group.

The sampling used in this study, and described above, aims to be representative of all families of the Missing. Here, the profile of those interviewed is described. The tables below show a breakdown of the sample in terms of ethnicity of the missing person, gender, status (civilian, combatant etc.), religion, the year they went missing,

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<sup>29</sup> The Madeshi are persons considered to be of recent Indian origin, living largely in the Terai, who constitute about 35% of Nepal's population (Sinha, 2009).

perpetrator and the relationship of the principal interviewee to the missing person. The ethnic profile shows the high number of janajati and Madeshis, as well as a significant number of higher castes, largely senior CPN-M cadres and students taken from Kathmandu (Table 1).

<b>Ethnic group</b>	<b>Number</b>
Hindu high castes [Brahmin / Chhetri]	21
Dalit	7
Plains indigenous [Tharu]	28
Madeshi Hindu	12
Muslim	2
Hill indigenous [Magar, Chepang, Tamang, Gurung]	16

**Table 1 Ethnic and caste composition of the families met for the study.**

<b>Perpetrator</b>	<b>Number</b>
State	71
CPN-M	13
Perpetrator unknown	2

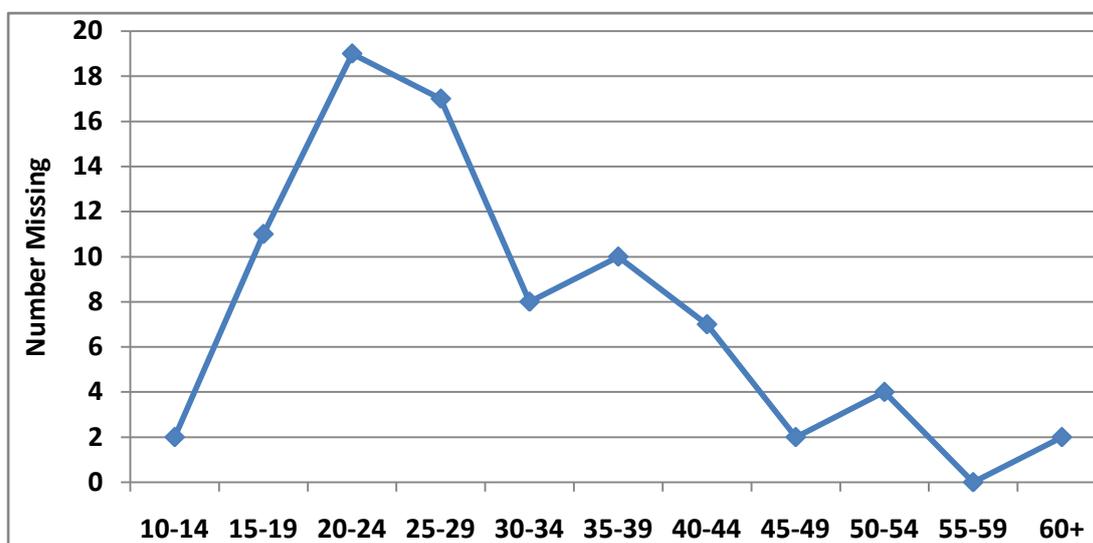
**Table 2 Perpetrators responsible for the person being Missing.**

The perpetrators responsible for the person becoming Missing are shown in Table 2. The two cases where the perpetrator is unknown consist of one where a young man working away from home disappeared in a zone of conflict and one where a man was abducted by individuals known to have worked with both the CPN-M and the security forces.

	<b>male</b>	<b>female</b>
Missing person	79	7
Principal interviewee	33	53

**Table 3 Gender of the missing person and the principal interviewee.**

The age distribution of the Missing peaks for those aged 15 – 30 years (Figure 8). Given that the vast majority of the Missing are male (Table 3), this has the effect of depriving families of those who are at their most economically valuable, resulting in often



**Figure 8 Age of the Missing at the time they went missing.**

extreme challenges to livelihood. Most of these young men were married (86% of all the Missing were married), and many had fathered children who were young at the time of disappearance. Nine of the Missing are under 18 years of age, more than 10% of the sample, largely teenagers taken by the security forces.

The status of the missing person, notably in relation to the parties to the conflict, is subject to some uncertainty and that presented here is based on what was reported by the family (Table 4). The family members of missing security force personnel included in this sample are those of a policeman taken by the CPN-M and an off-duty (Tharu) RNA soldier made missing by the RNA in Bardiya.

Civilian	53
Security forces	2
CPN-M member or supporter	25
PLA fighter	2

**Table 4 Status of the missing person.**

Wife	28
Brother / sister	17
Son / daughter	14
Mother	11
Husband	3
Other	4

**Table 5 The relationship of the principal interviewee to the missing person.**

The number of missing in each year of the conflict represents a history of the intensity of the conflict, Figure 9. The average time passed since the person went missing was more than 5 years at the time of field work.

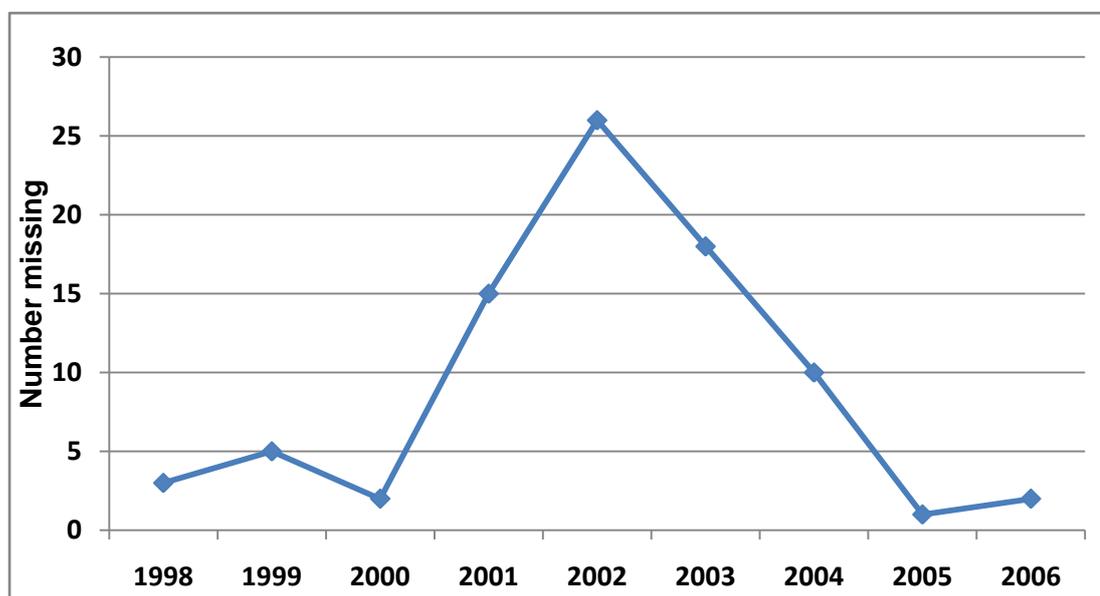


Figure 9 Year in which the person went missing.

## 6.2 Needs of families of the Missing

This section will discuss the needs that emerge from the study of families. Whilst this is to some extent steered by the literature reviewed in Section 2.3, it derives largely from what families reported. The discussion is organised to review the following topics: the need to know the fate of the Missing; the need for human remains; emotional and psychosocial impacts; economic needs; justice and accountability; reparation, relief and compensation; and institutional reform and attitude towards the state. Whilst this structure is imposed, it represents a logic driven by what families said and how they spoke about their needs, informed by the literature discussed in previous chapters.

The response of families to the study varied; some were angry that many agencies had collected data from them, but no action had been taken. In the majority of cases however, particularly in rural areas, family members were grateful that an interest was being taken in their issues, and understood the advocacy goal of the research: “Through you our voice reaches the Government and the work starts as soon as possible.” (Wife of missing man, Kathmandu.) During interviews families were asked

about human rights, with none outside the leadership of the family associations having any good idea what rights were:

We hear people on the radio talking about these things. But nobody has come and told us about our rights. We don't have any concept of human rights. (Sister-in-law of man disappeared by the state, Rolpa.)

For the majority of those met in this study the fact that they have rights, to redress, to justice and to reparation, plays no part in the formulation of their demands in response to their victimhood.

Needs of victim families are not static. As the understanding of the fate of loved ones has changed over the years of the conflict and as the peace process has developed, so needs have evolved. This study represents a 'snapshot' of those needs at a particular time. The first question asked during the interviews was an open question about the family's priorities. Three types of response emerged far more frequently than others as needs:

- An answer about the fate of the disappeared, the truth: 'Is he dead or alive?' (mentioned by 64% of families).
- Economic support: 'compensation', or a demand for privileges regarding education, medical treatment and jobs for family members (62%).
- Justice, in terms of the punishment of those responsible (29%).

For most families the truth regarding the fate of their missing relative and economic support are of the highest priority, with justice being seen as less so. On asking families if they would like to see someone punished, the vast majority said they would: thus this represents a hierarchy of relative priorities, rather than a set of alternatives. There were differences in priorities between more politicised and educated urban families, and poor rural families, most notably concerning justice. The most dramatic divergence of opinion concerning relative priorities can be seen when comparing responses from families in the capital, Kathmandu, with those from Bardiya, the latter being an example of an overwhelmingly rural peasant victim population (Table 6).

	<b>Kathmandu</b>	<b>Bardiya</b>
Answer regarding fate	0.85	0.70
Economic support	0.38	0.60
Justice	0.69	0.07

**Table 6 Fraction of families mentioning priorities in response to a general question.**

Rural families emphasise the economic almost as much as the need for an answer, while their alienation from the law and lack of understanding of judicial process leads them to dismiss prosecutions. A similar dependence is seen by gender, with women emphasising the economic and need for an answer over the judicial, while men prioritise all three needs approximately equally. There appears to be a strong dependence of the perception of needs on the extent of the marginalisation of the family: those most marginalised are most likely to prioritise basic needs over judicial process.

### **6.2.1 Need to know the fate of the Missing**

It's ok if they give us truth now, then the other things will follow. The first thing is finding out. [...] The first thing is the truth and then comes the matter of justice. (Focus group participant, Gorkha.)

Knowing the fate of the Missing was a priority for many families, with 80% of families met demonstrating a degree of ambiguity about what had happened to their missing loved one:

I haven't made any rituals. I still wear the symbols of marriage. I wear them because I haven't seen him dead: maybe he is alive somewhere. (Wife of disappeared man, Bardiya.)

For families of the Missing, due to the lack of clarity over their fate, the death of their loved one is something almost impossible to admit to themselves. This can disrupt the normal grieving process and may lead to arrested grief or atypical reactions, known as 'complicated grief' (Blaauw and Lahteenmaki, 2002). This phenomenon can best be understood in terms of ambiguous loss (see Section 2.3). Among families of the Missing in Nepal, around 20% accept that their relative is dead, in some cases because there is evidence of death from witnesses or other sources. The majority of families however live in a state of ambiguity about the fate of their loved one. Most maintain hope, even after

many years, that their loved one will return. The time that has passed has reduced hope, but has not extinguished it:

My heart says she is still alive, but it has been a long time, I don't have any news so sometimes I think she may have been killed. Now slowly my hopes are breaking down. But there is still hope. (Mother of missing girl, Bardiya.)

For families to move on, to conduct rituals and to look to the future rather than the past they need an answer. An answer concerning the fate must be something that convinces the family beyond all doubt that their missing relative is dead. One way of doing this is for the authorities to give families all the details of what happened to their loved one:

If they are no longer alive, we have to be informed when and where they were killed. [...] We will not remain quiet just by getting information that that they died. They have to win our confidence before saying that 'your person died'. We have to be informed when, where, on which command, in which barrack our dear ones were killed. (Focus group participant, Gorkha.)

In a minority of cases there is some information about the fate. For many of those arrested by the security forces, notably in Bardiya, some days after the arrest announcements were made on Radio Nepal that the individual had been killed in an encounter between Maoist forces and the RNA. However, remains were never returned to families, or any other official confirmation given and the fact that these stories were clearly false reduced their credibility in the families' eyes. Such perceived deceit by the state, in addition to the taking of loved ones, contributes to a breakdown in trust between the state and families of the Missing. In many cases perpetrated by the CPN-M announcements were made or notices posted about the death of the missing person; in some cases local people saw the body but the family were unable to retrieve it. Even in such cases however, families maintain a faint hope that their loved one may be alive:

The Maoists pasted pamphlets saying they had killed him at the border of Rasuwa, Sindhupalchok and Nuwakot. [...] On the basis of the pamphlet the Maoists had distributed we performed the death rituals even though we could not bring back his body. [...] We are 95% sure that he would not come back, though deep in our hearts we still have a small hope. (Brother of missing man, Kathmandu.)

Families are reluctant to accept these narratives since without evidence, they are merely stories: without evidence, the story of death is unacceptable and so families contrive different conclusions, notably that the Missing are alive somewhere.

Many families made great efforts to learn what had happened to their loved ones, despite the risks associated with this during the conflict. This often involved spending significant amounts of money, supporting friends and family to travel. In most of the cultures of Nepal traditional healers are consulted who, through supernatural means, can give hope to families about what has happened to the Missing:

I went to a Tharu *guruwa* and Indian *baba*.<sup>30</sup> According to them he is still alive abroad. The Tharu *guruwa* showed in the mirror my husband walking through the jungle and mountains, and the Indian *Baba* told me he is in another country. (Wife of missing Tharu man, Bardiya.)

Others, particularly those from indigenous groups, have told of contact with the spirits of the disappeared, often in dreams, which have reassured them their loved one is alive.

I dreamt him once. I felt him talking to me. He was telling me he stays wherever he works. I haven't been troubled by his spirit. Our traditional god troubles us if something goes wrong with a family member but it hasn't done anything so far. That makes us believe he is still alive. (Mother of missing Tharu boy, Bardiya.)

For many families of the Missing in Nepal as in Timor (see Section 7.2.3) such access to the spirit world is very real and can significantly impact on their understanding of the fate of their loved one. It can also permit an understanding grounded in their culture of the repeated dreams that often result from a disappearance and can concretely impact on perceptions of ambiguity. However, for families to move on, to conduct rituals and to look to the future rather than the past they need an answer that convinces them beyond all doubt that their missing relative is dead.

## 6.2.2 Need for human remains

There appears to be a basic need to see the bodies of the dead (Boss, 2004): the rituals around death break down its denial, permit grief and promote detachment (Boss, 2002).

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<sup>30</sup> *Guruwa* and *baba* are mystics from the Tharu animist and Indian Hindu traditions, respectively.

Across the diverse religious traditions of Nepal there is unanimity among families in their need to satisfy religious obligations: they need either the body or absolute evidence of death in order to complete rituals. A dilemma for the families of the disappeared is that without a body they have no proof of death and so the body is not only required for religious ritual, but *becomes* that proof. Especially for families that are illiterate a document cannot communicate something as important as the death of a relative: 85% of families met sought to retrieve the body:

This [the body] serves as proof that he is dead. Therefore, we need the dead body: even a bone can convince us that he is no longer alive. We also have to perform our rituals on the basis of it. We need a sign of proof of his death. (Brother of missing man, Gorkha.)

The other element that drives the need for a body is a desire to see the appropriate rituals done:

There is nothing else that can satisfy the family; it's difficult because according to the Hindu religion we have to do the death ceremony and it's important as we do it every year. If we don't do it then there is a belief that the spirit of the dead will always trouble the family. (Brother of missing man, Kathmandu)

In more traditional cultures, death rituals are not just desirable but a social obligation and having failed to perform them can result in families of the Missing being stigmatised in their community.

Many families have a belief that they will be able to identify the body, often through clothes or documents, or through a belief that they will somehow 'know' their loved one. This apparent naiveté confirms the "constitutive weakness" (Ricoeur, 2004: 181) of testimony and memory, in contrast to the documentary proof of scientific identification. Experience of exhumation processes elsewhere however suggests that only a comprehensive process of exhumation and scientific identification is likely to satisfy family demands. Families' distrust of the state extends to a lack of confidence in any remains that might be returned to them and they themselves propose two potential solutions to this problem. One is to trust tests, such as of DNA, that some families are aware of. It should be understood however that this technology is unknown to most families and can gain credence only through the affirmation of respected outsiders. The

alternative is that a 'chain of truth' could be established that would link the arrest, often witnessed by the family, to the body in the ground that has been exhumed:

If the security personnel who were responsible for the killing give us detailed information, mentioning the date and place of killing and the place where they have buried the body [...], there is a room for trust. Yes, we need the chain of truth; we have to be provided with the detailed information including who were the police responsible for the arrest. We won't believe in any bones brought by the authorities. (Brother of missing man, Gorkha)

This emphasises the *type* of truth that families demand. The truth of Truth Commissions, i.e. the historical truth of the conflict, is of little interest to families. They and their community know how they have suffered and they don't value a written public truth that will anyway be remote and inaccessible to most of them. They seek a *private* truth that tells them what happened to loved ones, and if they are dead, how they died (see Section 8.2).

Whilst processes do exist whereby burials and other rituals can be done using a substitute for the body (see Section 4.2.2), these can only be done where death is confirmed, and are thus not relevant for most families met. Whilst a small minority may be satisfied with appropriate information from the authorities, for most families a process of exhumation and identification is seen as absolutely necessary

### **6.2.3 Emotional and psychosocial impact and needs**

Sometimes we laugh out of crying and at other times we cry out of laughing.  
(Wife of missing man, Gorkha)

The 'therapeutic ethic' (Colvin, 2002) that drives much transitional justice process is rooted in an understanding that violations traumatise victims, and that truth is healing for those so affected: the emergence of truth then fosters reconciliation. In this study there is little evidence that trauma, at least in its Western understanding, is relevant for most families met. Families of the Missing are mostly found to suffer from normal emotional distress, rather than psychiatric disorders. In many family members the disappearance gave rise to repeated thoughts and dreams about the disappeared, disturbed sleep and sudden feelings of anxiety: 55% of those met described such symptoms. This generalised anxiety disorder was the most common syndrome encountered, together with expression of extreme emotional pain, and appears to allow the problems facing

most families to be discriminated from post-traumatic stress disorder (PTSD). Whereas PTSD is linked to a specific *event* of trauma, the anxiety expressed by families was about the disappeared person, rather than the event of disappearance: i.e. consistent with ambiguous loss.

We had to undergo mental torture throughout these ten years. As I mentioned earlier the pain of disappearance is more intense than that of death. We waited and waited hoping that he would come back. We have always been lingering between hope and doubt as to whether he would return or not. My mother has not been able to sleep properly even one night from the time the incident happened. (Brother of missing man, Gorkha.)

Families also described hypervigilance, as well as sleeping problems:

Sometimes I have a shock of fear. I think this is a problem that all families of the disappeared have experienced. I suddenly wake up and don't feel myself, I have a very strange feeling. At night when I think he may be no more, I have a different feeling. It's like this because sometimes we are hopeful. In the daytime and at night the feelings are different. Sometimes it is so hard to sleep thinking about him. (Wife of missing student leader, Kathmandu.)

Repeated dreams of the Missing are also interpreted as evidence that the missing person is still alive, and even that his spirit is communicating (see Section 6.2.1). Women described dreams where they see their disappeared relative, often in a position of suffering: this appears to be an unconscious expression of guilt at no longer being able to fulfil their traditional role as a mother or wife and provide for their missing man. Thirty-six per cent of those met, largely women, talked of how their mental capacity has been impaired as a result of the disappearance:

Yes, it has affected my daily life a lot. When I try to do something I forget what I have to do; I forget so many things I have to do on daily basis. If I am working and talking with people then I forget about the pain but the rest of the time it's the same. (Wife of missing man, Dhading.)

These respondents appear to be discussing an impact on what Nepalis would call the *dimaag* (brain-mind, see Section 4.2.2), although this wasn't necessarily the language that was used. There were also reports of family members drinking excessively as a

response to disappearance, another reaction that is associated with a problem with the *dimaag* (Kohrt and Harper, 2008), and also stigmatised. This is evidence that what would be seen as mental illness by Nepalis can be induced by disappearance, i.e. impact on ability to function ascribed to the disappearance itself.

Twenty-seven per cent of family members, the vast majority of them women, complained of chronic physical symptoms that they ascribed to the disappearance, most often as a result of the constant tension and anxiety, and understood as somatic:

Whenever I go to check up my health, the doctor tells me that I have been suffering from *chinta rog* [my worries are my disease]. [...] My son has also been suffering from the same disease, the disease created by worry. [...] He has given me medicine to sleep. (Wife of missing man, Gorkha.)

In three cases families described individuals suffering from mental illness that was seen as a consequence of disappearance, consistent with a pathology that was wholly or largely incapacitating, perhaps consistent with clinical depression.

My mother became mentally ill since he [her husband] was taken. She is scared to meet or talk to people and talks alone to herself. [...] She mumbles that they will come to take you after killing your father. [...] Now she doesn't even want to see people. [...] She doesn't talk to anybody in the house and becomes aggressive when people come near. (Man from Bardiya whose father is missing.)

### ***Gender, family and community***

The joint family, in which sons stay with their parents and wives join the family home of their husband on marriage, is the building block of Nepali society and can offer great support, economically and emotionally. However, the family can also become the greatest single stressor if individuals are alienated from it. In such a household there are power relationships, dominated by older men and with younger wives at the bottom of the hierarchy, expected to be subservient to their mother-in-law. Since a woman's relationship to her in-laws is defined through her husband, where the fate of a man is ambiguous, the relationship of his wife to his family will also be uncertain. In many cases, the wife of a man who is missing will often be perceived as seeking an opportunity to leave the family, typically through elopement with another man, an act considered a

betrayal both of her in-laws' family and of her husband. This often leads to the stigmatisation of wives of the disappeared:

My in-laws call me very bad things such as prostitute, witch, widow, etc in front of my children when they see me around. (Focus group participant, Bardiya.)

In some cases the wife is blamed for the disappearance:

The mothers in law in such households think that the son disappeared because the daughter in law was *alachin ko* [thought to bring ill-fate to the family]. (Focus group participant, Kathmandu.)

Thus, a wife of a missing man may be trapped within a family that resents her presence, but does not want her to leave due to the social stigma that would result. Economically a woman may be perceived as bringing nothing to the family, but being another mouth to feed. Leaving the house is an option, but often she would be expected to leave her children behind:

The relationship with my relatives and in-laws has been ruined. They see me as someone else's daughter, so I am an outsider and relations continue to get worse. [...] Sometimes I feel like leaving the house, but because of the love I have for my children, I cannot go. (Wife of disappeared man, Dhading.)

The net result of this web of obligation and resentment can often be an environment of extreme difficulty for such women. Of the interviews made with wives, 32% reported that they had problems in the family and 12.5% of these had extreme problems. Economic independence both gives the opportunity to make a free decision to stay or leave and increases a wife's status within the family. Assistance that families have received to date, whether from the state or elsewhere, has always targeted the head of the household and as such fails to address the issues of wives of the Missing. Women suffering from such impacts within the family seek to see their value to the family increased and their status within it raised.

Most of the families of the disappeared live in rural areas, in villages where families are part of a dense network of social relations. Having a relative disappear can challenge those relations. The issues that lead to women being stigmatised in the family can also lead to problems in the community. Notably, the ambiguity over a women's

marital status, her persistence in wearing the symbols of marriage and the impression that the wives of the disappeared are somehow predatory in their search for a new husband:

The relations with community members are not good. When I go to ask for something from anybody, others say there may be some illicit relations with me and therefore nobody comes to help me anymore because I am still young. (Wife of disappeared man, Siraha.)

18% of all women interviewed, and 28% of all wives of the disappeared said that they had problems in their community. One saw the solution to these problems as being a resolution of the ambiguity of their status, by the authorities giving a proper answer regarding their husbands' fate; this would resolve the confusion over identity, with a woman presently being neither a wife nor a widow.

Problems faced in family and community by women are a demonstration of how ambiguous loss impacts on identity and challenges the meaning given to disappearance. One woman reported being a victim of the extreme identity confusion of being subject to sexual advances by her father-in-law. In any context ambiguous loss provokes anxiety about the roles of those left behind, but in the cultures of Nepal the very strict understanding of an individual's place in the family and community provoke greater challenges: the problems seen are not just psychological and emotional, but deeply social in nature. Nepali societies define women's roles narrowly, notably as dutiful daughter, faithful wife or mourning widow, and the wives of the disappeared confound these categories by being without their husbands but continuing to wear the visible signs of marriage. Identity becomes a problem psychologically because identity is a relational concept, defined through social interaction. The greatest problems arise where a woman's view of her identity conflicts with that of the family or community who consider her a widow who must behave and dress as such, where the wife is unable to admit the death of her husband as long as there is no evidence for it. Such women are often considered sexually available because they do not dress or behave as widows. Issues concerning the reconstruction of meaning and identity in the face of ambiguous loss are discussed in Section 9.2.

Twelve per cent of all families met reported that they had significant or extreme problems with their community, included cases where families were receiving threats. For many of those with relatives disappeared by the Maoists, the greatest impact is their

continued displacement from their home village: half of all such families met remain displaced. Families of those made missing by the state had become victims of anti-Maoist sentiment in some communities:

In a way, you can say that the people in the village give us much more torture than the army and the police. We feel more pressure from the village.  
(Focus group participant, Gorkha.)

Some of this exclusion has ceased with the end of the conflict and the success of the CPN-M in the Constituent Assembly elections in April 2008. However the divisions of the conflict persist, with families being stigmatised because of their perceived association with the Maoists. The community was often unsympathetic to the special nature of the suffering of the families, and in particular assumed that they had been guilty of Maoist activity:

People don't let us drink or bring water from their hand pump. Other kids and people beat my children when I am not in the house. We beg for food or clothes and pay later on. Water is a big problem. My kids come from school and wait for me to give water. They can't go to the other house even though they are thirsty. (Wife of missing man, Bardiya.)

Half of all families met reported no problems with their community, while 26% reported that there had been problems in the past, notably during the conflict, but that there were none now. Of those families that were involved politically with the CPN-M, 72% had suffered problems with the community at some point.

### ***Resilience and coping mechanisms***

The impact of disappearance will be the sum of the emotional, psychological, cultural and social effects discussed here, subject to the resources of individuals and communities to cope. In this study there is evidence that most individuals show sufficient resilience to not suffer from significant disability as a result of their problems, i.e. they continue to function relatively well despite their suffering. This indicates the need for psychosocial interventions to aim to support and promote such resilience. The most discussed coping mechanism was to share problems with someone, emphasised by the very positive response of those who had regular contact with a family association, since it solves the major problem of having access to someone who not only understands but shares your problem:

Yes, we do share our problems with those with the same problems but we never share with those who have a husband. We never share our problems with our elders or relatives because we don't want to give them pain and trouble, we only share with friends. The main thing is that the one who is suffering, only they can feel it. (Wife of disappeared man, Kathmandu.)

However, almost half reported that there was no-one in the family or community with whom they could talk. This reveals the dilemma of those who find themselves isolated with no-one who can understand their problems, and the fact that those facing problems within their families or communities are those most likely to be isolated. There is evidence that having contact with a family association can reduce the levels of problems women see. For problems in both family and community the rate of serious or extreme problems is significantly less among those who have contact with a family association, suggesting that involvement with an association ameliorates such issues. One common and effective coping mechanism for those whose loved ones were made missing by the state was political engagement. As with a family association this provides solidarity with the like-minded which brings family members into contact with others who share the beliefs of their loved ones and who appreciate the family's sacrifice. This facilitates the construction of positive meaning as a response to the disappearance.

The most common negative coping mechanism was repeated thoughts about the Missing, often becoming an obsession with continuing to search for the missing person. In some cases the loss became the central feature around which all aspects of life were organised, with many elements of healthy functioning suspended, threatening relations with family and others.

#### **6.2.4 Economic needs**

I still can't control myself when I remember those times, when I had 2 sons and a daughter-in-law with me. I had a happy family. Can you imagine, now I beg in the village? I became a beggar when once I had everything in the house and 2 earning sons. (Mother of two missing sons, Bardiya.)

Ninety-three per cent of the disappeared are men, the traditional breadwinners in Nepali society, and most of these are of an age where their economic contribution to the family is crucial. Eighty-one per cent of disappeared men were married and 71% of these disappeared between 18 and 35 years of age, with the result that families have been

deprived of breadwinners and women of husbands, often with young children to support, reducing their economic security. Data from the worst affected district, Bardiya, suggests that 92% of families of the Missing are dependent upon either working their own land, or labouring for others (CVC, 2008). Where land or labour is the principal source of income, loss of the people who provide the labour for both reduces livelihood. Many female headed families were met where daily agricultural labour is the only source of income.

We really lack household necessities since my husband is not here. I can buy rice or school things if I earn 50 rupees from labour. I have great difficulty to manage everything for the house and the children. I borrow money from others to pay my children's school fees and for uniforms and books, but lots of time we go without. My husband was fulfilling our every need. I don't have a capacity like he had. I am alone to take care of everything now. I have some 1/2 katha<sup>31</sup> of land but it doesn't give good food because there is no fertilizer. I can't buy with what I earn. If my husband was here, this land wouldn't be dry. I go to work in other's houses to get food. (Wife of missing man, Bardiya.)

As a result, many of the needs discussed here are the same as those of the poorest in Nepal, whatever the reason for their poverty. Families defined necessities as food, medical treatment and the education of children: more than 80% of families met were unable to afford all of these (Table 7).

<b>Economic security status</b>	<b>Fraction</b>
Not mentioned	0.22
Moderate - unable to afford some necessities	0.59
Serious - unable to afford many necessities	0.19
Extreme - reducing to begging for food	0.04

**Table 7 Summary of the economic status of families of the Missing met in interviews.**

Many families have spent significant sums of money that they can ill afford searching for their missing loved ones. Where someone had been taken by Maoists, local cadres often demanded money from families as a ransom, even though this rarely resulted in the release of the abductee. Most families take on debt in order to support

<sup>31</sup> In Nepal, 1 katha = 130.2 m<sup>2</sup>.

their families; 69% confirmed that they were in debt. The most extreme cases are where families are left with no economically active individual to provide support, notably older people who have no children to support them, or women heading households who have little capacity to earn a living: 4% had to beg to eat.

Lots of time I sleep without food. I just drink water and sleep. I can't go to beg at night so I have no choice. (Mother of two disappeared sons, Bardiya.)

For most families the greatest sacrifices they have to make concern health care and education. Where a family member is sick, money must be borrowed, or land mortgaged or sold in order to pay for treatment. Primary schooling at a Government school is free in principle, but parents have to fund uniforms, books and usually 'fees' that are demanded by teachers. One woman in Siraha decided it was better for her children to help with the animals than to send them to school:

I have no money to send my children to boarding school since it may cost some five hundred rupees only for school fees besides uniform, stationery and other things, and as the teachers in the Government school don't come to school every day and don't teach the students well, so nobody wishes to send their children to Government schools. [...] Therefore, I think it's better to send the children to pasture for grazing the buffalo and goats than to send them to study in the Government school. None of the children is studying in school. [...] As I have nothing to educate them, everyone is working to maintain our livelihood. (Wife of missing man, Siraha, mother of four, aged 5 to 16)

The individual who disappeared would often have worked to support the family, notably his parents, throughout his life and this concept often underlies the need for long-term support. "In a family in Nepal, loss of your son means loss of pension." (Father of missing man, Dhanusa.) The solution as far as families are concerned is to give them a sustainable way to pay for the necessities of life. This could mean that the Government guarantees education and health care for families of the disappeared, or that families are given jobs that guarantee an income that will permit them economic security for the future.

A few families have received support from NGOs, mostly non-food items given on a needs basis where agencies came across such victims. The most comprehensive

financial assistance to families of the Missing however has been given by the CPN-M to families of those made missing by the state as apparent compensation for their loss, as well as payments to cover certain expenses such as medical treatment. Whilst this may represent the Maoist party attempting to use the memory of the People's War to maintain its support among its traditional base, such payments have been crucially important for many poor families. Several tens of family members of the Missing have also been employed in Government Ministries and associated offices under the control of the CPN-M since the formation of the interim Government, as well as in private businesses in Kathmandu, as a result of the intervention of Sofad, the Maoist family association. All of the assistance facilitated in this way however excluded victims of the CPN-M. In the period following the field research, relief payments of Rs. 100,000 (US\$1,300) were made to many families from the Ministry of Peace and Reconstruction (see Section 6.2.6).

In many of the discussions with families, they made clear that they did not envisage compensation or reparation consisting of a single payment, but of long term support in specific areas, including support for medical expenses and education for the children of the Missing: "Many conflict victims don't want money or compensation but guarantees for the future of their children." (Brother of missing man, Banke.) In some instances it was explicitly articulated that they expected that the families of the Missing should be given jobs by the authorities, so as to guarantee livelihoods.

As we have no source of income, the Government should give us employment. How long can we manage with daily labour that is always uncertain? We have to stay idle and face problems feeding ourselves when we cannot find any work. So, the Government should manage our food and shelter. (Daughter-in-law of missing man, Bardiya.)

Whilst most rural Nepalis have little contact with the formal state, the issue of land is one where ownership documentation has become very important. Land and property constitute the most pressing administrative issues as a result of the uncertain and undocumented fate of their disappeared relatives, and were mentioned by 14% of those met:

Although the land is not in my father's name it is difficult to transfer the land into our name because the land should be transferred first to my father's

name and then to our names according to the law. So, it is very difficult due to lack of a death certificate. (Son of disappeared man from Siraha.)

### 6.2.5 Justice and accountability

When asked what justice meant to them, families replied as shown in Table 8. Although it is not a priority for most, a majority of families seek prosecutorial justice. Many however see justice in terms other than retribution. There is also an understanding among a minority of a need to end impunity, as an example for the future.

Meaning of justice	fraction
prosecution	0.54
compensation	0.45
truth / an answer	0.31
acknowledgement	0.07

**Table 8 Meaning of justice for families.**

Families were asked who should be prosecuted, and the results are shown in Table 9.

	fraction
Direct perpetrator	0.65
Informers	0.29
Those who gave orders	0.19
Politicians	0.13

**Table 9 Whom families believe should be punished.**

In Bardiya, where informers were very widely used, informers are those most favoured to be prosecuted, even though most are unlikely to have committed any criminal offence. Victims of both sides made the point that prosecuting lower level actors would not satisfy them; some emphasised that responsibility was political, and went to the very highest level, on both sides. Some families have filed cases with courts or police stations with the help of human rights organisations, but most have no understanding of the processes involved. Preferences concerning judicial process were driven by a desire that it was accessible to victims: families sought that process should ideally be local and there was no interest in an international process. Families believed that the pre-transition Nepali legal system was not capable of trying the perpetrators of disappearances, but there was agreement that with 'new laws' an appropriate domestic judicial process was possible. Whilst this was based on little understanding of the legal system, it does

represent some faith on the part of the victims that justice is possible for them in a 'new Nepal', given the appropriate transformation of existing institutions.

The Government's initial draft Truth and Reconciliation Commission Bill (Govt. of Nepal, 2008) included a broad amnesty for perpetrators, but 69% of families rejected amnesty. One woman explicitly linked a lack of judicial process to what might be considered 'healing' of victims:

The truth about the facts should be clarified, but the perpetrators should not be given amnesty. If they are given amnesty, the mentality of the victim families will remain as it is, so amnesty should not be given. (Wife of disappeared man, Siraha)

Thirty-one per cent could envisage amnesty, but more than half of these believed that it must be conditional, only being granted to lower ranks who were following orders, or subject to the demand that the truth about the disappeared be revealed. Amnesty was far more favoured among victims of the Maoists than victims of the state, perhaps reflecting the low expectations of prosecution among the former at the time of the research.

### **6.2.6 Reparation, relief and compensation**

*Reparation* as a word was almost never used by families, even though the concept was well understood by some:

Paying compensation means an admission of wrongdoing even if there is no direct admission of the truth. Indeed, paying compensation means the state is paying the fine [for its wrongdoing]. (Brother of disappeared man, Gorkha.)

Families expressed the view that the most reparative act of the authorities responsible is to reveal the truth about the disappeared, but the consistent use of the term *compensation* reflected the concurrent priority of economic support. There is a concern among families that payments of compensation are somehow designed to distract families from pursuing the truth about their loved ones. 74% of families said they would not accept compensation if it preceded the truth, in the spirit of reparations. For all families there is a dilemma between the need to feed themselves now, the need to know the truth before any compensation or reparations can be accepted, and the very idea of

putting a value on the life of the disappeared by accepting money from the authorities. A number of families resolved this dichotomy through the concept of *relief*.

If they give us 1 lakh [100,000] Rupees as *relief* then I will take it, if they say it is *compensation* then there is no way I am taking it. (Wife of disappeared man, Dhading.)

This view appears to have driven the naming of Government payments in the months following this study as *interim relief* (see Section 6.2.4). In this way families can address their immediate needs, without sending a message to the authorities that they believe the issue of the disappearance is closed. For some compensation was not an acceptable alternative to the return of their loved one, and in this sense the most reparative act of the authorities was perceived to be an answer and the return of remains.

In a number of communities, where the missing issue goes beyond individual families and affects the community as a whole, families were asked about community reparations. This concept was universally received negatively. They claimed that families had suffered, and thus families should be compensated, believing that the idea of community reparations was a trick of the Government to spend less money on a compensation policy, by providing schools or other infrastructure to which the community had a right. The leader of the Bardiya family association, 80% of whose members are Tharu, articulated *political* demands arising from the victimisation of the Tharu people, as reparative:

If the government declared the Tharu as the worst affected race in the entire nation in the course of the Peoples' War that would be a great relief the Tharu people. The state could give them first priority in government opportunities in the district. [...] In this context, the state could declare the Tharu as a special ethnic group so that these people would feel relief [...] if the state wants to give reparation to the Tharu, we would say that we need a Tharu State. If the state wants to give reparation to the district, we would propose that the Tharu people should be entitled first priority in every sector. (Leader of Bardiya family association, personal interview, Sept. 2008.)

The logic of such an approach is that the Tharu were so targeted during the conflict that the authorities should compensate them as a community, by supporting those cultural elements that define them as a community.

## ***Truth-telling and acknowledgement***

Whilst the particular truth of what happened to a family's missing loved one is considered crucial to families, more general truth-telling forms a rather small part of the demands of families. Families are well aware of how they suffered in the conflict, believe this was well known throughout the country,<sup>32</sup> and did not seek it to be validated by any truth seeking process. Reparation, whilst potentially providing material compensation to victims, is primarily about *acknowledgment* of what has happened and the responsibility for it. Families, particularly those that are politically engaged, have a burning desire to see the sacrifice of their loved ones acknowledged:

[T]he government has to recognise the contribution of these families in bringing change in the country. [...] The dead have to be declared as martyrs and a trust can be established in their names. Money is not everything; it comes today and it will be finished tomorrow; respect is something important. (Brother of disappeared man, Gorkha.)

Seven per cent said that they felt the disappeared had been acknowledged, through payment of compensation or a judgement of the Supreme Court and 42% of relatives of victims of the state said that they had received acknowledgement from the CPN-M. Many families use the language of martyrdom to describe the status they want to see accorded to their missing relative (despite the ambiguity of their loss), and this is also partly linked to compensation. This attitude arises partly from the experience of having seen previous martyrs, notably of the *Jana Andolan* of April 2006, acknowledged and their families financially compensated.

Unofficial efforts to memorialise the disappeared are under way, demonstrating the enthusiasm of communities to see such acknowledgement. The families met during this study mentioned their need for memorials to the disappeared, most seeking a local memorial. In one district in the plains for example a statue is being constructed of five local students who were arrested by the security forces during the conflict and remain missing: the junction it sits in has been renamed Martyr's Crossroad. Families prioritise local memorials to the Missing and the public sanctioning of the status of the victims,

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<sup>32</sup> Whilst no studies have been made, it is likely that the scale and type of violations committed during the war, particularly by state forces, are not in fact well known in Kathmandu or elsewhere beyond affected districts.

believing that the Government should commit itself to commemorating the Missing. In this way families seek a central affirmation of locally held opinions of the Missing that may well be highly contested elsewhere (see Section 9.2).

### **6.2.7 Institutional reform and attitude to the state**

An essential component of reparation is satisfaction, notably giving families assurances of non-repetition of the offence (de Greiff, 2008). Half of all families believe they will never be able to trust the state, while 40% believe that this trust could be built:

There should be change in the army's character and the soldiers who committed crimes should be punished. There should be a reform in the military. (Brother of disappeared man, Siraha.)

In Bardiya, as discussed in Section 6.2.6, some families see the devolution of political power to the Tharu, in exactly the spirit of federalism which will define the new dispensation in the country, as a route to guaranteeing non-repetition. This contrasts with a legalistic conception where prosecutions, institutional reform and 'rule of law' constitute such guarantees.

There remain differences in perceptions among the victims of each side in the conflict, reflecting the divisions that remain: 71% of victims of the state believe that the Government will address the issue of the disappeared while only 22% of victims of the Maoists share that view. If the issue of disappearances is not addressed, a majority of the victims of the state say they would react: half would take part in a political movement, while a significant minority (15%) say they would be prepared to launch a rebellion with the use of arms, even against their own party:

The Government has to understand our grievances and it has to respect our dignity. If the government of this twenty first century does not understand our problem, the counter-revolution will take place. (Brother of disappeared man, Gorkha.)

Given that many of these families are cadres of the Maoist party, the implications for the future of the peace process of ignoring the needs of such victims should not be underestimated.

### **6.3 Nepal's still-born transition**

The transition from conflict to peace in Nepal has been steered by national elites, notably the political parties and the civil service, with significant input from international advisors and the donor community. As part of this study such elites, including political leaders, Ministers, UN functionaries and Nepali civil society were met to understand their respective visions for post-conflict Nepal. Here, the mechanisms proposed by those leading the transition, notably a TRC and a Disappearance Commission, are discussed in the light of needs expressed by victims. In Chapter 7 and Chapter 8 the contrast between the agenda of elites and that of victims, and the deficit in addressing the needs of families of the Missing, are analysed. Here, an emphasis will be placed on a critique of the planned Disappearance Commission, on the basis of the needs articulated by families.

A principal reason for the lack of any transitional process has been the political stalemate that has seen the first Maoist led Government deposed, the peace process stalled and the entire transition jeopardised. Without stability it is unlikely that a transitional justice process can be initiated. However, the greatest long-term challenge to a comprehensive transitional justice process is the reluctance of political actors to see action that might lead to judicial process related to their roles during the insurgency and this has led to reluctance to initiate any process. This is particularly true of senior Nepali Congress figures, in power during the time of greatest violations and perceived as close to the army. The CPN-M and its leadership had direct command responsibility for its armed forces, the People's Liberation Army, and remain reluctant to see party cadres implicated in violations, despite pressure from the party grassroots to act on state perpetrated disappearances. The human rights community in Nepal has exacerbated the fears of those in power of any transitional process by emphasising an agenda for transition in which primacy is given to the need for prosecutions and all other goals of transition made subservient. Even where a Disappearance Commission is created, families remain cynical of its prospects as a result of the history of commissions of inquiry in Nepal which have historically been subject to political interference and seen their recommendations routinely ignored.

The draft Disappearance Bill, first published in 2008, proposed a Commission of Inquiry into Disappearances with a remit to investigate disappearances during the insurgency, identify perpetrators and recommend reparations to victims (Ministry of

Peace and Reconstruction, 2008). However, the Commission (which is slated to contain no victims' representative) falls short of addressing the needs expressed by the families in this study in many ways. The Commission will inform a family if it is learnt that the disappeared person is dead, but is not mandated to pass on any other details; the bill makes no mention of a capacity for exhumation and identification of human remains, and so it is unclear if any such programme is envisaged. The Commission will inform the family if death is confirmed (Ibid: Chapter 5: 38), but will not satisfy families' need to know as many details as possible concerning the disappearance. Whilst the bill foresees prosecutions, sentences can be reduced or waived subject to cooperation with the Commission; this appears to be an effort to introduce an amnesty procedure, rejected by most families. There is no scope for the Commission to grant a missing person a legal status such that property can be transferred in their absence. The reparation process outlined includes payment of compensation and free education, which will be welcomed by families, but health care support limited to a 'check-up'. For those who are not economically active these provisions offer little hope for an escape from poverty and for others are unlikely to ensure livelihoods; there is no mention of the value of compensation, nor concerning the payment of pensions. There is no scope for acknowledgement or formal apology, no mention of memorialisation and none of psychosocial support. These provisions resemble more a compensation procedure than one of comprehensive reparations. There is no scope for action concerning informers and others within communities divided by the conflict where legal action is likely to be impossible. The Commission has no defined presence outside Kathmandu, and it is unclear how victims would make contact with the Commission. The Commission would appear therefore to represent very much the institutional, centralised approach to transitional justice and appears to be both remote from victims and unlikely to address the breadth of their needs. The further implications of this study for transitional justice process in Nepal are discussed in Chapter 7 and Chapter 8.

#### **6.4 Summary: Victims' agendas for transitional justice**

The needs of families of the disappeared in Nepal are dominated by a need for the truth about the fate of loved ones, access to human remains where they are dead and economic support to ensure livelihood. The most visible conflict with dominant narratives around transitional justice, in Nepal and globally, is the relatively low priority victims give to both judicial process and truth-telling. Whilst they seek justice, this is not considered

an immediate need, and is interpreted in broader terms than prosecutions. Truth-telling of the sort that emerges from a truth commission was also not prioritised: families sought a *private* truth about their loved one, rather than a public truth about the conflict. The issue of reconciliation was little mentioned explicitly; where it was families expressed feelings of being excluded and stigmatised because of their perceived role in the conflict. An addressing of such divisions demands a local process, centred on the community, rather than a truth commission based in far away Kathmandu. With exceptions, most families are largely at peace with neighbours, blaming a remote state for violations, rather than individuals or communities they know, challenging a discourse that puts reconciliation at its centre. Many of the needs discussed, and indeed the general impact of disappearance, emerge from the unique social and cultural position of affected communities, indicating that approaches that do not consider the context in which victims live will be unlikely to meet their needs.

Not knowing the fate of missing loved ones has left many family members suffering significant emotional and psychological problems, including sleep disturbance, somatism and generalised anxiety disorder. The most extreme impacts however are *social* in nature, where wives of the disappeared have experienced loss of status within the family and identity issues in the community resulting in stigmatisation. This serves to confirm that within the marginalised communities that were most affected by conflict, women are further disempowered by disappearance. The positive role that family associations have played in supporting those affected by disappearance, suggests that solidarity and sharing is a crucial coping mechanism. This is consistent with the ambiguous loss model that sees the social reconstruction of meaning and identity as a prerequisite to living with the ambiguity of loss (Robins, 2010a). Beyond their own organisations and communities, victims have little or no access to medical facilities or other psychosocial support. Many of the impacts of ambiguity, such as being unable to perform the expected rituals for the dead, demand not only that families receive an answer concerning the fate, but also that they have access to human remains through a comprehensive process of investigation, exhumation and identification.

It is unsurprising that economic needs are emphasised, given the profile of many victims as the poorest and most marginalised in a highly unequal state. Families seek not a simple payment of compensation, but livelihood guarantees that will allow them to feed and educate their families in perpetuity, restoring the economic security that their missing breadwinner enabled. In this sense, reparation can be understood as filling the

economic role of the disappeared. Reparation should also mean addressing the health issues, notably the psychological impacts that have arisen as a direct result of disappearance. The long-term marginalisation by the state of many communities that were also most impacted by the conflict leads to demands for recognition. These arise initially as a response to their victimisation, through demands for memorialisation, martyr status for the dead and compensation. Recognition however is also seen as giving a place in the nation to those long denied it, a goal for which many families believe their loved ones have given their lives. The behaviour of the state and local elites in rural areas during the conflict was a continuation of how the disempowered have always been treated in Nepal. As a result the demands of victims go to the heart of the goals of transition, demanding that the 'new Nepal' that emerges is inclusive and representative.



## **Chapter 7 Timor-Leste's transition and the Missing: A victim-centred evaluation**

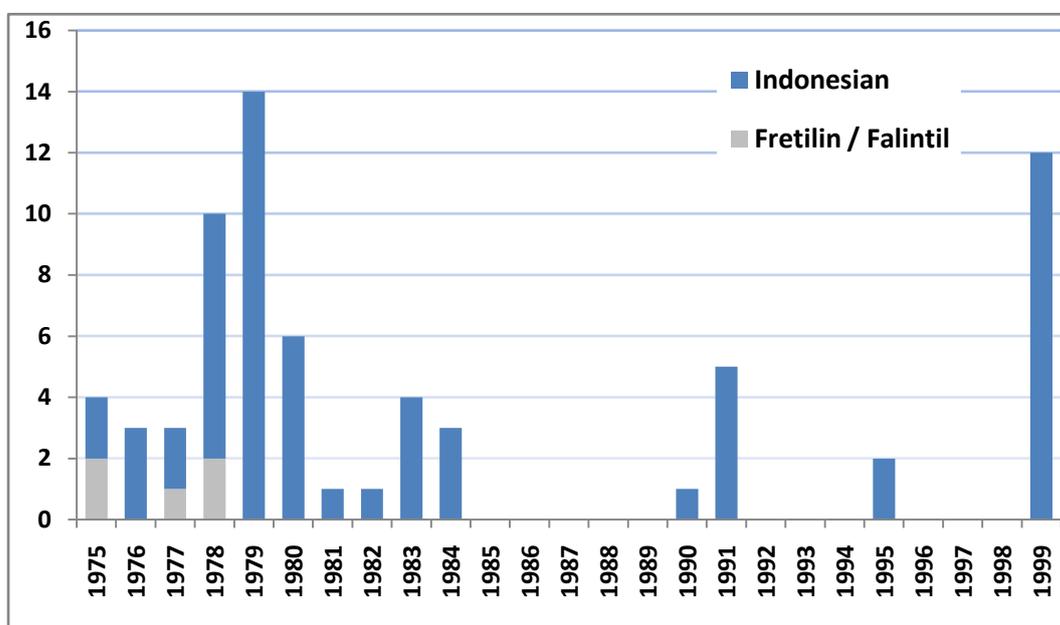
While Nepal's transition is in negotiation, Timor-Leste has seen a decade of transitional justice mechanisms that are now largely complete. The transition has been shaped by both local elites and the international community, and whilst not directly constrained by the departed Indonesians, their interests have nevertheless had significant influence. Timor-Leste emerged from conflict with no institutions and few other resources and the UN both governed the state in the years immediately after the chaos of 1999 and created the most important transitional justice mechanisms. As a result, the mechanisms created reflect recent global practice in prioritising the rhetoric of truth, justice and reconciliation as the principal goals of the transitional justice process. This study with families of the Missing in Timor-Leste aims to understand the needs of families a decade after the end of conflict, in the light of the transitional mechanisms that have been created. Whilst this research cannot replace a longitudinal study that could evaluate impact on victim needs of the decade of transitional process, it can understand current needs that remain unmet and attitudes towards that process: as a result the impact of that process can be inferred. As such, the study represents a victim-centred evaluation of Timor-Leste's transitional justice process, allowing victims to articulate both their unmet needs and their attitudes towards the mechanisms that have unfolded over the previous ten years.

This chapter begins with profiles of the Missing and their families met for the study. The needs of families that emerge from the study are then reviewed, including a discussion of the dependence of those needs on when persons went missing, made possible by the length of time over which disappearance occurred. Attitudes of the families of the Missing to the principal transitional justice mechanisms are then explicitly discussed, and the relevance of the mechanisms reviewed in the light of articulated needs.

### **7.1 A profile of the victims**

The sampling frame used for this study is a list of 2,452 persons missing as a result of the conflict between 1975 and 1999 and collected since 1979 by the International Committee of the Red Cross (ICRC). This included persons killed but whose bodies had not been retrieved by families, those missing following arrest by either Indonesian forces

or Timorese parties, and those who had become separated from families and not seen again, notably when populations were fleeing in the mountains. This dataset was the result of families of the missing visiting ICRC offices and of ICRC delegates meeting families in extensive movement in all areas of the country over a 30 year period (see Figure 10). A selection of four districts was made, including those with the greatest numbers of Missing, districts from east and west, urban and rural. The study was conducted in Bobonaro, Dili, Los Palos and Manatuto districts (see Figure 5), and within these districts cases were selected at random from the ICRC list and the families of victims visited in their homes. A total of 69 families were interviewed and additionally 81 relatives of victims met in 9 focus groups organised by victims' organisations (in Dili and Bobonaro), and by local community leaders (in Manatuto).



**Figure 10 Number of Missing in Timor-Leste by perpetrator and year for families interviewed during the study.**

Figure 10 shows the 69 missing cases where families were interviewed for this study, as a function of perpetrator and year of disappearance,<sup>33</sup> where the perpetrator is as reported by the family. This figure tells the story of the conflict in terms of the numbers missing. The early years of the conflict were the most devastating, with many killed and

<sup>33</sup> Here, cases where disappearance followed separation from families while displaced have been considered as Indonesian perpetrated.

separated from their families as a significant fraction of the population was displaced into the hills and pursued by Indonesian forces, resulting in families being dispersed and separated. With the effective victory of the Indonesians over the armed resistance in the early 1980s, the number of persons going missing fell substantially. There is a small spike in 1991 as a result of the Santa Cruz massacre and then a large peak around the violence of 1999 and the popular consultation. Missing cases are dominated by those perpetrated by the Indonesians and Timorese allies, such as the *Hansip* militias and militias responsible for much of the violence of 1999. Ninety-three per cent of those cases where families were met were Indonesian perpetrated. Timorese perpetrated cases consist of persons made missing by armed or political cadres of Falintil and Fretilin, and one case where a civilian member of the clandestine network was allegedly responsible. Figure 10 shows that these occurred largely in the early years of the conflict.

<b>Perpetrator</b>	<b>Number met in this study</b>
Indonesian <sup>34</sup>	64
Timorese (Fretilin / Falintil)	5

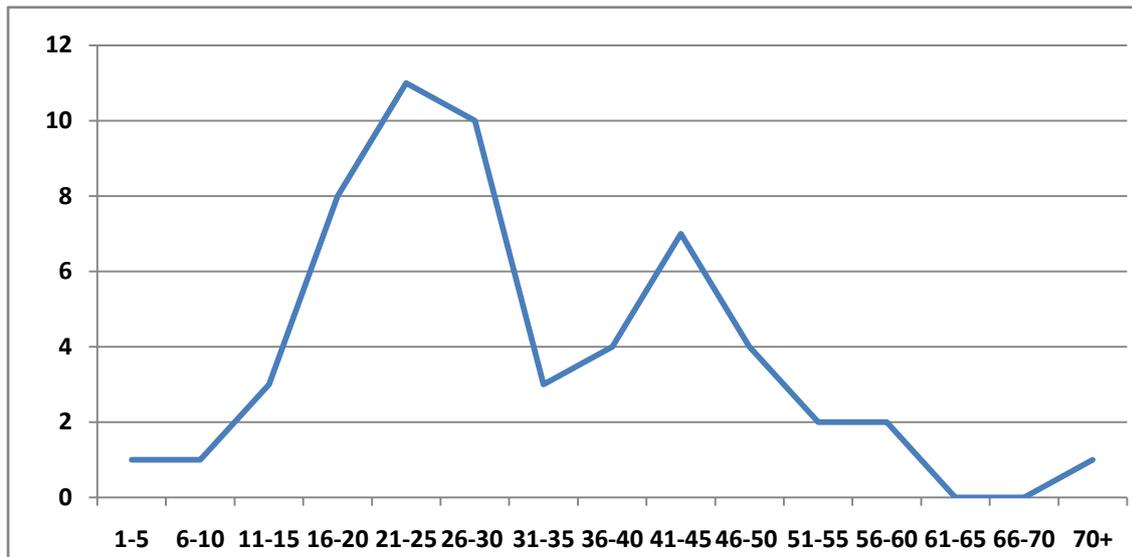
**Table 10 Perpetrating authority responsible for the person being Missing.**

The age of the Missing at the time of disappearance is shown, for those whose families were interviewed, in Figure 11. The distribution peaks for those aged 15 - 30 years. As in Nepal, given that the vast majority of the Missing are male (Table 11), this has the effect of depriving families of those who are at their most economically valuable, resulting in often extreme challenges to livelihood. That a significant number of the Missing are women and children reflects the nature of the conflict in Timor, where in many cases civilians were actively targeted at points in the conflict, by both sides. Disappearances early in the conflict, when attacks dispersed families, were as likely to lead to women and children becoming missing as adult men. Twenty-three per cent of all the Missing from those families met were under 18 years of age when they went missing. Some of these were children taken by Indonesian troops, either to aid military units in menial tasks (as *Tenaga Bantuan Operas*<sup>35</sup> or TBOs) or to be adopted by families in

<sup>34</sup> This includes one case where a man disappeared while being held by Fretilin when Indonesian forces overran the area.

<sup>35</sup> Indonesian, literally 'staff assisting operations'. Individuals were taken as TBOs of all ages, but many were young boys in principal at least 12 years old, but sometimes younger (van Klinken, 2008).

Indonesia. The gender of the missing person and the principal interviewee are shown in Table 11. From the families interviewed 9% of the Missing are women and an additional 3% of families are missing both male and female relatives. Among families interviewed the principal (or sometimes sole) interviewee was evenly mixed between genders; 74% of the Missing were married and 67% had children.



**Figure 11 Age of the Missing in Timor-Leste at the time of disappearance for the sample interviewed in this study.**

	male	female	family group
Missing person	61	6	2
Principal interviewee	34	31	4

**Table 11 Gender of the missing person and of the principal interviewee.**

During interviews an effort was made to understand the role in the conflict of the persons missing, and this is recorded in Table 12. It should be noted however that families may not have been fully aware of the nature of the missing person's role in the resistance, and that since significant payments have been made to veterans and their families there is evidence that some families may be exaggerating the nature of the missing person's role. Table 13 shows the relation of the principal interviewee, or the closest relative in the family group, to the missing person.

Civilian	21
Resistance fighter	14
Political cadre	19
TBO minor	4
Indonesian militia	2

Wife	17
Brother / sister	15
Son / daughter	11
Mother	6
Father	12
Entire family missing	1
Other	6

**Table 12 Status of the missing person.**

**Table 13 The relationship of the principal interviewee to the missing person.**

## 7.2 Needs of victim families

This section will discuss the needs that emerge from the study. The organisation of this material derives largely from the priorities articulated in the data, informed by the literature reviewed in Section 2.3. The topics discussed include economic needs; recognition, acknowledgement and reparation; and the fate of the Missing, which in Timor is linked to spiritual issues and the recovery of human remains. Sections are devoted to ambiguous loss, and emotional and psychosocial impacts, and the time dependence of these is discussed, exploiting the 25 year period over which disappearances occurred. A victim-centred evaluation is then made of the various transitional justice mechanisms that have occurred, using the data to determine the extent to which these processes addressed victims' perceived needs.

Needs vary from family to family, and are a function of when and how the person went missing, the role the person played in the family, the economic and educational status of the family and of many other factors. Needs also evolve over time: in the sample of families met the time since disappearance ranges from 10 to 34 years, and thus permits an explicit test of how needs change with time (see Section 7.4). It is also seen that public discourse about the conflict impacts upon families' perception of their needs. Those whose loved ones were taken during the violence of 1999 have seen widespread discussion about the violations that occurred then and about the issue of judicial process in particular. As such, families of victims from 1999 who have been exposed to this discourse (and not all have) are much more likely to discuss the issue of justice than families of those missing from earlier in the conflict where judicial issues

have never been on the public agenda. Underlying all of these issues however are those needs with which families are confronted on a daily basis.

The needs of victim families emerged from an initial open question about priorities, with those most dominant being the needs for economic support, for recognition, for truth about the fate and access to the body.

<b>Need</b>	<b>Fraction</b>
Economic support	0.61
Recognition / memorial	0.30
Truth about fate	0.30
Access to body	0.16
Justice / punishment	0.10

**Table 14 Needs expressed by families in semi-structured interviews.**

As in Nepal, there is a dramatic difference in needs expressed by families in the capital and those elsewhere (Table 15): almost 3 times as many families outside Dili as in the capital expressed economic needs, while in Dili 4 times as many families demanded an answer about the fate as did those in rural areas. In Dili 31% of cases arose from the Santa Cruz massacre, where ambiguity about the fate of the Missing may remain high, compared to cases of those lost in the mountains following the Indonesian invasion, for example, who are presumed to have died. It is also likely that these data reflect the disempowerment of many victims in the countryside: they cannot conceive that they will ever receive an answer or a body and so have resigned themselves to moving on, in contrast to those in Dili who understand their rights and make demands as a result.

<b>Need</b>	<b>Families expressing this need, fraction</b>	
	<b>Dili</b>	<b>districts</b>
Economic support	0.25	0.73
Recognition / memorial	0.44	0.25
Truth about fate	0.69	0.18
Access to body	0.06	0.20
Justice / punishment	0.19	0.08

**Table 15 Difference in needs expressed between Dili and rural districts.**

A small minority of families, 7%, articulated no needs; they have accepted the death of their loved ones, have made appropriate ritual even where the body has not been accessed and have received recognition and in some cases economic support from the Government.

### 7.2.1 Economic needs

The single priority expressed by the greatest number of families (61%) was that for economic support. It is not immediately clear however as to the extent to which this is related to the missing person, rather than being what one would hear from asking the population at large about such needs. Whilst many families have had the opportunity to develop mechanisms to cope with the loss of loved ones, those who lost husbands and fathers in 1999 are still struggling to make ends meet, with many women heading households containing younger children.

I'm 64, I don't have any more strength to do all that. I stay home, looking after my house. We are three in the house, an aunt of mine who is old - I'm taking care of her, my daughter and another girl. I don't have any man in the house, no husband or brother. When we don't have a man in the house of course we have to do everything even though you are old and sick, you have to survive, to live. (Focus group participant, Bobonaro.)

Where women are left heading households they must find ways to feed themselves, most often continuing to try to farm, despite the challenges involved. The economic priorities expressed by families were for food, education of children and support to enable appropriate rituals to be made for the dead and missing from the conflict. In many cases the sole reason rituals have not been done is the expense of feeding those who must be invited to the ceremony and of construction of a grave.

I am not able to do the ritual ceremony, and so we are still waiting. It's also difficult to find our daily food. We were only able to bury him but we did not make his ceremony because we don't have the capacity and also lack food. (Wife of missing man who recently exhumed a body she believes to be her husband, Lautem.)

Victims living in poverty share the needs of all Timor's poor. In some cases families are also burdened with other impacts of the conflict, such as the children of other relatives who died:

Yes, since the death of my brother, his three children - the two older ones are staying with my sister in law and we all contribute to look after them. The young one is with me since the father has gone and I take full responsibility for his life even though I am a widow. I have to struggle to find food for both

of us. [...] It is very hard to cope with three children going to school. There is never enough money and many times I cannot satisfy them, you know what kids are like. If they ask to buy this or that and I can't afford it. To get food is very hard, food is hard to buy for them... We are living in a house in poor condition... (Wife of man killed in 1999, Bobonaro.)

Where education is no longer affordable, children are sent to work to contribute in any way they can to the family income.

Since the end of the conflict policies have been elaborated providing potential support for families of conflict victims, both through payments and pensions for veterans and from the social assistance programme of the Ministry of Social Solidarity (MSS). Of families met 6.5% had received compensation as part of the valorisation process, and 13% were receiving pensions: these are discussed in more detail in Section 7.5. It is worth noting that whilst such payments have a dual role, representing both recognition and economic support, it is for the latter that poor families most value them. These payments had mostly begun rather recently, typically in the 6 months prior to the research being undertaken, more than a decade after the end of conflict. The main planks of economic support that could constitute a reparations programme emerge from the needs expressed here:

Support to children of the Missing in education, such as scholarships, particularly at the secondary and higher levels;

Assistance to female headed households and others unable to ensure their own livelihood, both in terms of economic support to address urgent needs, such as housing and food, but also income generation schemes that can ensure livelihood in the long term.

### **7.2.2 Recognition, acknowledgement and reparation**

Almost one third of families mentioned the need for recognition of the sacrifice of the family as a priority (Table 14):

For those that have been gone a long time, we as a family, we're asking the authorities that this father of ours no matter what, whether he is dead or alive, he has to have some value for what he gave, therefore if the Government cares, it will look after us today or in the future... We don't

demand high payment, it's up to the Government to think why this person died. If the person died to defend his sovereignty he needs recognition from the Government. (Children of missing man, Dili.)

Table 16 shows families' understanding of recognition, with families seeing many of their needs as part of the acknowledgement process, most commonly understood as economic support.

<b>Understanding of recognition</b>	<b>fraction</b>
Compensation / economic support	0.50
The truth regarding fate or access to body	0.27
Medal	0.20
Memorial	0.17
Acknowledgement / public truth about what happened	0.07

**Table 16 Understanding of recognition for families of the Missing**

Families did however see a dilemma in accepting money as something to repair the loss of a son or father. Such payments are unable to fill the economic gap left by the loss of a man who would have supported the family for a lifetime, and are certainly not considered something that can take the place of a loved one. Others see compensation as honouring the memory of the dead, and even serving as a memorial to them. Local leaders saw their entire community as victimised and as a result seek a reparative process that targets the community, rather than individual families. Potential reparations schemes are discussed further in Section 8.4 The dilemma for any reparations scheme is how to support victims without being seen to exclude the many others living in abject poverty who are not victims of the conflict, and this necessarily demands that a reparations process must consider its relationship to livelihood and development programmes.

Whilst some saw reparation as a literal repair of the surviving family, psychologically and economically, many saw a need for public recognition, i.e. symbolic reparation, using the symbols they see as acknowledging the family's sacrifice. The medals that many have received have been largely welcomed (see Section 7.5), but the lack of a specific veterans' category for those missing fails to recognise the number of families where relatives are not known to be dead, since this denies the family's ambiguity:

A while ago they called us to receive the medals but I refused because they put my father in a group of dead people, which he is not. He is not in this category yet, because we are uncertain whether he is dead or alive. I gave them suggestions about my father's case, I cannot tell that my father is dead, nor that he is alive because there is no clear evidence. In case you don't accept what I'm saying, sorry but I cannot accept the medals. At present I refuse to receive the medals. If one day I know for a fact that my father is dead, then I'll accept the medals. (Son of missing man, Dili.)

Whilst almost half (45%) of all families met have received a medal as part of the ongoing valorisation process, and 13% pension payments, there remains no mechanism to acknowledge the many who were not active in the resistance to Indonesia, who died or are missing as a result of the conflict. When explicitly asked, 69% of families sought a memorial to the missing and the dead, something shared by many who lost relatives in the conflict, but particularly important where there is no body:

Firstly, [we need] something that can't fade with time: a monument that will stay, for those who died in order to always be remembered by everyone, [including the] next generation. Secondly, if the state seeks to help by giving something for me, of course I will take it. Just like if they think to give some pension for all the parents who have lost their sons, then of course I will take it. (Father of missing man, Dili.)

It is remarkable that while those who are missing as a result of the Santa Cruz massacre of November 1991 have become a significant component of the narrative of national liberation (and families have received medals) there remains no memorial to them. This remains a key demand of the 12 November family association. Whilst a national memorial to those who died fighting with Falintil is under construction, accommodating the resting places of hundreds of fallen fighters, for many this is too far from their community to be relevant, and it excludes the civilian dead. Local efforts at memorialisation are underway in some areas, but victims seek support from the authorities both financially and to ensure a component of official recognition of the dead and Missing.

The study revealed the extent to which attitudes to the leadership have been shaped by feelings that victims and those who fought for freedom have been betrayed:

I want to tell the government, they need to pay attention to the widows, those whose relatives died; they can give us rice with some money. If they want to give, it must be quick so we can start to build the grave. So, the family will feel proud that their relatives died for this beloved nation. All those people can go around with their cars, they use luxury cars, but for those who died and whose remains are unclear still suffer. (Sister of missing man, Manatuto.)

Victims of the conflict compared their treatment with those displaced by the violence of 2006, suggesting that they perceive there is a hierarchy of victimhood in the country:

Why did the Government attend to the crisis of 2006 so urgently, especially those that packed their stuff and ran to join others as IDPs? Those people were not affected by that but they simply packed all their belongings and joined the IDPs and not just that, but they also had good treatment from the Government. We felt like those from 1975 till 1999 didn't have any value. (Focus group participant, Bobonaro.)

The CAVR final report proposed a reparations scheme that targeted the most vulnerable victims (including the disabled, widows and children) and stated that Indonesia should bear a 'significant proportion' of the costs. (This element of engaging those most responsible for violations was mentioned by very few families met.) The proposal included scholarships for affected children, support and rehabilitation for the most vulnerable individuals and for highly affected communities, and a programme of memorialisation. Whilst this proposal is not inconsistent with the demands of the families of the Missing, its implementation was vetoed by the President at the time the CAVR report was presented to him.

### **7.2.3 The fate of the Missing, human remains and spiritual needs**

Table 17 shows the perception of the fate of the Missing by families. A majority of families met believe that their loved one is dead mostly as a result of the time that has passed since disappearance. In some cases death was confirmed by the family having witnessed the killing themselves, as in some militia killings in 1999 where bodies were then removed, or where a relative died while families were fleeing in the mountains, but the body left where it fell. Most families however have received no information about the fate of loved ones and have been unable to access the body of the missing person. 30%

of families still seek the truth about the fate of the missing, and remain living with ambiguity about whether loved ones are alive or dead.

For me, I am not yet sure regarding my missing son; I can't say that he is dead because I have not buried the body, or alive because my child doesn't stay with me; I can't say anything about my son's whereabouts. What I know is my son went to school and never returned home. (Father of young man missing from the Santa Cruz incident, Dili.)

<b>Perception of fate</b>	<b>fraction</b>
Alive	0.03
Ambiguous	0.15
Ambiguous, probably dead	0.15
Presumed dead	0.54
Seen killed, body not retrieved	0.05
Seen killed, body retrieved <sup>36</sup>	0.05

**Table 17 Family perception of the fate of the Missing.**

That families know, or believe, that a loved one is dead does not however mean that they have no needs; in many cases they have been unable to do rituals and still seek to retrieve the body.

A third of families met have been living with ambiguity for between 10 and 35 years. Families find themselves torn between wanting to believe their loved ones are alive and facing the fact that after so long they are not coming back. Families are literally stuck: trapped in the conflict period when the uncertainty of war meant one didn't know if a family member would survive the day or not. This ambiguity was often demonstrated by families who in a single phrase could assume that the Missing was both dead and alive.

I wonder if he is still alive somewhere, like my son said before. But if he is dead we never had any signs or dreams that tell us he is dead, it's strange... We pray, we are still praying for his return and may God help him wherever he is. (Mother of missing man, Dili.)

A number of families reported the sort of myths that are common in contexts where many are missing, and that sustain hopes of return. In Timor-Leste these mostly centred on the

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<sup>36</sup> These persons are not missing by the definitions of Section 1.1, consisting of cases where a body has been recovered recently or where data has been incorrectly included in the ICRC list.

possibility that the Indonesian authorities have taken the Missing to remote islands elsewhere in the archipelago. In some cases the impact of the ambiguity of their loss remains severe, even decades after disappearance. Parents of young boys taken by Indonesian soldiers presumed their children to still be alive in Indonesia, and in one case had a single contact years after he was taken that could then not be pursued. The understanding that a missing loved one is dead has often come as a result of the time they have been missing or as a result of contact with the spirit, in dreams or otherwise, that is perceived as confirming death. Many of these families have performed the appropriate traditional rituals, often using a substitute body (see Section 4.3.2) where they do not have access to the remains of those missing; in other cases families lack the financial capacity to make such rituals. Even where death is assumed however, most families see access to human remains as very important. The need for an answer leads families to make demands of their own Government and of perpetrators, primarily the Indonesian authorities. Families seek their Government to cooperate with the Indonesians to reveal the truth about the missing and to aid in the return of human remains.

A message from us, the families of the missing; we want that the Timorese and Indonesian governments should sit together to find a solution for those who are missing or died during Indonesian occupation up to the independence of Timor-Leste. (Brother of missing man, Dili.)

A number of families were met, notably with relatives missing who were fighting with Falintil, who believe that some cases can be addressed using information that is available within Timor-Leste, from ex-comrades in Falintil.

### **7.3 Psychosocial and emotional impact**

The medicalisation of trauma that has driven responses in many societies emerging from mass violence (Pupavac, 2005) has not occurred in Timor due to the lack of victim access to such discourses, since facilities and expertise have not reached rural areas. As a result most victims do not speak of post-traumatic stress or even trauma, but of much more local understandings, such as *hanoin barak* (Tetun, literally 'thinking too much', a term indicating anxiety or intrusive sadness, Silove et al., 2008). A number of families used this phrase to describe their emotional state:

Her [mother of the Missing] life is very sad. She always feels sad when she goes to the fields. She *thinks too much*. Her illness is that sometimes she thinks too much, she can get a headache. (Brother of missing man, Bobonaro.)

It also appears that some of the emotional and psychological issues arising from what a Western approach would consider trauma and loss are ascribed to the action of spirits. Here a family member talks of life 'having no movement', something that could describe the stasis often implied by ambiguous loss (Boss, 2006): this is blamed on the spirits, and specifically on the lack of a proper burial for the missing person:

Our life was not running on from that time until now because since his loss we were suffering. We raised chickens, pigs and all animals but they always died because of his spirit. The spirit of the victim made our life have no movement. Maybe he [the spirit] sits alone and thinks, 'you get a good place to live but I am suffering'. As a result I do not have anything, including money, in my life. (Son of missing man, Lautem.)

The families met demonstrated a range of symptoms associated both with the impact of trauma and of ambiguous loss, including sadness, depression, sleep disturbance and dreams of the missing, anxiety and hypervigilance; during interviews there was evidence of avoidance in some families. Thirty-eight per cent mentioned one of the symptoms or phenomena discussed here, but given the reluctance with which families talked of such issues, it likely that this represents significant under-reporting. The most commonly mentioned emotional impact of having a missing relative was sadness, reported in 11% of interviews. In most cases this did not appear to impact significantly on function, but permeated much of life. In 5% of interviews families spoke explicitly of depression, most often when a family member had been treated for mental illness:

She looked for my missing father but never found him. My mother was so depressed, she died from mental depression, she was not too old when she died. (Daughter of missing man, Manatuto.)

A common impact of disappearance was dreaming of the missing person. This was almost universally considered to be a manifestation or visit of the spirit of the missing person (see below). Somatism was reported in 6.5% of interviews: family members in many cases understood that the stress of losing a loved one were responsible for

sickness, explicitly making a connection between physical symptoms and the mental anguish they were suffering.

In some families, women, particularly wives of the Missing, were seen to have problems with their communities, echoing issues observed in Nepal (Section 6.2.3). Both family and community resent the fact that they do not dress as expected as widows. Issues over their identity in a society where women's roles are narrowly defined can be problematic:

[When asked if she is a widow] I will say that I don't know about the life of my husband but I know that he is going to school. This is the information from the Indonesian government and some of the leaders. I do not know about the death of my husband or any other information beside his going to school. [...] I do not know the opinion of the community but I, his wife, do not know [his fate]. (Wife of missing man, Lautem; this group was taken away by helicopter in 1976, with Indonesian authorities reporting they were leaving for military training.)

### ***Rituals and spiritual implications***

Timorese cultural conceptions include a spirit world that is as real and present as the physical world. After someone's death it will be unsurprising to the family if they have contact with the spirit. This will often be through dreams, but can also occur more explicitly, for example through the spirit possessing a family member or other physical manifestations. During one interview of this study the younger brother of a missing youth became possessed by his spirit, beginning to shake and sweat heavily and able to pass on messages from the dead brother. A lack of contact from a spirit may be taken as evidence that the missing person is still alive, and so unable to communicate spiritually. Of the families met, more than half had had contact with the spirit of the Missing; in 60% of cases this was through dreams, while 23% had a waking experience of the spirit, either through possession of a living person or some other manifestation. For 10% of families who had previously had contact with the spirit this ceased once rituals had been done, with the assumption that the spirit was then at peace. The implication of this understanding of the spirits is that mechanisms to address the missing issue do not only serve the living, but are perceived as serving the dead, through allowing the spirits to rest in peace. The most important cultural element of the expressed needs was the performance of rituals that permit the spirits of the missing to rest: the consequences of

not making rituals for the dead were believed to be the potential sickness and death of family members, and instances of both were reported during interviews:

Because they [the spirits] take over the place we cannot keep any animals because many died and only a few of us were left alive. For this reason we always get sick, we cannot domesticate our animals properly and we cannot live in peace, because the spirits are too strong. [...] [They are the spirits of] those who died without knowing where they are buried. [...] You know us Timorese, how we deal with the spirits. We know they died, but just think we did not get to bury them, and they died disgracefully, because we were not able to do any rituals; that is why they always come to disturb our family. (Brother of missing man, Bobonaro.)

For Timorese families a malign spirit is the most negative potential impact of a missing relative; where the missing person is believed to be dead rituals can be made even in the absence of body, but for those who remain ambiguous about the fate of a loved one such rituals cannot be done.

Our custom is like this: if we forget him, his spirit will always come but after we think of him and make his ceremony to bury him we believe that his spirit will never come again because he has found his place. (Brother of missing boy, Lautem.)

In Timor-Leste, addressing the issue of those who died or are missing in the conflict means not only addressing the needs of the families but also the demands of the spirits. For some families met the peace of the nation is dependent upon this, with recent violence in the country perceived as arising from the many spirits of the conflict dead still not at rest.

If the authorities do not do anything to address [the issue of the missing], many people will suffer again, because I believe that something else might happen: like a tragedy for the Nation. Let us face it, in 2006 what happened? In 2008, on the 11th of February the President was shot... and for those of us who believe in the spirits, the understanding was that this land is holy or sacred. So all I am asking for the authorities to follow up quickly in order to stop any other tragedy happening to this country. [...] Still they take no action. I have told them, for whoever rules this nation, if we have done

nothing for them [the spirits], they will always shake up this country. (Father of missing man, Dili.)

Information about the fate of the Missing and the location of human remains can be found using indigenous approaches, both through local spiritualists and from the spirits themselves. One woman met received information from the spirit of her husband about the bodies her family had recently exhumed, while others talked of traditional techniques that can be used to confirm the identity of exhumed remains. One implication of spirits visiting family members is that they can themselves pass information, and in some cases spirits can tell what has happened to them, and this can serve to reduce ambiguity about the loss and allow the family to understand what happened to loved ones. One family were convinced not only of their son's death but also of the location of his remains, since the spirit of their son had described in detail how he died. Another spirit reported that he had been dropped from a helicopter.

Almost 90% of those met reported that they sought to receive the remains of missing loved ones. The need for a body is motivated not only by a desire to end ambiguity and perform ritual but by the need to acknowledge and recognise the contribution the dead are perceived to have made to the struggle for independence. This was also demonstrated by the need for a grave, a place where families could come to remember the dead and missing.

### 7.3.1 Justice

While justice, in a retributive sense, has been at the heart of much discussion about Timor-Leste's transition, few efforts have been made to understand what victims seek. In this study 10% of families mentioned retributive justice as a priority, and when asked explicitly about the need for prosecutions, only a minority sought them. For most families justice is perceived as receiving an answer regarding the fate, the return of remains, or recognition and compensation (Table 18), a reframing of the issue into the terms they prioritise.

<b>Meaning of justice</b>	<b>Fraction</b>
Answer regarding fate / Return of human remains	0.45
Acknowledgment / recognition	0.32
Prosecution	0.27
Compensation	0.18

**Table 18 What families regard as the meaning of justice.**

Whilst many families of those missing from 1999 maintain a fierce commitment to seeing justice done, these constituted only 15% of the sample, and in rural areas those families who have not had contact with mobilised victims or human rights agencies do not articulate judicial needs. A broader understanding of justice than the purely retributive was seen in statements families made using terms such as 'social justice', echoing the rhetoric of the leadership, to describe their goals. When asked explicitly about the need for prosecutions a majority said either that this was not useful, not possible or a decision should be left to political leaders. One of the dominant attitudes towards justice was an understanding that ordinary people (*ema ki'ik*, 'small people') have little to say on the matter, seeing it as business for their leaders. A majority saw the deaths and disappearance as a 'consequence of war':

Like I said before, let it [justice] go because that was a consequence we faced of wanting independence, so many of us had to give their lives for it; it's all in the past now. They had reason to defend their nation, their integrity, as well as us here; we did the same, so just leave it to the past, it's all over now and let's face the future. The main thing we ask is to tell the truth: what have they done to them, to give clear information that we took them away. Here we ask to stop, we don't want any punishment, it's enough. The process is very long, let's see that whoever was responsible, he might have family and children, in case justice goes ahead, what will happen to his family? The best way is to finish with it, no punishment. (Mother of missing man, Dili.)

A significant minority (40%) however, notably families of victims from 1999, felt judicial process to be important:

Now, we have independence we want to investigate and ask why you killed Timorese people that looked for food to eat. You can tell us why you shot unarmed people. If they died because they were both shooting, that is no problem, but they had no gun. They were civilians that wanted to find food to eat. Both my father and my sister were killed, including him [the Missing], but we did not find him. (Brother of missing man, Lautem.)

Another group that saw the need for prosecutions were the victims of Fretilin, who feel they and the crimes committed against their family members, have been forgotten in a process dominated by narratives of Indonesian violations (see Section 7.5):

I would like to talk about justice; we can see that we look more into pro-autonomy<sup>37</sup> people, while pro-independence people also made crimes so I can see there is no justice. Every time we blamed pro-autonomy people but pro-independence people were also wrong. Is there justice for them or not? We're looking more into pro-integrationist cases instead of ours. (Focus group participant, Bobonaro.)

Families' attitudes to the limited judicial process that has occurred are discussed in Section 7.5.

### **7.3.2 Reconciliation**

The conflict in Timor was not simply between a foreign army and native resistance but included intimate enmities between Timorese political parties, factional fighting within Fretilin and significant numbers of Timorese fighting on behalf of the Indonesians against their own compatriots. Despite this however, a need for reconciliation, or needs linked to problems with or between communities were articulated by no-one met. When asked all reported that relations within the community were unproblematic. The dominant narrative of the conflict remains that of an enemy outside the country, either Indonesians or Timorese militia who have fled, and the truth-telling process has not changed this. This study confirmed the extent to which Timorese were engaged in supporting the occupation, and that for most this is not an issue today:

When the conflict began, I was a soldier. I was a member of the Portuguese military and turned into an Indonesian soldier; it was just a change of uniform. (Brother of man disappeared by Indonesian forces, Dili.)

There is no problem in this community; the civilian defence units [Hansip, an Indonesian militia raised locally in Timor-Leste] included my own uncle because he is my mother's brother. We are from one family. (Son of Falintil fighter missing in action, Lautem.)

The limited support for judicial process among the victims is also evidence that a mood of reconciliation, if not forgiveness, characterises responses. Perhaps the principal

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<sup>37</sup> Autonomy within Indonesia was the alternative to independence offered in the popular consultation of 1999 and whose advocates were responsible for the death and destruction that followed it.

exception to this arose in families of those who became victims in 1999, in which violence was often perpetrated by neighbours who were militia members. In many cases those responsible for killings and disappearances fled to Indonesia, and thus are not present to incite conflict in the community: families still seek justice and prosecutions of these individuals. Whilst the Community Reconciliation Programme (CRP) of CAVR was praised by some as a tool of reconciliation, the fact that rather few families met had any contact with it and that it did not engage with either serious crimes or cases prior to 1999, suggests that it is not responsible for current attitudes (see Section 7.5).

## **7.4 The time dependence of needs**

The dataset collected in this study permits an investigation of the dependence of family needs on time passed since disappearance, as a result of the fact that persons went missing over a period of 24 years. Here, variables have been plotted as a function of when the person went missing. The data have been divided into periods that contain a sufficient number of families that a statistically meaningful statement can be made: this leads to an uneven binning in time, owing to the uneven distribution of missing cases. For these plots the vertical error bars represent the statistical uncertainty on the measurement, arising from the limited number of families in each data bin. Figure 12 shows the fraction of families believing that their missing loved one is dead, as a function of when he went missing. It appears to show for most of the data a significant trend that the longer someone is missing the more likely the family will believe him to be dead. Conversely, the number of families who feel ambiguity about the fate of the Missing decreases with time. The data point corresponding to those missing from 1999 is anomalous however. Similarly, in Figure 13 the fraction of families that have made some sort of ritual for their loved one is shown as a function of when he went missing.

For those missing in 1999, 86% of families have made rituals for the Missing, contradicting the trend. That the families of those missing from 1999 are more likely to believe that the Missing are dead can be understood as a result of the collective nature of the experience of the violence of 1999. The violence impacted the entire country and it is widely understood that many died, constituting a shared experience where communities reinforce the belief of families that loved ones are dead. Additionally, the events of 1999 have been given far more attention in post-conflict Timor-Leste than the earlier deaths and disappearances were, and families are well aware that when taken by the militia people were killed, even if bodies have not been found. This is in contrast to

the experience of those whose loved ones are missing from earlier phases of conflict where little information was available and it was quite conceivable that relatives were alive elsewhere, or held by the Indonesians.

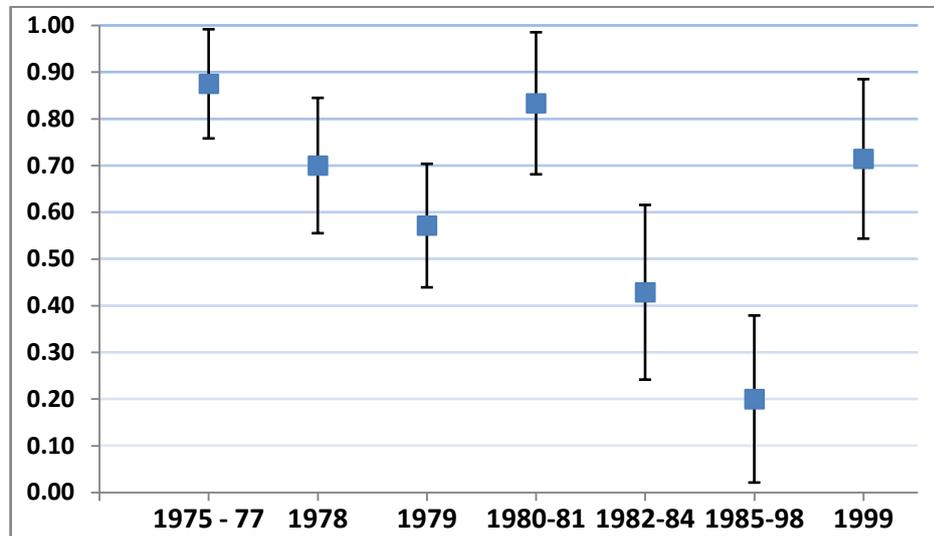


Figure 12 Fraction of families believing their loved one to be dead as a function of date of disappearance.

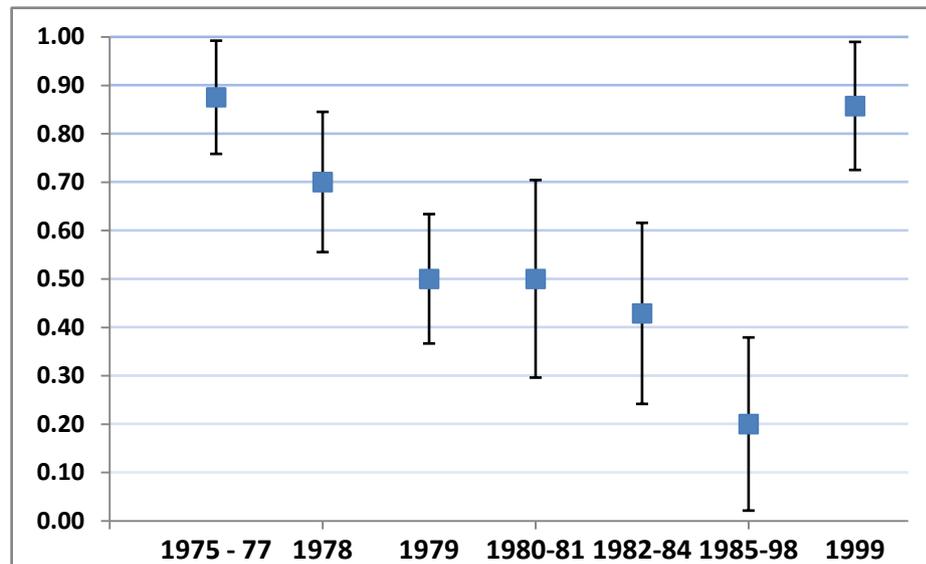


Figure 13 Fraction of families having done some ritual for their missing loved one, as a function of date of disappearance.

## 7.5 Attitudes to transitional justice mechanisms

All those met were explicitly asked about the mechanisms of transitional justice that had taken place in the country, namely judicial process, CAVR and the valorisation process. In many cases however, mechanisms were not known by families of victims. Indeed the first conclusion to be drawn is that whatever the aim of those processes they did not impact significantly on victims of the conflict.

### *Victims' attitudes to judicial processes*

Whilst hardly any families knew of the limited judicial processes that had taken place, some were aware of the Indonesian efforts to try those guilty of crimes in 1999, and families of the victims of the violence of 1999 were highly critical. Families knew a little more of the trials resulting from the serious crimes process in Timor-Leste; however these latter concerned only a minority of families (those who lost loved ones in 1999). There is a perception that the issue of justice for victims emphasises the events of 1999, over the more widespread violations of the preceding years:

[...] there is no justice for the people that died in 1975. Justice is only for the people that died in 1999. (Father of missing man, Lautem.)

This interest in trials was further diminished by the fact that no family was met whose case had been heard by the courts in Timor, reflecting that more than 600 deaths in the violence of 1999 have not been investigated (Reiger and Wierda, 2006). Despite the many words that have been written about justice and the limited process of trials, the dominant attitude of most families of victims is one of ignorance: they are largely unaware of what judicial process has taken place, despite a vociferous minority for whom justice is extremely important.

A woman whose husband had been killed in 1999 reported that forensic experts from Serious Crimes took away artefacts from a well where her husband's body is presumed to lie, including her husband's wedding ring, some years before, but that she had heard nothing since. In general those few families who discussed the Serious Crimes process saw it as remote, understood little about it and received little information about the process.

### ***Victims' attitudes to CAVR***

The most powerful initial finding of this study is how little people know of CAVR, despite its extensive outreach and significant presence throughout the country. A majority (65%) claimed to know something about the Commission and a minority (11%) had given statements; two families met had seen CRP (Community Reconciliation Process) sessions. However when probing the views of families on the work of CAVR, it is clear that knowledge of it, even among those who claimed to be aware of its work, was actually rather scant: half of those who said they knew of CAVR had no opinion of its work. The two families who had attended CRP sessions did not know that these were part of CAVR. Because of the direct potential benefit to families, many had sought contact with the Veterans' Commissions, and a significant fraction of those met either confused these with CAVR, or had little idea that they were distinct. Beyond the limited number involved in victims' groups, none had seen the report of CAVR, but some had heard something about it on the radio.

<b>Did family know CAVR?<sup>38</sup></b>	<b>Fraction</b>				
	<b>Dili</b>	<b>Lautem</b>	<b>Bobonaro</b>	<b>Manatuto</b>	<b>Total</b>
Not known	-	0.28	0.11	0.53	0.27
Know vaguely	0.38	0.50	0.44	0.20	0.42
Know well	0.62	0.22	0.44	0.27	0.33

**Table 19 Did family know CAVR? (As function of district.)**

A deeply ethnographic study with families in two *aldeias* reported that 3.5% (Nanu, Kovalima) and 43.7% (Sarelari, Lautem) had heard of CAVR (Grenfell et al, 2008), respectively. The difference in these two figures suggests that there is some geographical dependence upon knowledge of CAVR, and this is supported by the data of this study (Table 19).

Whilst half of those met were insufficiently informed to have an opinion of CAVR, a quarter believed that CAVR had produced no results. 7% believed that CAVR had led to their receiving a medal or pension. Others considered CAVR biased against victims of Fretilin, or that it brought back the pain of their loss; 9% believed that its work was good,

<sup>38</sup> 'Know vaguely' indicates that families had heard mention of CAVR on the radio, while 'not known' meant they had no idea what it was; 'know well' indicates that families knew something of the CAVR mandate.

or that it did what it was able to. Opinions of CAVR were dominated by two attitudes: first, that the Commission had not been interested in meeting victim families, and second, that the Commission had produced no results for families. That only 13% had met with CAVR reinforces a widely shared perception among families that no-one in authority cares about what happened to victims or the condition they now find themselves in. The greatest complaint about CAVR was that it had done nothing for victims. Many families believe that CAVR had failed them because they have received nothing (no reparations or recognition), as a result of the CAVR process. This is of course due to either a misunderstanding of the CAVR mandate or of the process that has delayed the implementation of the recommendations of the CAVR final report (such as the reparations process): most families are simply unaware of such issues.

CAVR did a good job in taking data but the result of publication seems like just to bring back the wound and the pain as some people have been able to forget but this information is like bringing the pain back again. No reparation has been received until now, there is no legal basis for reparation either; it should be on their recommendation with regard to reparation based on the needs of the family. (Brother of missing man, Dili.)

There was a perception among victims of Fretilin that CAVR focussed on Indonesian violations and deliberately avoided those families who were victims of the resistance:

We have waited for CAVR for a long time but they have not come here yet, they just passed by. They have not visited us to talk more seriously with us, to find the root of problems to put these people in prison. [...] No, they haven't visited us, you are the first visitor who asked us about the missing. CAVR visited others; we are the only ones that they did not come to visit. (Son of man killed by Fretilin with two other family members, Manatuto.)

In one community in coastal Manatuto that was highly impacted by Fretilin raids, with many killed, families claimed that CAVR had talked only with those who had been with Falintil in the hills, in fact those responsible for violations, and as such had learnt little of

the truth of that period.<sup>39</sup> Others see this as an intrinsic bias in the process that reduces its value by seeking to blame Indonesia rather than Timorese:

I see that CAVR is not good because those who spoke and those who interviewed, these people only spoke out about some things and didn't release other information. They only spoke out about the things that made them look good and sometimes they added stories that made us mad, not to make us feel comfortable because they made up many stories. They told false stories, I do not believe that a person would say that I have killed someone and then it's impossible to say what he has done. Who has the courage to tell the truth, that he killed people? I don't believe it. Fretilin supporters who surrendered and died, one question: who killed them? Will he tell the truth? All of the mistakes were blamed on Indonesia. (Father of missing youth, Dili.)

One man who had been jailed by Fretilin in 1975 (and seen many others not survive detention) asked why those responsible are not brought to justice, since they remain in Timor today.

Rather few families met were familiar with the mechanisms of CAVR's reconciliation work, but those who were aware were highly complementary about the Community Reconciliation Programme:

CAVR did a good job because they have resolved a case down there; a person who was a victim. I went there to participate, a priest from Manatuto also came and we were on the *biti bo'ot* [big mat] where all the traditional elders speak, it went well. [...] My aunt who lives down there, she was a victim; a priest from Manatuto came here with the elderly to sit on the *biti bo'ot* and distribute money. Until today, the victim receives money. But she was a victim of Timorese where a man who lives up there threatened her, no violation, a verbal violation only. They have resolved it, there is peace between them, and a celebration was conducted for the process. (Sister of missing man, Manatuto.)

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<sup>39</sup> Examining the CAVR report, the scale of the violence by Fretilin and the massive casualties in this area reported by the community and its leaders are nowhere mentioned.

Such tributes represent a real success in the concerned communities. However, the framing of the CRP process to deal only with non serious crimes prevents it from aiding with cases of the dead and missing, and on the evidence of this study, the CRP was accessed by rather few victims.<sup>40</sup> In general it was seen that families did not have problems with those in their community linked to violations and the data of this study suggest that reconciliation within communities is largely accomplished. (It is also clear that in many communities issues that predate the conflict, as well as some that arose during Indonesian times, continue to bitterly divide some communities and serve as potential triggers to future violence.) Given the fact that the CRP did not address the issue of the missing or the dead, and that its coverage was far from complete, it seems likely that such reconciliation has been either spontaneous or made through community level initiatives. An exception concerns families of victims from 1999 who are aware that perpetrators known to them remain in Indonesia, apparently immune from any judicial process. More general attitudes to Indonesia, again with the exception of 1999 victims, also appear to be dominated by acceptance and a commitment to coexistence.

One family linked the work of CAVR to their issues with the spirits of the dead and considered that the work of CAVR was dangerous precisely because discussing the dead where spirits have not been placated can be dangerous:

We are mentioning their name here, sometimes we could all get sick in the future because their spirits have been silent but the government always comes and disturbs us to mention their name. It means that we can get sick. [...] When CAVR had not yet come here in the past we had no problem, but when CAVR asked us to register all of their names, we faced many problems. It can happen, because they are dead. (Son of missing man, Lautem.)

Issues around the relevance of a truth process centred on the capital in a traditional rural society are discussed in Section 8.2.

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<sup>40</sup> It has been reported that CAVR engaged 3-4% of the population in CRP hearings (Burgess, 2006), and the fraction of families met in this study who had attended hearings is consistent with this.

### ***Victims' attitudes toward the valorisation process***

45% of those families met had received a medal, and 13% were receiving a pension as a result of the Veterans' Commissions. The large scale awarding of medals through the Veterans' Commissions has been a huge success. The medals are considered valuable and important by most families:

Yes we are happy [with the medals and pension], it means a history of my father's sacrifice to help free the country; although he is not here with us but this is something that honours him. (Children of missing man, Dili.)

If we receive it [a medal], we will consider we have received the body of my father. (Daughter of missing man, Lautem.)

In addition to the medal itself many families talked with some pride of the award ceremonies where senior members of the leadership had given them the medals. The awarding of medals appears to be something hugely popular with recipients whilst being quite affordable for the authorities (at least in comparison with the pension scheme or a comprehensive reparations process). It can thus very reasonably be considered the most successful mechanism in attempting to address a need of the families of the dead and missing. As with any process this important to families, there was much complaint and query about it: indeed this only serves to emphasise the importance families ascribe to it. No families were met who did not know how or where to register their loved ones, demonstrating that where a mechanism is perceived as meeting a need, rural victims will find ways to access it, in contrast to CAVR. Complaints about valorisation centred on obstacles to registration and the failure following registration of recognition to come. For families met the greatest complaint remains that valorisation is only for veterans and that many of the dead and missing are not in that category but still deserve to be remembered for their sacrifice:

...all the veterans and those who are missing are just the same. Both gave themselves for this country. Why do the veterans get the subsidy but those who are missing cannot get it? (Focus group participant, Bobonaro.)

### ***Support from family and community***

In contrast to a remote transitional justice process that gave victims little, families talked of how they had found support locally, in their family and community. For some their

Catholic faith was a mechanism that helped them to cope, both privately and through the intervention of priests, who provided both emotional and often very practical support:

The one who helped in consoling my mother was the priest. This priest finally supported my eldest brother to go to school in Fatumaca. Later, a priest came and supported one of my siblings to go to school in Maubisse. (Son of missing man, Dili.)

Within communities victims found solidarity and support from their peers, most often those who shared their experiences:

We the combatants, we the ones who still remain alive in the village since 1975 until now, for us things are the same. We are a small number of people and families, we never leave each other, we never fight with each other but we actually support each other and we love each other. (Man missing many relatives, Bobonaro.)

Not only did families talk of this support, but in many cases it was visible when they were met to discuss the impact of disappearance. The research duplicated what families themselves had been doing since the violence of the conflict: talking with each-other to give meaning to the extreme events they had experienced. When groups of victims were met this became apparent: mothers would share their sorrow and their ambiguity and this, building on long traditions of talking and sharing, represented the most local and effective support mechanisms to which families had access. The family associations represented the formalisation of such processes, the principal reason they were so effective.

## **7.6 Summary and conclusions: Questioning the relevance to victims of the transitional justice process**

This study reveals a gap between the stated goals of the transitional process that has occurred over the last decade in Timor-Leste and the needs of victims. Transitional mechanisms emphasised a process of truth and reconciliation, while judicial process was largely neglected. However, despite the leadership's emphasis in rhetoric of issues of 'social justice', that are echoed by many of the victims met, such approaches have been absent from efforts to address Timor's legacy of violence. There has notably been no reparations process that could offer both economic support and recognition, while the

success of the valorisation process reveals the importance to victims of such an approach. As the centrepiece of the transitional justice process CAVR promised truth and reconciliation. The evidence of this study is that it was largely irrelevant to victims of serious crimes. Only a small minority of families met had any contact with CAVR during its work, as might be expected given the challenge of addressing more than 100,000 deaths, even where some 8,000 submissions were received from among the country's population of almost one million. The product of the Commission is a report that remains largely inaccessible to the ordinary people of Timor-Leste both physically since copies have not reached villages and due to widespread illiteracy.<sup>41</sup> Narratives of 'healing' as emerging from the public presentation of truth fail to resonate with most victims for the simple reason that very few of them engaged with any stage of the CAVR process.

Memories of the conflict have for most of those affected not been recounted as part of the transitional justice process and what comfort victims have found has come from support in family and community. The cathartic metaphor of a truth commission does not resonate with a family that is confronted daily with the unmet basic needs that arise as a result of the loss of a husband or a son. More than this, the truth that CAVR delivers is a public truth, an act of historiography that does not coincide with the truth that victims seek. The victims of conflict know how they and their families suffered: they expressed no need for this experience to be validated through integration in an official report. Firstly, victims sought a very private truth, they wanted to know what had happened to dead and missing loved ones, and sought to satisfy cultural demands for bodies and rituals. Secondly, they wanted recognition of their suffering, through receipt of official sanction of their loved one's sacrifice, either through medals, compensation, or memorials. For example, it remains a mystery to the families of those missing as a result of the Santa Cruz massacre of 1991, why no memorial to the event yet exists. Their family members' lives have become a part of the liberation narrative that sustains Timor-Leste's sometimes fragile sense of nationhood and yet families still have no place they can mourn their loved ones, or confirm the value of their loved one's sacrifice.

Reconciliation was to be delivered through the CRP, but was constrained to dealing with less serious crimes and almost exclusively with the events of 1999. Whilst it engaged rather few of the victims of the conflict, those met who had engaged with the

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<sup>41</sup> Even the title of the final report "*Chega!*" is in a language, Portuguese, spoken by only around 2% of the population (Hattori et al., 2005).

CRP found it valuable for their communities. This study suggests that the people of Timor-Leste are largely reconciled, with little mention of problems within or between communities, with even attitudes towards Indonesia reflecting an acceptance that coexistence is necessary and that the long years of conflict should not determine future relations. It remains unclear however to what extent this can be credited to the CRP, given victims' unfamiliarity with it. Only family members of those killed in the violence of 1999, either by Indonesians or Timorese who remain in Indonesia, prioritise judicial process. In this sense the position of the leadership in not prioritising prosecutions coincides far better with victims' views than human rights advocates who see accountability as a principal goal of the transitional justice process. Despite the CAVR process being well accessed by elites, where reconciliation has clearly failed is among the leadership itself, where splits that date back to the era of the Indonesian invasion have been blamed for sustaining the policy decisions that drove the 2006 violence both within and between the various security forces (Aarons, 2006; UN, 2006).

The finding of this study that judicial process is not a priority for most victims directly contradicts other studies (Pigou, 2004; Kingston, 2006). This likely arises from the difference in the victims accessed and emphasises the importance when generalising from such studies of ensuring that samples are representative. This study shows that urban victims have very different agendas from those in rural areas. Similarly, victims who have had contact with CAVR or with rights agencies, or have been mobilised through victims' groups, will demand very different things from more isolated victims. As a result any study that uses existing networks of victims is likely to reflect a much more empowered community of victims, familiar with the rights discourse. For the vast majority of those met here, there is little perception that they have rights, or can make demands: they maintain a deferential attitude to Government.

The single most important issue to families is the economic one, and the failure of any element of the transitional justice process to address this represents its greatest failure in the eyes of victims. CAVR was unusual among Truth Commissions in that it devoted attention to the social and economic consequences of the Indonesian invasion, notably through what it describes as policies of "displacement and famine" (CAVR, 2005: 7.3). Indeed, the CAVR report notes that far more deaths arose from hunger and disease

than from the direct action of the security forces.<sup>42</sup> Despite this however, CAVR's recommendation of a broad reparation process was rejected by the Government, and there has been no acknowledgment of the economic consequences of victimhood on families. The priority that families give to economic support and official recognition is seen in their response to the process of valorisation that has given both acknowledgement and livelihood support. What remains to be done is to ensure a similar process for those civilians who became victims of the conflict.

A success of the CAVR process was that it exposed the truth of the conflict in its complexities and cruelties, focussing on the violence of the entire 24 year period and ensuring that crimes of the Timorese 'resistance' were also emphasised. Questions remain however about the extent to which the most difficult truths have really been integrated into the national narrative, and how much contact with such truth-telling rural people have. The victims of the liberation movement remain distraught at the lack of recognition of their suffering. Whilst the very visible valorisation process has been welcomed, it of course excludes those who became victims of Fretilin or Falintil. In this sense the construction of a narrative of the conflict as one characterised exclusively by an Indonesian brutalisation of Timor-Leste has not been challenged by the transitional process, and is perhaps the account that most suits the leadership.

The greatest implication for the future of the state of a remote transitional justice process is the alienation of victims from those who govern them. An apparent refusal by successive Governments to view the legacy of the conflict through the eyes of its victims, who still largely live in poverty in rural areas, poses a potential threat to continued stability. Many veterans were met during this study, few in number and ageing but deeply disaffected with the performance of the heroes of the resistance who now hold office. Such sentiment, combined with the continuing inability of the regime to ensure the livelihood of a youthful population can create an explosive mixture with the ability to ensure violence in the future. Division has also been seen among victims, with some resenting the greater attention, both judicially and otherwise, given to victims of the 1999 violence and envious of the generous payments made to those displaced in 2006. This

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<sup>42</sup> CAVR concluded that a minimum of 84,200 people died from displacement-related hunger and illness during the whole period, and some of these were among the missing relatives of families met in this study.

highlights one danger of seeking a reparative process that does not appear inclusive to victims.

## **Chapter 8 Addressing the needs of families of the Missing: A critique of current practice in transition**

This chapter uses the data from Nepal and Timor-Leste to examine how effectively contemporary approaches to transitional justice address the needs of families of the Missing. It begins by considering the research questions and supporting theoretical propositions and discussing how the data address these. The chapter then considers the goals and mechanisms of typical transitional justice processes, how these map onto the needs articulated by families in both primary contexts and what constrains them in more effectively meeting needs.

An effort is made here to engage with the mechanisms that typify transitional justice and with the needs articulated by the families of the Missing in this study, with the intention of identifying conceptual and practical gaps, as shown in the previous chapters. In the low income states studied, the priorities of victims are economic and concerned with the fate of the Missing and retrieval of remains (Chapter 6 and Chapter 7). The relevance of Timor-Leste's Truth Commission to such needs is examined in the light of victims' perceptions and this extended to a questioning of the ethos that underlies such processes. The low priority with which victims view prosecutorial process is contrasted with the emphasis on retribution in transitional justice discourse, and the legalism of the rights approach critiqued. The theory and practice of reparations is discussed in light of the data of the study, with an emphasis on the priority of victims for reparative measures that are principally economic and on the gendered aspects of reparations. Victims' need for reparation in those areas that are largely neglected by contemporary transitional justice process, including the psychosocial and in terms of answers concerning the Missing and human remains, are discussed in Section 9.2.

### **8.1 Addressing the needs of families of the Missing**

This section addresses the two components of the research question, namely, outlining the needs of the families of the Missing and the effectiveness with which they are addressed by transitional justice process.

Theoretical proposition one summarises needs as consisting of: answers, human remains, resources, truth and justice, and support; in both contexts this is seen as an accurate summary of needs:

- Answers refer to the need for a definitive addressing of the question of the fate of the Missing, primarily whether he is dead or alive, but also the need for details of how he died and where his remains are.
- Human remains refer to the need for the body of the Missing, seen by many as the only definitive answer and the only way to permit rituals to be performed. The way in which this is articulated by families implies that a process of exhumation and identification is required.
- Truth and justice overlap strongly with the need for an answer and a body. Truth for families means primarily an answer about the fate and the body is the most favoured way of confirming that truth. Truth as a history of conflict of the sort produced by a Truth Commission was largely not mentioned by families. Justice was seen not primarily as the prosecution of perpetrators, but in broader terms, including both answers about the Missing and a 'social justice' in which the families of the Missing are provided with livelihood and the loss or sacrifice of the Missing is recognised.
- Resources refer to the need for economic or livelihood support, to both replace the economic contribution of the Missing, and in the light of widespread poverty in both contexts, raising the issue of transitional justice as addressing issues of livelihood and development..
- Support refers to issues of rehabilitation, relief and compensation, i.e. economic and livelihood support, but also to broader aid with coping with the impact of disappearance and the overall impacts of conflict. This includes support for very local processes, such as creating communities of victims that can help each-other, as well as addressing stigmatisation in family and community.

The needs outlined above were, in Timor-Leste, largely not addressed by the mechanisms of transitional justice that are for the most part complete and, in Nepal, did not appear likely to be addressed by the mechanisms under consideration. This can be

understood by considering the other theoretical propositions. Proposition two claims that transitional justice mechanisms are created subject to the balance of political forces, and that victims play little role in this. Whilst victims are indeed seen to have played almost no role in the development of transitional mechanisms in either context (Chapter 7 and Chapter 8), the 'politics' in both scenarios is more complex than might be imagined. In Timor-Leste the leadership determined the overall direction of the process and this emphasised 'truth and reconciliation' rather than prosecutorial justice or reparative process. This decision was driven by a political desire to ensure good relations with Indonesia and a perception that pursuing those perpetrators that were accessible to the Timorese authorities was not in the broader national interest. Similarly the lack of any significant reparations process for victims appears to be sustained by a wish to promote a narrative of the conflict in which all Timorese are heroes, rather than victims, and in which evidence of Timorese culpability is ignored. In Nepal, the political successors of the parties to the conflict are driving the transition and seek to minimise retributive process. They are however under strong international pressure to embrace a narrative of 'truth and reconciliation' and are ultimately likely to do so in some sense. This agenda is driven by foreigners and national elites and is attempting to impose a narrative on the transition consistent with current global orthodoxy, despite its lack of resonance with victim agendas. In this sense, transitional justice in both Nepal and Timor-Leste is subject not just to a national political agenda but restricted by a broader global discourse (Section 8.2).

In Nepal this led to the commitment to a Truth and Reconciliation Commission being written into the Comprehensive Peace Agreement (Govt. of Nepal, 2006c), despite there being no apparent commitment to it from the parties signing the CPA. Interviews with those involved in the development of the CPA suggest that the proposal for a TRC came directly from foreigners engaged with the process, with some actors tracing its inclusion directly to a highly placed advisor to the process being of South African origin.<sup>43</sup> It appears that not only were the Nepali political actors (from the mainstream parties and CPN-M) not emphasising such a mechanism but they may well have not understood what it was at the time they committed to such a process. The net result since has been no interest from any of the parties in transitional justice mechanisms beyond those, such as relief payments, that can be used as instruments of political patronage. Despite a continuing commitment of foreign donors and agencies to transitional justice, or at least

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<sup>43</sup> Interview with UN staff involved in the peace process.

their vision of it, political deadlock has ensured that it has been a priority for almost no domestic constituency beyond victims themselves. This reveals the dangers of attempting to drive such a process externally and the importance of both engaging victims in the process and of letting indigenous agendas dominate, even at the risk of bucking dominant global discourses.

In Timor-Leste the CAVR was largely an instrument of international rather than Timorese will and even today the leadership maintains scepticism towards judicial process in particular and efforts to address the past in general. This has been demonstrated through the bringing into government of those closely linked to the Indonesian authorities prior to 1999, and through Presidential pardons and commutations of sentences of the few convicted by the Special Panels. The process of drafting a law to address issues of reparation and the Missing, observed by the researcher during his advocacy with the Timorese authorities in 2009 - 10, has revealed the extent to which this remains a process that not only excludes victims but actually ensures that decisions are made by very few. The legislation currently before a Parliamentary Committee has been written, translated and adapted into a relevant legal framework (i.e. a Portuguese one) by a series of foreign consultants. The draft has, at the time of writing, received rather little examination from Timorese. Whilst a Parliamentary Committee is discussing the legislation, it is clear that the two most important political figures, the President and Prime Minister, will have a veto on any new law. This is in effect a dictatorship by charisma, in which all authority is vested in the credibility of the two 'paramount' leaders, marginalising not just victims but also the Parliamentary process. This has implications for the legitimacy of both the process and the authorities themselves.

The lack of a significant reparations process, or the prospect of one, in either context is linked to the findings concerning proposition three, that rights based approaches emphasise civil and political issues at the expense of the social and economic. This is confirmed by the study, with the priority given by families to economic issues failing to be reflected in mechanisms created or issues discussed in either context. The fourth proposition, that mechanisms are more likely to address victim needs when victims participate in their creation appears to be strongly favoured by the data of this study, but cannot claim to be demonstrated. This is discussed in detail in Section 10.2.

In the rest of this chapter the results of the study are analysed in the light of these propositions and of the research question more generally. The principal mechanisms of contemporary transitional justice (truth commissions, trials, reparations processes) are discussed and critiqued in the light of the data.

## **8.2 Truth Commissions: Challenging the therapeutic ethic**

This section emphasises the context, Timor-Leste, where a Truth Commission (CAVR) has reported. As the centrepiece of the transitional justice process in Timor-Leste, CAVR promised truth and reconciliation, very much in what has become the mainstream of transitional justice, with the trope of ‘truth as healing’ (Section 4.3.3) driving the process. Here the data from victims is used to make a victim-centred evaluation of the CAVR process.

The evidence of this study is that both the process and product of the Commission were largely irrelevant to victims. Victims’ distance from transitional process was driven by both the lack of physical access that ordinary, largely rural, Timorese had to the mechanisms, and by the lack of resonance between their needs and CAVR’s goals. Despite the decentralised Community Reconciliation Process (CRP) and the district level offices of CAVR, only a small minority of victims had any contact with CAVR during its work, revealing the challenge of addressing more than 100,000 deaths, even where some 8,000 submissions were received. The product of the Commission is a report that remains largely inaccessible to the ordinary people of Timor-Leste both physically and due to widespread illiteracy.<sup>44</sup> Narratives of personal ‘healing’ as emerging from the public presentation of truth fail to resonate with victims for the simple reason that few of them engaged with any stage of the CAVR process. Memories of the conflict have, for most of those affected, not been recounted as part of the transitional justice process; the cathartic metaphor of a truth commission lacks meaning for a family that is confronted daily with the unmet basic needs that arise as a result of the loss of a husband or a son. More than this, the truth that CAVR delivers is a public truth, an act of historiography that does not coincide with what victims seek. Victims of conflict know how they and their families suffered: they expressed no need for this experience to be

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<sup>44</sup> Even the title of the final report “*Chega!*” is in a language, Portuguese, spoken by only around 2% of the population (Hattori et al., 2005).

validated through integration in a remote official report.<sup>45</sup> First, victims sought a very private truth, they wanted to know what had happened to dead and missing loved ones, and sought to satisfy cultural demands for bodies and rituals. Second, they wanted recognition of their suffering, visible integration into political memory (Section 9.2), through receipt of official sanction of their loved one's sacrifice, either through medals, compensation, or memorials. As such, it is not only the degree of engagement of CAVR with victims that led to the failure to address victims' needs, but also the quality of that engagement.

Reconciliation was to be delivered through the CRP, but was constrained to dealing with less serious crimes and almost exclusively with the events of 1999. This study suggests that the people of Timor-Leste are largely reconciled, with little mention of problems within or between communities, and attitudes towards Indonesia reflecting an acceptance that coexistence is necessary and that the long years of conflict should not determine future relations. It seems unlikely however that this can be credited to the CRP, given victims' unfamiliarity with it. Despite the CAVR process being well accessed by elites, where reconciliation has clearly failed is among the leadership itself, where splits that date back to the era of the Indonesian invasion have been blamed for sustaining the policy decisions that drove the 2006 violence both within and between the security forces (Aarons, 2006; UN, 2006).

The challenges of communicating the work of the Commission in a dispersed and rural society like Timor-Leste's denied CAVR the performative element (Andrews, 2003) that is crucial to institutionalising the truth claims of victims through public truth-telling. Whilst the CRP worked well in the communities where it was used, there was no equivalent on a national stage. As a result the social goal of reconnecting victims and society has failed, with no "societal consensus" (Humphrey, 2003) emerging from it. The observation that most of the population have had no contact with either the work or final report of CAVR also questions the ability of Truth Commissions to meet their national and societal goals in rural low income states, where populations are isolated and inaccessible. It seems highly unlikely that the national goal of reconciliation can be achieved through the work of such a Commission in these circumstances. In Nepal

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<sup>45</sup> Whilst the CAVR Final Report did include the names of some of those dead and Missing the lack of families with access to this document has rendered it largely useless as a means of providing recognition.

similar challenges will face any such commission. A truth commission also has a political role that confers legitimacy on the state through public acceptance of the commission's work and final report (ibid). A danger for the future of Timor-Leste is that this goal for CAVR remains unmet. The issues arising from the nation's legacy of violence continue to alienate victims from their rulers.

The evidence of the data is that in a society where identity is largely constructed locally, such processes can only work locally, and that a truly participatory national memory project would always have been impossible in a society as disparate as that of Timor. The victims' groups interviewed in this study have been initiating the construction of local memorials and constructing their own histories through talking. This continues long traditions among rural communities of story-telling and appears to be a more valuable coping mechanism than public testimony (Section 7.5):

The psychologically healing process of testifying or telling one's story is not dependent upon the content of the story (as lawyers tend to assert) but rather on the environment and the process of the actual re-telling. (Hamber, 1996: 5)

Truth Commissions operate through the continuing objectification of the victim to support the broader aims of the state. It is not clear that the victim who is the central performer in the exercise benefits. Most victims in Timor-Leste remain as publicly silenced now as during the conflict, despite the fetishisation of the testimony that did emerge during the CAVR process. Victims need to overcome objectification and become subjects in their own right, which demands their mobilisation and empowerment (Section 10.2), a process that has only recently begun in Timor-Leste on a national scale.<sup>46</sup>

Meanings given to the violence to which people were subject are intimately linked to local perspectives and emerge as a unique product of the social and symbolic worlds they occupy. This is revealed most clearly in the importance assigned in Timor-Leste to spiritual issues, an area where a global discourse of rights and reconciliation can make no contribution. There is no evidence that a Western therapeutic approach has any relevance in providing healing for those who suffered from violence. Critiques of trauma as a culturally constructed pathology that cannot be generalised (Summerfield, 2004;

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<sup>46</sup> A first national victims' congress was held in Dili in September 2009, organised by national NGOs with the support of the ICTJ and the UN mission in Timor.

Mezey & Robbins, 2001; von Peter, 2008) are echoed in indigenous Timorese responses to mass violence through interactions with the supernatural and a demand for addressing of spiritual needs (Section 7.2.3). CAVR as an exercise in therapy failed victims due both to the inability of most victims to engage with it, and to its articulation of a Western therapeutic ethos that did not address local needs.

### ***Challenging truth as healing***

This section uses the evidence from both Timor and Nepal to make more general critiques of the concept of the Truth Commission from the perspective of victims of political violence. Whilst the “global paradigm of redemptive memory” (Shaw, 2008: 183) in transitional truth-telling processes has come “to appear ‘natural’ and ‘universal’” (ibid), the value of this approach has been subject to rather few empirical tests. The data of this study challenges the therapeutic power of testimony for both individuals and nations (Colvin, 2003). Whilst others have questioned the link between truth and individual and societal healing (Humphrey, 2003; Daly, 2008; Wilson, 2001) this is the first to note that victims have simply been unable to be a part of a truth process, as well as pointing to its apparent conceptual irrelevance to them. This raises questions about the *mechanism* by which victim testimony heals a nation that remain obscure (Avruch, 2010). It seems clear however that where a population is unaware of a process, that process cannot contribute significantly to societal healing. The families of the Missing met in Nepal and Timor talked very little of healing. Such needs were most concretely expressed when discussing health impacts, mental, physical and somatic; the healing victim families most require is access to healthcare, support within their family and community, and an end to ambiguity (Section 8.4): the term *recovery* seems more appropriate to characterise their demands. More than this, the structural violence of poverty and inequality, as articulated in both Nepal and Timor-Leste, is likely to remain an obstacle to recovery for many in poor and unequal societies.

In contrast to Timor-Leste, in many transitional contexts individual victims are exposed to a discourse of trauma, where it drives approaches to psychosocial work (e.g. Ager, 1997, de Jong et al., 2001; Pupavac, 2005). For individual victims it is unclear that this is entirely positive (Summerfield, 1999; Eisenbruch, 1991): imposing the frame of trauma on victims implies a diagnosis of PTSD and a consequent need for ‘therapy’, in contrast to potentially more relevant and local understandings of how they might respond to the impact of victimisation. Additionally, the therapeutic ethos implies that once truth has been told and its performative role is complete, the victim (like the nation) will be

cured (Colvin, 2003). In practice, such testimony can as often be damaging as therapeutic (Silove et al., 2006; de Ridder, 1997) and after victims have disappeared from the national stage that a Truth Commission provides their suffering continues. The data of this study strongly suggest that what the families of the Missing most need is to be able to reconstruct meaning and identity in a social way, in their own communities (Robins, 2010a), and that this is best done in peer groups at a very local level, rather than on a national and very public stage (Section 8.4). The importance of storytelling in building solidarity among victims that emerges in Timor and in attitudes to victims' groups of those met in Nepal (Section 6.2.3) is confirmed elsewhere (Colvin, 2003). A Truth Commission necessarily individualises victims in ways which divorce them both from their communities (membership of which was very often the reason they became victims) and from the political and other motivations of the violence to which they were subject (Mamdani, 2002).

Western approaches emphasise *narrative* as legitimating victimhood and the Truth Commission depends upon it, as all testimony based approaches must. In the highly unequal societies studied here, not only have we seen a Truth Commission where the giving of such testimony was denied the majority of victims, but entire communities of victims who are denied any narrative at all. The poor and disempowered, and even more so those marginalised within such groups, have little voice because it is denied them by the power structures to which they are subject. This has led the effort here to understand victims' worlds experientially, and to construct a bridge to narrative that is a requirement of both academic and human rights discourse. However, for victims to gain agency, and voice their own agendas, requires them to bring an experiential approach to advocacy. This demands that they participate on their own terms in national debates through mobilisation, rather than being constrained to give testimony whose form is defined by others with the greatest access to written and other formal narratives. This gives an insight into the real goal of a Truth Commission, that is the transformation of traumatic memory into therapeutic history (Colvin, 2003). This is the social engineering goal of such mechanisms and the way that victims' testimony, legitimated by their suffering, is seen to create new narratives for states to build their legitimacy upon. The Truth Commission thus serves as part of a political economy of memory after violence, and this is discussed further in Section 9.2.

### 8.3 Beyond retribution: legalism in transitional justice

Law remains the dominant discourse of transitional justice, despite the fruitful engagement of a diverse range of disciplines with the issues at its core. As a result, transitional justice has been accused of having become “overdominated by a narrow legalistic lens” (McEvoy, 2007: 412) that has led to a ‘thin’ transitional justice that is institutionalised and driven by legal processes (McEvoy and McGregor, 2008). This echoes broader critiques of legalism in other fields:

[L]egalism [...] has led to the construction of rigid systems of formal definitions. [...] This procedure has served to isolate law completely from the social context in which it exists. (Shklar, 1986: 2)

Here the impact of the predominance of law as a tool to address violent pasts will be explored on the basis of the everyday experience of victims that emerges from the data of this study. The evidence of the data is that such practice has little relevance to those most affected by violations and as a result diminishes the ability of transitional justice to address many of its aims. Legalism serves to both narrow the goals of transitional justice and to exclude ordinary victims from participation in its development. Here the discourse of transitional justice in the contexts studied is examined to understand the impact of this legalism, with an emphasis on the process in Nepal.

Individual prosecution has become the overwhelming emphasis in the practice of transitional justice, credited with the ability to deliver on a large range of goals (e.g. Aukerman, 2002; Teitel, 2003) despite the lack of empirical support for such claims. In Nepal and Timor-Leste both national and international agencies advocating for action in response to violations committed during the conflict give primacy to judicial mechanisms, and advocacy has centred on ‘ending impunity’, rather than defining justice more broadly. A study of recent publications of Nepali human rights agencies concerning the transition confirms this emphasis: in one (Advocacy Forum and Human Rights Watch, 2008) the eight ‘key recommendations’ all revolve around prosecution, criminalisation and ending impunity; of the 10 recommendations in a second (INSEC, 2008), whilst some engage with the mechanics of preventing disappearance, most concern prosecutions and none concern the families of those who have disappeared. Both documents understand justice in a narrow prosecutorial way; they are analyses that are perpetrator and violation centred, rather than victim and needs centred. Non-prosecutorial processes, such as the proposed TRC, are seen as a way to name and

thus prosecute perpetrators, with other roles considered secondary (Advocacy Forum and Human Rights Watch, 2008). This represents an international trend in approaches to transition in which an international justice project is privileged over the goals of those most affected by the events of the conflict and indeed the broader needs of the nation. A senior foreign human rights worker at a UN agency in Kathmandu deflected criticism of the lack of an engagement with victims by saying that he was in Nepal “to see perpetrators sent to prison”.<sup>47</sup>

In Timor similar priorities have been advanced by rights activists but have been opposed by a leadership who, for their own reasons, seek non-judicial approaches to transition (Section 4.3.3). In both primary contexts law has traditionally been seen by victims at best as remote and inaccessible and at worst as a tool of the powerful used against the weak. Legal process is poorly understood by victims,<sup>48</sup> who retain an awareness and affinity with local and traditional judicial systems that they can comprehend, even where they express the logic of local power relations (Hohe, 2003; Grenfell, 2009). In Nepal, those who sought judicial process prioritised a local process on the understanding that it would be accessible. This reveals the irrelevance to most victims of the ongoing campaign for an international judicial process in Timor-Leste (ANTI, 2008): if such a tribunal were initiated, victims are likely to be barely aware of it without a very substantial dissemination campaign. Alienation from such processes has been noted in other contexts where remote international tribunals have taken place (Sieff and Vinjamuri, 2002; MacMahon and Forsythe, 2008).

The legal lens superimposes upon the complexity of post-conflict societies a single dominant approach to transition that claims unique importance to the society as a whole, despite the massive diversity of ways in which the conflict was experienced. It implies that the impact of a conflict born of exclusion, oppression and grossly unequal distributions of power and resources (as in Nepal) can be addressed largely by a judicial process. More than this it homogenises the many complex and varied demands of victims, arising from their unique experiences of the conflict, into something that can readily be addressed by central institutions rather than through solutions that emerge from victims’ communities. Mamdani talks of “the multiple faces of justice - criminal,

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<sup>47</sup> Personal interview, 2008.

<sup>48</sup> In Nepal a majority of victims either did not know which institutions provide justice or thought human rights organisations did so (ICTJ and Advocacy Forum, 2008).

political and social” (2009: 470), and this echoes the broader concept of justice that victims articulate. The principal risk for victims of the constant emphasis of prosecutions is the marginalisation of basic needs, and the diversion of resources of all types to the judicial agenda.

Victims’ representatives emphasise not only that basic needs are a priority, but their satisfaction is seen as a *prerequisite* to victims being able to campaign for (legal) justice:

For instance, [an HR agency] works in providing legal support. In the course of it, they frequently invite victims for interactions. The victims are tired of taking part in these meetings; they complain that they cannot participate in meetings, abandoning their work, since they get nothing to eat in the evening if they do not work in the day. But [the agency] does not have any programs to support the livelihoods of the people. [...] To me, it seems that if we could make [the wife of a disappeared man] earn her food and clothes she would go to Gulariya [district HQ] to chant slogans. If she does not have food to eat, she will have to confine herself to the struggle to feed herself. [...] If your stomach is empty, how can you sing a song? Therefore, I am of the opinion that only the people who have enough to eat and wear can be involved in politics. (Personal interview with leader of CVC Bardiya, Kathmandu, September 2008, discussing the typical female relative of the Missing.)

This study reveals that prosecutions are not a priority of victims, at least in states where other needs remain urgent. The data of this study support claims that legalism prioritises prosecution far more highly than victims themselves, that it institutionalises transitional justice, distancing mechanisms from those most impacted by violations, and ‘dilutes’ its content by translating issues that are embedded in a context into narrow legal representations. The prevalence of legalism has resulted in debates in transitional justice being centred on the extent to which retributive justice is possible, in the light of a need for peace to be sustained (e.g. Snyder and Vinjamuri, 2004), despite the potential lack of priority to victims of such process. An emphasis on law and the legal skews debates in directions led by lawyers and human rights workers, rather than by victims of violations, or even by the broader needs of societies emerging from conflict. Legalism has been accompanied by an *institutionalisation* of transitional justice process, where the creation of state or supra-state bodies, including tribunals and truth commissions, is seen as its

core role. The data from both Nepal and Timor-Leste reveal the remoteness of such institutions from both victims and their concerns. Such institutions serve to distance transitional justice process and “to see victims or violence-affected communities as constituencies which must be managed rather than citizens to whom they must be accountable.” (McEvoy, 2007: 424) This study demonstrates the limits of such institutions in achieving even the narrowest goals of transitional justice and the extent to which they reinforce ownership of the process by the state and elites. The people of Nepal and Timor-Leste, and in particular the most marginalised in those states, live in worlds where local institutions, including the primary institutions of family and community, are more relevant to all aspects of their lives than those of the state in a remote capital.

Whilst transitional justice seeks to address legacies of violence and bring perpetrators to account, it also seeks to legitimate new regimes, establish stability and justify the compromises made by those leading transition. Law can become a crucial instrument in that justification even when it is the agenda of a narrow political class that drives it: “While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power” (Leebaw, 2008: 95) Much of transitional justice is about the making of political decisions, ostensibly to optimise the transition to peace, but inevitably subject to the interests of those leading transition. Legalism permits the political agendas of elites to take precedence over the needs of victims, in particular where demands that can be characterised as the seeking of social and economic rights are concerned. In highly unequal states such demands challenge the existing social order and a legalist discourse that emphasises the civil and political can serve the powerful, by blunting such claims. This is discussed in detail in Section 9.1.

Legalism also serves to translate ‘thick’ issues, deeply embedded in the history and culture of a context, into ‘thin’ legal representations. This facilitates a mimetic approach, allowing external experts to present prescriptive solutions derived from other contexts as solutions to the dilemmas of transition. The data from victims in Timor-Leste have shown that such approaches, driven by an abstract discourse of rights, fail to address the principal needs of victims, largely as a result of their being divorced from the social basis of those needs. Legalism is articulated through a rights discourse that is seen as emphasising justice claims precisely because of its base in law and claims to universality. It is however this very universality that reduces the capacity of law to address needs that emerge from a very specific and local set of circumstances. For a

victim-centred approach, normative criteria and universalist rights claims are rejected as the sole basis for addressing needs in favour of what victims perceive will aid most in their recovery from the impact of the violation: “The question is whether this particular claim to justice actually contributes to the remaking of the world, or whether the rights-thinking implied actually distorts the nature of social and individual suffering” (Hastrup, 2003: 310).

The focus of this study on addressing human suffering suggests that a narrow legal approach is not sufficient to enable victims’ recovery from the impact of violations (Chapter 7 and Chapter 8), and that a broader understanding is required (see Section 10.3.3). Constraining approaches to violations using the language of rights limits both the range of solutions that can be considered and ensures that agency in the process rests largely with those, rights workers and other experts, who have greatest access to the language and mechanisms of rights and law, denying ownership of such process to victims (see Section 9.1). The “seduction of legalism” (McEvoy, 2007) also restricts the range of questions that are asked of transitional justice, and it is this which ensures that many of the victim needs articulated here are not considered a part of the practice of transitional justice. The proposed corrective to legalism in transitional justice is to put the needs of victims at the centre of the process, to challenge legalism. This is essentially a framing of the question who (or what) is transitional justice for, and has led to approaches, such as this one, advocating for a transitional justice ‘from below’ (McEvoy and McGregor, 2008). The victim-centred approach is elaborated more completely in Section 10.2.

#### **8.4 Reparations: Needs, rights and the disempowered**

For the families met in this study reparations are the most concrete manifestation of the mechanisms of transitional justice that otherwise often remain invisible and intangible to victims. Addressing any of the needs expressed by families is reparative, and the emphasis on restoring both livelihood and well-being resonates with theoretical ideas of reparation as repair of the *damage* of the violation. Families’ reparative needs are to ‘undo’ the violation, even though disappearance is necessarily irreparable: “Through reparation, the person can continue her life, look forward to the future and be back again as she used to be.” (Wife of Missing man, Liquiça, Timor-Leste): the articulation of needs constitutes an appeal for rehabilitation. (What rehabilitation means in this context, psychologically and socially, is discussed in Section 9.2). This section discusses the

implications of the results of this study for reparations policy, driven by the needs of families but also engaging with the implications of reparations for the broader socio-political context.

Political violence renders its victims powerless and the impacts of disappearance on family members demonstrate their disempowerment, politically, socially and even over their own emotional state. Violations are accompanied by rhetoric of dehumanisation and aim to undermine social ties and relationships in the communities that are its targets. Disappearance inscribes on the communities blighted by it that they are beyond society, with the unforgettability of the Missing serving to constantly reinforce their liminality. Reparations are thus intimately linked to repairing traumatisation, both individual and collective, and rebuilding the relationship between victims and the state. Reparation is linked to issues of memory and acknowledgement that operate at multiple levels between the individual and the state, a consequence of the social meaning that political violence carries. The data indicate that victims require affirmation of their own understandings of the violation and seek processes that permit the social reconstruction of meaning and identity that are challenged by disappearance (see Section 9.2). The individual and social need for the disappeared and their families to be valued, in an explicit challenging of the dehumanisation implicit in the violation, leads to families' demands for symbolic reparations such as memorials and the granting of official status. These in turn have a societal role, acknowledging crimes of the past and setting norms for the future. Affected communities in both Nepal and Timor-Leste see many of the impacts of victimhood deepened by issues of structural violence and inequality, and these lead to demands for approaches beyond the purely restitutive: they seek transformative approaches that can address the marginalisation that both facilitated violations and magnified their impact. The study reveals that needs are highly individual: whilst some victims have coped well with the impact of disappearance and are living lives as they did before the violation, others are massively impacted, by for example disabling mental illness or poverty. This emphasises the role of approaches which are needs-based, driven by vulnerability rather than the nature of the violation.

There is a range of thinking as to what defines and constitutes reparations. Garvey (1999) has suggested that reparations are to address material harm, whereas moral harm must be addressed by penance. The restorative justice paradigm sees reparation as that which returns to balance the relationship between victim and perpetrator (Section 1.2). Others suggest that reparations are whatever victims feel is

required to make amends (van Boven, 1996),<sup>49</sup> and this is the understanding that emerges from the narratives of the families of the Missing, that reparation is “a fundamental stage in the progressive rehabilitation of the ... victim” that “provides the tools for mending a victim to a whole and integrated person” (Chinweizu, 1993, no numbering). ‘Integration’ articulates the need of victims that emerged from this study to be a part of family, community and nation and confirms that reparation is intrinsically social.

Families’ needs emerging from the data include disconnectedness, a distancing from both community and state, and disempowerment (Section 2.3), with families having no mastery of their livelihood, the bodies of their loved ones, or even their own emotional state. Empowerment is seen as regaining agency in their lives. The data challenge a perception of ‘moral harm’: families see material, emotional and social harms arising from disappearance, but there was for example no mention of apology in the data. The absence of an awareness of moral harm may be why prosecutions of individual perpetrators are not so highly prioritised, even though many scholars believe impunity to be in conflict with understandings of reparation (van Boven, 1996). Beyond the material impacts of disappearance, the harms that families perceived were less moral than *social*: the value of victims, and that of the disappeared, as part of their community and nation had been undermined by the violation: “...this father of ours no matter what, whether he is dead or alive, he has to have some value for what he gave.” (Children of missing man, Dili, Timor-Leste) Families sought the restoration of worth through what was largely articulated as recognition and acknowledgment. This is consistent with what other victims of gross violations have reported, where one of their most urgent needs is to refute the efforts of the state to deny their having any value: “Violence against individuals for political reasons tells victims how others value (or devalue) them as human beings; it communicates to them their place in society.” (Hamber: 2009: 23) The tools of reparation, such as compensation, memorials and other forms of recognition are mechanisms to communicate this worth. This is also relevant to affected communities, notably in Nepal where indigenous ethnic groups were targeted as part of an historical process of devaluation and exclusion, leading to communal demands for reparation.

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<sup>49</sup> The van Boven principles include medical, psychological and social assistance, and support as reparation; they also discuss the potential for providing satisfaction to victims through disclosure of the truth after an official and thorough investigation. This maps very well onto the range of needs of reparation and indeed more generally, expressed by the families of the Missing.

Individual perpetrators played little role in families' expectations. Since the perpetrator was most often a state, victims saw the concerned individuals as merely an instrument and responsibility lying with the state. Even where disappearance was perpetrated by a non-state actor, victims saw the state as responsible for reparation, suggesting little role for direct perpetrators and contradicting approaches to reparation where individual perpetrator engagement is demanded. Such attitudes may also be driven by an understanding that only the state has the *capacity* to address the needs victims articulate, both in terms of resources and in delivering officially sanctioned acknowledgement. The result was that families sought the state to demonstrate that they, and the Missing, had value through processes of compensation and recognition.

The addressing of economic and other material needs is seen in the literature as a less important role of reparations (e.g. Minow, 1999) while for the families met in this study it often constituted their main priority. *Recovery* is the best way to summarise what they see as the goal of reparation, dominated by the restoration of livelihood, but encompassing aims that include healing, rehabilitation and closure. The urgency of economic needs expressed by victims, the scale of victimhood in both contexts and the lack of judicial process suggests that reparations are best delivered by bodies decoupled from retributive process. This challenges understandings of reparations as a rights based project linked to the delivery of truth and justice, and serves to demonstrate how this normatively driven discourse conflicts both with victim needs and with the political realities of transition.

Reparations serve not only to address the needs of victims but also have broader socio-political goals. Summerfield, a psychiatrist, considers these broader aims as "mending holes in the social fabric" (1995: no numbering). Whilst individual reparations are designed to give private redress they also serve public policy: the evidence of this study is that many of the *private* goals of victims demand *public* actions by the state, to deliver the collectively understood recognition and acknowledgement that will restore the place of both the direct victim and his family to the social and historical fabric. Families see several mechanisms that can deliver this recognition, including compensation, valorisation<sup>50</sup> and memorialisation, as well as the issues of an answer, a body and a

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<sup>50</sup> Whilst the word valorisation is a translation from the Portuguese *valorisaun*, used in Timor-Leste, it communicates very well the concept of public recognition of suffering in a cause that is so important to many of the families met.

grave. All of these can be delivered in ways that magnify the social aspect. In Timor-Leste for example, the senior leadership was involved in ceremonies to award medals to the dead and Missing in a highly visible way as well as the interring of the bodies of dead 'heroes' on national holidays. Memorialisation is discussed further in Section 9.2. Such symbolic recognition and acknowledgement serves to construct political memory (Ricoeur, 2004), serving as a bridge from individual memory to the collective and as "vehicles for the intergenerational transmission of historical memory" (Hamber, 1998: 4). The socio-political role of reparations is to challenge the denial of past crimes and demonstrate that a new regime both recognises violations of the past and is committed to the respect of human rights in the future. Public condemnation of violations and acknowledgement of their victims affirms a society's values (Shelton, 1999) and serves as a boundary marking exercise. Given the legalist orientation of much of the literature on reparations in transition, the task of 'norm-setting' for societies emerging from mass violence is primarily assigned to retributive measures, notably trials. In the rural societies studied here however it seems likely that a decentralised approach, such as can be facilitated by local memorials, valorisation ceremonies and payments to families, will have greater impact on a society than a trial in the capital that is inaccessible to most. A positive consequence of a victim-centred approach is that it is natural that the processes that most impact victims will, where they are visible to all, have the greatest impact on others too, enhancing the socio-political impact. In both contexts studied it is also clear that the lack of acknowledgement and other reparative measures has alienated victims and their communities from their rulers, reducing their legitimacy in the eyes of victims. This serves as confirmation that reparations legitimate those leading societies in transition, a key component of peacebuilding (Section 2.1).

The idea of reparations as *restitution* is troubling to those from the poorest communities most likely to be victims of conflict who do not seek a return to the poverty and inequality that preceded the conflict:

[Reparations] aim to recompense for loss [...] but also to reintegrate the marginalized and isolated into society in order to allow them to be part of rebuilding the country. They aim to build and replace burnt-out buildings and destroyed infrastructure but also to create the conditions for poor communities to prosper, not simply to resume their poverty (Roht-Arriaza, 2003-4: 157).

This confronts the idea of reparative justice as exclusively *rectificatory* rather than also *distributive* (Mani, 2002), and that reparations should seek to address only the consequences rather than the causes of conflict. The data of this study reveal that many communities most impacted by conflict connect the exclusion and structural violence to which they have historically been subject to the violations of the conflict itself: marginalisation enabled violations. Since social exclusion enabled violations and worsened their impact, they see no logic in a process that addresses the direct impact of disappearance but not the structural violence in which it was embedded. This approach drives efforts to both provide reparation to impacted communities and to link such efforts to economic development. This also serves to direct reparative efforts to recovery, not just of individuals but of affected communities.

In Nepal the targeting of certain indigenous communities during the conflict leads naturally to communal demands for reparation. Community reparations to the indigenous serve both to address the impacts of the conflict and to 'undo' their exclusion, blurring the division between reparation for violence of the conflict and that for historic structural violence. Such reparation should ideally embrace minority representation in the institutions of the state, including governance structures and the security forces, and is seen to demand the remaking of those institutions such that non-repetition of violations can be guaranteed:

Special rights should be given to the Tharu people for the suppression they were subjected to. The state can preserve and promote their ethnic identity; it can also introduce special policies in order to make the provisions to allow the Tharu people to enter into positions in various government and other organisations. The state can build a museum in order to preserve our culture. (Leader of Bardiya Family Association, personal interview, Sept. 2008)

Here the community leader also identifies a museum as a goal, confirming that challenging past histories is key to the recovery of the Tharu people and also a role of reparation. Beyond this he made explicitly political demands, in the context of the ethnic federalism that is likely to define the 'new Nepal':

We want a Tharu State. [...] There were political reasons behind the conflict. [...] Therefore, politics should solve the problems behind the conflict. For all this, giving an autonomous state to the Tharu people is the best way of solving the problems; they would manage their affairs on their own. (ibid.)

This demonstrates how the needs of communities for reparation can serve to drive progressive transformation of the Nepali state, addressing not just what enabled violations, but to change the social relations and exclusion that led to conflict. In this sense reparation, particularly at the community level, can serve a broader socio-political role. Experience of such community reparation process is limited, but there are precedents, in Peru and Guatemala (Viaene, 2010):

[T]he content of reparations policies should, first, affirm the commonality of members of indigenous groups as citizens and holders of basic human rights. It should also affirm their condition as members of sub-state groups with distinct cultures and/or communal forms of life. (Rubio-Marin, Paz y Paz Bailey & Guillerot, 2009: 1)

Beyond ethnically defined groups, communities were met in both Nepal and Timor-Leste who because of their location and other factors were subject to extreme violence by one or more parties to conflict. Such communities can be targeted for reparations in terms of infrastructure and services, where they perceive this as recognition for their suffering: “...we lack many things: no clinic, no good school, no clean water, no toilet and sanitation [...] We want the government to pay us attention.” (*Xefe suku* in Manatuto, Timor-Leste, personal interview, July 2009). As for individual victims this concerns the need to be valued by the state.

The melding of reparations and development assistance has been dismissed by some as confusing the message that reparations serve as restitution for violations, while all citizens have a right to seeing their basic needs met (de Greiff, 2008; Roht-Arriaza, 2003-4; OHCHR, 2008). Such thinking however fails to recognise the reality that many low income transitional states, including Nepal and Timor-Leste, are simply unable to meet their obligations to their citizens. More than this, those living in extreme poverty are generally victims of the inequalities and structural violence that gave rise to conflict, if not of the direct violence that is privileged by the rights discourse (Section 9.1). In this study we see that victims in practice do not care if assistance is called ‘reparation’, ‘development assistance’ or ‘social assistance’, their priority is to see children fed and educated and they understand that the state can do this as rectification for both the impact of the conflict and a history of exclusion, on the basis of *need*, as long as those violations are also acknowledged by the state. A victim-centred approach, at least in the two contexts studied, implies that vulnerability can be an explicit indicator in determining

if and how particular victims are provided with reparation. Whilst wealthy victims should receive the same symbolic reparation as all, those elements with an economic component benefit from being *needs*-based. Community reparations are feasible in those many cases where ethnicity or caste has led to exclusion, and particularly for the most marginalised, such as women, to support them and their organisations. Collective reparations in the form of livelihood programmes can target women in conflict affected communities, enhancing family incomes as well as serving to empower women in families and communities. Ensuring that vulnerability is a criterion for receiving reparations alongside victimhood ensures that states where the scale of victimhood is massive can formulate an affordable reparations scheme whilst simultaneously ensuring that this is perceived as fair by victims and the broader community.

Victims in both contexts emphasise the importance of financial compensation as reparation. Money is seen as an optimal form of reparation because it both serves as acknowledgement of victimhood and addresses some of victims' many other needs. "Victims see it [compensation] (quite correctly) as a judgment by the state on the worth of their claim and their status as victim" (Maguire & Shapland, 1997: 218). Compensation serves to deliver recognition in a way that is both visible and quantifiable, to the state, the victim and to the victim's community. One of the largest challenges for a reparations scheme that will necessarily generalise is the addressing of the great range of needs of victims and, in this sense, the best reparation from a victim's view is something that is *enabling*. This drives some of the families' focus on financial compensation, since it can address many needs and gives victims themselves agency in choosing which needs to address. It is also seen that it is traditional in cultures such as those of Nepal that compensation is paid when wrong is done: compensation is understood as an admission of responsibility because it is a tradition of the culture.

Many victims saw dilemmas in taking money as compensation for the death and disappearance of loved ones (Section 6.2.6). The fact that many victims in both Nepal and Timor-Leste found payments too little confirms the modest literature from other contexts (Danieli, 2006). However, most of those met in Timor and Nepal could not afford the gesture of declining payments offered, given that for many they were a necessity to meet basic needs:

No-one can return our son. Therefore, we have to accept whatever amount we are offered to as compensation though nothing, no amount of money can

really compensate for our missing relative. (Father of missing man, Gorkha, Nepal)

The literature observes that the relationship between the legal remedy and reparations are crucial for a payment to have positive meaning, with the perception that without justice, money is 'dirty', or 'blood money' (Hamber, 2009). For the families of the Missing this was seen to be true, but in the data of this study justice was perceived as the receiving of an answer, rather than prosecution. This echoes statements in other contexts where families saw compensation as breaking their connection with the Missing making them their 'executioners' (Suarez-Orozco, 1991), which in Nepal prompted the demand for 'relief', rather than 'compensation'. In this sense a victim-centred approach can increase the effectiveness of reparation, even through something as simple as how a payment is defined. The limits of the role that money can play for the families of the Missing means that all efforts should be made to resist political attempts to present payment of compensation as *closure*: compensation can constitute only one component of a broader reparative process.

Victims' poverty threatens their ability to access health services and education for children since such services always come with a cost that is significant for the poorest. Addressing health needs, which are created or exacerbated by victimhood, can be considered rehabilitative and fits naturally into a reparative framework. In all societies it is usual to give those injured in the service of the state, notably soldiers, *preferential access* to certain services. (Indeed, families of victims of the state in Nepal compared their situation with the families of members of the security forces killed in the conflict, who were receiving pensions and other services.) The extent to which reparations can include the civilian victims in such a scheme will depend upon the political narratives that emerge after conflict. If such narratives can encompass the privileging of those who have suffered in violence, then it can become natural to extend such preferential access to them. Where victimhood is very extensive however, this can have cost implications or simply overwhelm the limited services of low income states. Issues will also arise about the privileging of victims above others in the community with greater needs, and this prompts the proposal that reparations can be combined with social assistance using vulnerability criteria (see above).

Whereas traditionally reparations have targeted the head of household, a victim-centred transitional justice can challenge the assumption of congruent interests among

all family members. In this sense, reparation can serve a much larger agenda than merely acknowledging affected families, by challenging gender inequalities:

When reparations are thought of as part of a political project of (re)creating a more legitimate, democratic and inclusive political order, rather than of reverting to a broken past, they open a window of opportunity – even if small – for women to endorse forms of reparations that depart from settled practices and norms that are so frequently part of pre-existing gender hierarchies. (Rubio-Marin and de Greiff, 2007: 325)

Payments can be made to the wives of the Missing, and whilst it is likely that money would be taken from them by family members, it can be paid as a regular pension that would serve to raise their status in the household and reduce stigmatisation.

## **8.5 Summary: Victims' needs and transitional justice process**

This chapter has examined the needs of victims articulated in the data of this study and compared them, in Timor-Leste, with what has been delivered by transitional justice mechanisms and, in Nepal, with both what the global discourse promises and planned mechanisms. Transitional justice process has failed to begin to address the bulk of needs presented by families of the Missing. In both contexts mechanisms have followed global norms through the initiation of processes dominated by Truth and Reconciliation Commissions and trials. In neither context does a broad reparations process that would most satisfy victim demands appear likely to occur. In Timor-Leste, such a reparations process, as recommended in the CAVR report, has been vetoed by the nation's leaders and judicial process remains highly compromised owing to a lack of commitment to such processes in both Indonesia and Timor-Leste.

The impact of disappearance on families is profound and in both Nepal and Timor-Leste families affirmed a similar set of needs. Families of the Missing and their communities are impacted on a range of levels, including the emotional, social and material. Families' needs can be summarised by the demand for rehabilitation: an addressing of the physical and psychological impacts of disappearance and support to meet basic needs. In both contexts prosecutorial agendas have dominated discussion of transitional justice mechanisms, despite retributive process being far from the priority of the victims met. This reflects a legalism in transitional justice globally that is seen to place less emphasis on the priorities that victims express than on the norms that emerge

from the human rights discourse. As a result institutional mechanisms, such as trials and truth commissions are preferred to more reparative approaches or those that are rooted in victims' and communities' experience of the impact of conflict.

Data from Timor-Leste demonstrates that the needs of families of the Missing fail to coincide with what a truth commission is tasked to deliver: families seek an answer about their loved one, rather than a history of the conflict. In Timor-Leste, CAVR was remote from and irrelevant to most victims, who have had no access to either its process or final report. Rather, the truth families sought was a *private* truth concerning the fate and remains of missing loved ones. The evidence of the data does not support the understanding that victim trauma is best addressed by public testimony, or even that it would be positive for most victims. The victim-centred evaluation of the transitional justice process in Timor-Leste that this study constitutes strongly suggests that in traditional and rural societies like those of Timor, centrally led national processes to address issues of truth and memory will struggle to address people's needs. Among victims' groups and in communities those most impacted by disappearance are coping not through the giving of public testimony, but in sharing their experience with peers in ways that resonate with traditional ways of dealing with adversity.

Addressing any of the needs of families is reparative and a broad understanding of a reparations process that includes economic support as well as recognition and acknowledgment could address their needs. The reparative agenda that emerges from families is one of recovery: addressing the global impacts of disappearance including the economic, health impacts and social stigmatisation. Families of the Missing saw reparations as challenging the dehumanisation of the Missing and the devaluing of their families and communities that accompanies political violence. Families wanted the state to affirm their value through compensation payments that would both permit the satisfaction of basic needs and through memorials that grant the Missing a place in collective memory. Women are seen to suffer from social impacts of the disappearance of husbands that arise because of their patriarchal societies: reparations can challenge the inequalities that lead to such impacts. In so doing such an approach can serve to drive a transitional justice that not only addresses the consequences of conflict, but is truly transformative and seeks to also address its causes.

The greatest impact of disappearance is ambiguity over the fate of the Missing and this drives families' needs for both an answer and access to human remains.

Exhumation is a prerequisite for families to recover remains of loved ones, but in neither context is this occurring systematically. In both contexts traditional attitudes lead to needs arising from the spiritual obligations families feel to the Missing, notably for exhumation and for ritual. This demonstrates how reparation can only be defined on the terms of the needs expressed by victims, it is not sufficient to assume that the fact of violation itself can automatically lead to appropriate reparative measures. The result of this insight is that the context of victimhood, including the cultural and social worlds in which victims live, is a crucial ingredient in creating a victim-centred transitional justice. The implications of context for a victim-centred approach, and the needs of families not addressed by contemporary transitional justice process, are discussed in the following chapter.



## **Chapter 9 Beyond prescriptive approaches: contextualising a victim-centred transitional justice**

I don't know anything about Peru, we are Nepali. (Wife of missing man, Bardiya, commenting on a presentation from a human rights organisation)

The previous chapter compared the data concerning the needs of families with the mechanisms that have come to characterise transitional justice praxis. Significant gaps are seen in the ability of such mechanisms to address the needs of victims. This chapter outlines how and why transitional justice process fails victims, highlighting the elites who steer such process and the content and constraints their agendas articulate. It then discusses those needs that are not targeted by contemporary transitional justice process, notably issues of the psychological and social, and proposes that they be explicitly included in the purview of transitional justice. Chapter 10 then lays out a conceptual framework for a transitional justice process that would be steered by the needs of victims.

States in transition seeking to address legacies of violence and conflict are encouraged to turn to an international community with expertise and funding to support processes of transitional justice that follow global mimetic practice. The evidence of this study is that the global transitional justice discourse, prioritising trials and national truth processes, fails to address the most important needs of families of the Missing, as well as other victims, and as a result threatens sustainable peacebuilding. Here, it will be argued that the needs that victims express demand an approach that is derived not from a universal model, but one that is rooted in the culture and context in which victims live. Those needs with which families of the Missing are confronted that are most acute are a product of the local and particular circumstances in which disappearances occurred and in which the dynamics of conflict were immersed and that continue to inform social relations at all levels. This drives those topics discussed here, that are most prioritised by victims met (ambiguity, memory, exhumation, the spirits), and yet are most marginal to mainstream transitional justice practice.

In this chapter the data of this study will be used to argue for a contextualised approach to transitional justice that seeks not just to tailor such process to the particular

circumstances of each context and conflict, but a process that emerges from the everyday social world in which victimhood occurs, rather than from an abstract global discourse. The *victim-centred* approach for which this thesis advocates aims to ensure that transitional justice mechanisms spring from the needs of victims and their communities, where possible as an initiative of those communities. A contextual approach to victimhood that emphasises the local and particular requires that emotional and psychosocial issues that can be the greatest reminders of the experience of political violence must be placed at the centre of efforts to address its legacy. The practicalities of such a process are discussed in Chapter 10. The ambiguity of disappearance is linked with the trauma of conflict and victimhood more generally and the memory of what conflict means and what identities it imposes. To address these issues in individuals, families and communities implies the remaking of the meanings and identities that conflict creates. This demands that victim communities be given a place in collective memory denied them by their victimhood and that their own perceptions of repair be privileged. For victims in Timor this notably means that the spiritual demands through which they express their trauma be considered a valid and legitimate claim of the transitional process. Similarly, the ambiguity of families who are still waiting for news of missing loved ones must be considered a principal impact of disappearance that transitional justice must address. This leads to the putting centre stage of psychosocial approaches, as mechanisms of transitional justice.

This chapter seeks to understand how and why transitional justice praxis fails to address the needs of families of the Missing and to indicate routes and approaches that can build victim-centred process. It begins by exploring how the global rights discourse interacts with victims and, suggests that in Nepal the rights discourse is an intrinsically elite approach that marginalises victims and their agendas. The psychosocial implications of a victim-centred approach are then investigated, focussing on issues relating to truth about the fate of the Missing, exhumation and human remains. An effort is made to demonstrate the connection between the needs of victim communities and the broader memory politics that underpins much of transitional justice process. Finally, the implication for transitional justice process in traditional societies is discussed. Such contexts have little concept of individual rights and are wedded to spiritual traditions that inform both individual and collective understandings far more than the liberal frameworks that have driven Western approaches to victimhood. The dynamic of the collision between rights approaches and indigenous tradition is used to demonstrate the importance of the local in such contexts.

## 9.1 Transitional justice as an elite discourse: Human rights practice after conflict, between the global and the local

The stark mismatch between the needs and priorities of families of the Missing and the agenda being promoted by agencies advocating for transitional justice is one of the main findings of this study. Here, an effort is made to understand why this gap is so great, using the data from Nepal, and noting the class and political perspectives of both typical victims and those who work with rights agencies.

One clear finding of this study is that rights language is rarely used by those who became victims of the long histories of conflict, in either context. Claims making by victims is driven by needs, defined in both absolute and relative terms, and rooted in their everyday lives. In many cases the needs articulated emerged wholly or partly from distinct cultural factors, such as local spiritual understandings or expressions of patriarchal hierarchies, which can only be understood when contextualised. This suggests that culture exists empirically and logically prior to rights in the contexts studied here, and that ontologically culture trumps rights in the eyes of those who are the subject of this study. The data give rise to a number of distinct critiques of the rights discourse that will be explored here; firstly that it can reinforce existing power relations rather than challenge them; secondly that it constructs its subjects on terms other than their own; thirdly that it prioritises particular rights, marginalising those of most importance to the poor of the global South, and finally through a critique of the individualism of rights. At the heart of this discussion is the understanding that in seeking an analysis that derives from the local and particular, from the everyday lives of victims, agency in allowing victims to choose their own forms of both expression and action is crucial.

The human rights discourse, from which transitional justice derives, is now truly global, both in its stated universality and in the range of states that claim to enforce rights. However human rights has globalised together with other sets of norms, including a broad range of liberal, and sometimes neo-liberal, tenets (Rajagopal, 2003). In the developing world a discourse of development, rights and liberal democracy has become truly hegemonic, with international donors, NGOs and most governments claiming to ascribe to what are broadly perceived as universal values. These have entered mainstream work in post-conflict contexts through the rhetoric of the 'liberal peace' (e.g. Paris, 2004; Richmond and Franks, 2009). The *practice* of human rights however remains far from universal: 'on the ground' human rights is a transnational discourse that

must compete with local political and other imperatives. As a result, the study of the practice of human rights is necessarily discursive; to understand how the global rights discourse impacts in particular places upon human actors, given the webs of political and social relationships in which it must operate (Goodale, 2007).

In contemporary Nepal, post-conflict efforts to create transitional justice mechanisms continue to be elite led and to marginalise victims and their agendas, and to be dominated by a narrow legalism that neglects the priorities of victims (Section 8.3). This study appears to confirm that the idea and meaning of rights in this transitional context is a product of the conjunction of victims with needs and a global discourse articulated by elites. However, the norms that emerge and drive the agenda of rights agencies and those advocating for transitional justice refer far more to priorities internal to the discourse itself than to the needs or agenda of victims, largely because one is articulated by the powerful and one by the powerless:

[H]uman rights is not a product of [H] social relations but immanent in them, internal to their very expression [...] rights are positioned at the conjuncture of the two fields of the social: agency and power. (Wilson, 1997: 14)

In Nepal a liberal discourse, combining ideas of democracy, rights and development, has become hegemonic as a result of the priorities and resources of international agencies and the willing cooption of national elites who have benefitted from an association with it, through access to funds and careers. The ideologies and institutions of development have come to be understood as the definition of modernity (Pigg, 1996) even though these were created entirely upon the basis of elite understandings of what a Nepali was and should be (Armbrecht, 2009). For the indigenous, those both most marginalised and most impacted by disappearance, the conflation of this modernising agenda of rights and development with a Nepali culture defined by and in the image of elites created a pressure that actively served to erode indigenous culture (Pigg, 1996). Because the liberal principles on which the democratic post-1990 state was founded did not challenge the extreme inequalities that existed, indigenous people and others remained excluded. This issue reflects a deeper fault line in the global human rights project that from its inception elevated individual rights over group rights.

In the data of this research and other studies (Mario-Rubin and de Greiff, 2007; Advocacy Forum and Human Rights Watch, 2008), victims of conflict prioritise livelihoods and the economic well-being of their families. It has been observed that in

transitional justice advocacy in Nepal, despite the clear evidence that they are a priority for victims, social and economic rights have taken second place to civil and political rights. In principle, there is “interdependence and indivisibility” (UN, 1998) of all rights, but in both the global rights discourse and in praxis (in Nepal, Timor-Leste and elsewhere), social, economic and cultural rights are far less emphasised. This represents an international trend in approaches to transition, what might be called the judicialisation of transition, in which an external legalism is privileged over the goals of those most affected by the events of the conflict. This legalism is discussed in Section 8.3 and can be seen in the attitudes observed in rights workers in Kathmandu. When a senior national human rights agency worker in Kathmandu was asked about the continuing legal emphasis of his work despite victims’ expressed needs, he replied that “sometimes simple people do not know what they should want.” (Private interview, 2008) The retributive roots of transitional justice and narrow agenda of its practitioners continue to prevent the emergence of a practice that can deliver a broader justice after conflict that includes addressing the social injustice that led to conflict. In the long term, sustainable solutions to the livelihood deficit seen among both victims of the conflict and many other sections of Nepal’s population will involve both economic development and the confrontation of structural inequalities in terms of social and economic exclusion. In contemporary Nepal, the claiming of social and economic rights, which demands both effective representation and redistribution, such as land reform, amounts to a challenge to the social, economic and political order of the pre-transition state. Whilst in rhetoric this is accepted at the political level, civil society generally and human rights agencies in particular, dominated by economic, ethnic and political elites, have proved themselves unable or unwilling to articulate the economic and social needs of victims and to challenge entrenched hierarchies that ensure most remain poor. Those with elite backgrounds who lead rights agencies have internalised liberal agendas that do not prioritise the transformation of the state that is required to address the needs of victims.

Ignatieff has written that “Human rights matter because they help people to help themselves. They protect their agency.” (2003: 57) This study suggests that in a post-conflict transition in an unequal society the human rights discourse can be used to do just the opposite: indigenous victims are denied agency by elites using the discourse of human rights. For the indigenous villagers of rural Nepal who became the victims of conflict human rights is a discourse that comes ‘from above’ and is largely disseminated by members of elites who have traditionally benefited from the historic exclusion of the indigenous (and others). As a result of the narrowness of the transitional justice agenda

that emerges, its emancipatory potential is highly constrained: it seeks to address the violations of the conflict, but defines these in a limited way and seeks remedies that emerge from a legalistic analysis. It makes no effort to address the unequal social relations that led to the conflict, and more than this the human rights discourse itself appears to act to maintain and enforce the most fundamental power relations within Nepali society. This appears to confirm what has been written about the limits of rights as an instrument of emancipation in unequal societies:

[rights] may become ... a regulatory discourse, a means of obstructing or co-opting more radical political demands [...] The point is that rights converge with powers of social stratification and lines of social demarcation in ways that extend as often as attenuate these powers and lines. (Brown, 1995: 98)

The first priority for transitional process in Nepal to challenge such constraints is to seek to broaden it beyond the legalistic to include those elements, notably the social and economic, which challenge the social injustice that led to conflict.

To describe the interaction of the global human rights discourse with ordinary victims as a simple binary or dialectical relationship between the *global* and the *local* is to simplify the situation. In practice we see that human rights are constructed through a complex and layered process. The global discourse is instantiated through the actions of international actors and national human rights agencies working in the capital, while contact with the victims themselves is mediated by staff in regional offices and representatives of victims. In this way the human rights discourse filters down to victims who know nothing of rights and articulate their demands in terms of *needs*, which are translated into rights-based language for the consumption of those higher up the chain. The true desires of victims are sublimated into a rights-centred discourse regardless of how relevant it may be to what is actually being articulated. This study supports the contention that relationships between those who represent the human rights discourse in the developing world and excluded victims of violations can have embedded within them power relations of a colonial character (Spivak, 2004): elites who have access to the discourse import skewed power relations into the practice of human rights. This both dismisses communities of rural victims as a site of production of human rights, in favour of concepts imported from the capital and ultimately from the West, and renders certain forms of violence, notably that inherent in local power relations, such as that between landlords and tenant farmers, invisible to the discourse. This happens as a result of only

certain parts of society having the skills and access that enable them to speak the language of donors; the result is that funds are steered only to those who have internalised the legalism of the rights discourse. Table 20 summarises ethnic and caste representation in some areas relevant to the articulation of rights in Nepal, demonstrating the extent of exclusion: whilst no data exist for national rights agencies, anecdotally it is worse than for the international agencies shown here. Challenging elite control of the transitional discussion in Government and civil society demands replacing tokenistic and instrumentalising attitudes to the incorporation of victim perspectives with genuine participation.

	<b>Nepal, % (Census, 2001)</b>	<b>International agencies, %<sup>51</sup></b>	<b>Civil service, %<sup>52</sup></b>
<b>Hill Brahmin, Chhetri and Newar</b>	36.4	65.6	95.7
<b>Hill dalit</b>	7.9	3.6	0
<b>Hill janajati</b>	21.9	22.6	0.5
<b>Terai janajati</b>	9.8	2.5	
<b>Madeshi<sup>53</sup></b>	27.8	5.2	3.7

**Table 20 Representation of various ethnic and caste groups in international agencies and the civil service in Nepal. The first column shows the fraction present in the country, and the final two columns the over-representation of Brahmin, Chhetri and Newars and the under-representation of Janajatis, Dalit and Madeshi communities.**

Confining transitional justice to a politics of rights under liberal political institutions in which existing power relationships are enshrined, ties any process to the system that produced those power relations. Systems of domination, that include iniquitous property relations and the systematic exclusion of those most impacted both by inequality and conflict (such as the indigenous), must be challenged in any transitional process by recognising the agency of those victimised and challenging power structures that embody the relations that led to conflict.

<sup>51</sup> (SIAG, 2008)

<sup>52</sup> Gazetted Third Class (Section Officer) employees passed in the examinations taken by Public Service Commission 2000-2001 (Battachan, 2006).

<sup>53</sup> Including Muslims.

Examining rights from the perspective of actual struggles makes it possible for analysis to transcend accepted normative parameters of human rights debates, question conceptual categories and expand the range of claims that are validated as rights. (Nyamu-Musembi, 2005: 31)

Expanding the range of claims made means challenging the legalism of elites, such that social and economic needs of victims can be considered valid, rights-based demands of transitional justice. Beginning with deeper consultation with affected communities, rights agencies should be working to build capabilities to enable indigenous victims to take part as equals in decision making. If those who purport to represent victims are unable to do this, then it is highly unlikely that the transitional process for which they are advocating will be at all inclusive. Mobilisation of victims must be supported on the basis of their own agendas and not subject to their sanctioning by local and international elites. As a result of the power relations that permeate the practice of human rights in a highly unequal society such as Nepal it is problematic to consider the rights discourse as the sole legitimate driver of transitional justice. Whilst human rights remains a tool of strategy and mobilisation for oppressed groups seeking justice after conflict, victims' organisations offer an alternative route, in which victims themselves have full agency, free of agendas set by elites and less constrained by traditional power relations to use the language of rights or not. Such locally-grown, 'non human rights' efforts to both address the issues arising from conflict and to fight for political and social change in the system that led to conflict can provide unique input to create transitional justice process that can give space to the agendas of victims.

## **9.2 Ambiguity, memory and trauma: Psychosocial intervention as transitional justice**

Transitional justice in general and the normative aspects of reparations in particular have largely excluded health despite the van Boven principles specifically including medical and psychological care (van Boven, 1996). Health, and in particular mental health, is intricately related to the socio-political fabric of a society (Das and Kleinman, 2000) and has implications for both the recovery of communities from conflict and peacebuilding more generally. The data of this study suggest that for many victims the emotional and psychological sequelae of disappearance are its greatest impact. Here, an analysis of that impact will be presented, with an emphasis on *ambiguous loss* as a diagnostic lens. An argument is developed that for such victims, individually and collectively,

rehabilitation is the most important element of reparation and in this sense psychosocial intervention *is* transitional justice. The psychosocial is here assumed to cover the breadth of emotional, psychological and spiritual needs expressed by victims. As such it includes a discussion of the need for answers and human remains of the Missing that demand programmes of exhumation and identification, and a discussion of the demands of memory, individual, collective and societal, made by families of the Missing.

### ***Addressing psychosocial needs: ambiguous loss***

The disappearance of bodies through political repression creates an ontological uncertainty among survivors [...] The disappeared person inhabits the threshold between being dead but also potentially still alive, and the families of the disappeared can find themselves psychologically preoccupied with the same existential space. (Hamber, 2009: 81)

The data of this study allow the dominant psychological phenomena mentioned by families to be discriminated from PTSD: whereas PTSD is linked to a specific *event* of trauma, the anxiety expressed by families was about the missing person, rather than the event of his disappearance. Ambiguous loss (Boss, 2006) occurs where a family member is psychologically present, but physically absent, and is an explicitly relational perspective, which differs from individualised trauma approaches such as that of PTSD, in that it characterises the stress as external and ongoing (Section 2.3). Ambiguous loss is a model that has been developed to understand the impact of unresolved loss and shape interventions. It discusses therapeutic approaches in terms of recursive guidelines, dominated by the need to find meaning and construct new identities where these have been challenged by such loss (*ibid*). The model has been developed however in a largely Western context, and this represents the first test of the model in a non-Western context (Robins, 2010a), predominantly discussing the data from Nepal and emphasising wives of the Missing for whom ambiguous loss has the greatest impact.

Much of the need for an answer concerning the disappeared appears to be an attempt to give meaning to the ambiguity of loss. Families sought not just an answer, but an *explanation* of what happened to their loved one and to know *why* their relative was taken. Meaning is constructed relationally, and is best achieved through interaction with others in the same position: wives of the disappeared found most value in talking with other wives and rather few valued talking *within* the family. This is because many challenges faced are social problems within the family or community and this

emphasises that the type of social space in which meaning is constructed is crucial, revealing the value of associations of families of the disappeared. The positive impact of such contact is consistent with the understanding that through such interaction victims develop resilience, echoing reports of families of the 9/11 victims (Boss, 2006). One notable difference from the New York City experience is the meeting in peer groups, for example wives with wives, rather than in family groups, reflecting the hierarchies that exist within Nepali and Timorese families. Another common and effective coping mechanism was political engagement, bringing family members into contact with others who share the beliefs of their loved one and allowing positive meaning to be constructed. Such 'active' coping strategies (Colic-Peisker and Tilbury, 2003) allow families to directly challenge those responsible for their victimhood (Hollander, 1997). The spirit world and dreams, like the fantasies of contact with the disappeared reported in other contexts (Boss, 2006), can also very powerfully influence the meaning given to disappearance in both Timor and Nepal.

In any context ambiguous loss provokes anxiety about the roles of those left behind, but in the cultures of Nepal the very strict understandings of an individual's place in the family and community provoke greater challenges: the problems seen are not just psychological and emotional, but deeply social in nature, arising from community and family attitudes (e.g. Section 6.2.3). Identity becomes a problem psychologically because identity is a relational concept, defined through social interaction. The greatest problems arise where a woman's view of her identity conflicts with that of the family or community who consider her a widow who must behave and dress as such, where the wife is unable to admit the death of her husband as long as there is no evidence for it. For many families in Nepal once a son has disappeared the relationship of his wife to the family is ambiguous. The "intentional reconstruction" of roles and boundaries required to overcome such ambiguity within families cannot be done on the terms of the wives of the disappeared (Boss, 2006: 120), because of power relations within families. For most wives of the disappeared the reconstruction of identity takes place largely outside the family, through contacts with other wives of the disappeared, using narrative methods, analogous to those of family therapy:

Telling and listening to stories in interaction with others who suffer the same ambiguous loss sets the stage for one's identity to be relationally expressed through the symbolic interaction of language, rituals and cultural, gendered, and generational patterns of coping and adaptation. (Boss, 2006: 129)

Such contact aids in (re)constructing identity, but can also challenge the isolation and disconnection that many wives feel; talking with peers builds on traditions of sharing and story-telling among women in many communities. This emphasises the importance of spaces where family member's identities and roles are understood, such as family associations where wives can meet together. The greatest challenges to addressing identity issues arising from ambiguous loss come from the narrow definition of women's roles and assumptions made about the death of the disappeared. As such, any intervention must ideally go beyond the impacted family and address the views of the community concerning gender and the ambiguity of the fate of the disappeared.

In Nepal ambiguity arises not only over the fate of the disappeared, but also over the relationship of the wife to the family. Ambivalence can thus arise both in attitudes towards the disappeared, and in the conflicted feelings of family members towards the wife. Symptoms of the stress of ambivalence are depression and anxiety and these are seen in the families of the disappeared, notably wives. A solution to the ambiguity (and the subsequent ambivalence) is invariably seen as being an 'answer', something that would bring closure and confirm a wife's role as wife or widow. During the research efforts to suggest to families that they could move on with their lives without an answer was angrily rejected, even though many were doing exactly this, revealing that ambiguity and heightened ambivalence need not be problematic. Experience in Timor-Leste and elsewhere shows that even in the long-term only a small minority of families of the disappeared are likely to ever receive a satisfactory answer concerning the fate of their loved one. For most of the families, it is a fact that "closure is a myth" (Boss, 2004: 560). This then begs the question, if closure will never come, what should families do? The approach of the ambiguous loss model is to seek meaning despite the absence of information and ongoing ambiguity, and find ways to live well despite not knowing (Boss, 2007). Normalizing ambiguity and the resulting ambivalence primarily means acknowledging it (Boss, 2006): resilience comes from recognizing ambivalent feelings and managing them. For families of the Missing this implies accepting that their relationship to the wife of the disappeared, and indeed to the missing person themselves, will remain ambiguous and understanding the conflicted emotions that generates. Normalizing this ambivalence remains one of the greatest challenges families face.

Revising attachment means learning to live with the ambiguous loss of a close attachment. A number of families and communities constructed tributes: even though

few families accepted the death of the disappeared many were keen to see memorials of a type that typically honour the dead. Such tributes are a way both of revising attachment and normalizing the ambivalence that families felt: in a culture where convention made formal death rituals impossible, such memorials are one of the few ways this can be done. Families in Bardiya, Nepal are conducting traditional prayer ceremonies, and building commemorative roadside resting places (*chautara*) and hand pumps to serve the community that record the names of the Missing. Another example is the demand of families that their loved ones be recognised as 'martyrs', even while denying that death is proven, challenging attachment with a status that continues to value the disappeared highly. This normalises ambiguity, both honouring the missing and allowing hope for their return to remain, and puts memorialisation at the centre of psychosocial needs. It has been suggested that the somatic symptoms many wives display, although involuntary, may represent a continued connection to the disappeared:

Sickness ... related to political violence represents a refusal to break ties with the person who was killed or disappeared. [...] such refusal circumvents the goals of disappearance or death, which is to wipe out a person's existence. The women thus embody the acts perpetrated against their husbands. (Green, 1999: 117, discussing widows of Guatemala's *violencia*.)

The body is seen as demonstration of a continued attachment to the disappeared, and revising attachment as the solution to ill-health. Somatism may also be a way for women, whose pain is poorly understood, to manifest the impact of disappearance in a way that renders their suffering socially meaningful. A phenomenon that emphasised this approach in Nepal was where women had acknowledged that their husband was likely dead, but persisted in wearing the symbols of marriage (bangles, *sindhur* powder in the hair) as a protest with two aims: one to establish their right in the community to wear such symbols as long as death was not proved, and another to demonstrate to the authorities that they were still awaiting an answer. This appears to be a way for women to reclaim the symbols that most demonstrate their need for closure from being used against them; a move from despair to protest using symbols of attachment to the disappeared.

Hope, like almost all aspirations in Nepali and Timorese society, is relational. Families of the disappeared expressed hopes beyond their missing loved one: they talked of hopes for their children and their wider families and hopes for continued peace.

Indeed, this could serve as a definition of resilience for the families, the ability to have realistic hopes for the future despite the ambiguity of their loss. The families of the disappeared in Nepal used the word hope most often to refer to the return of the disappeared; although most had little hope, almost all (80%) had some. Therapeutically, the goal would appear to be not to disabuse families of such hope, however unrealistic, but to ensure that they are also sustained by other hopes. Because of the extreme poverty and hardship many live in, families expressed hopes that their children would be well fed and would be able to study, often accompanied by demands for compensation or relief payments; others had hopes that their children would be able to support them in their old age. The greatest barrier to realistic hopes was an obsession with closure, with searching for the disappeared above all else. A number of families or individuals had been unable to create goals that went beyond the disappearance, and for some their lives revolved entirely around it, with no route to new hopes.

Ambiguous loss appears to be generally applicable to Nepali families of the disappeared: the need to find meaning and reconstruct identity has been found to be directly relevant to the challenges faced by families. Whilst the time that has passed has reduced ambiguity among families of the Missing in Timor-Leste, where ambiguity persists, the ambiguous loss model also seems to well describe its impact on family members. Many of the principal issues Nepali families discussed are comprehensible in the light of these understandings: in addition to symptoms of identity confusion, conflicts between social and individual understandings of meaning and identity were seen to be a dominant source of stress. Since the understanding of disappearance is constructed socially within family and community, so its impact must be understood in the same terms, and interventions initiated at the multiple levels of individual, family and community. What also emerges from this study is that many individuals and families have been able to live well despite ambiguity by finding locally relevant ways to reconstruct meaning and identity. Those who have coped least well have become fixated with the ambiguity of their loss and with seeking closure: this strongly suggests that human rights led interventions with families of the disappeared that emphasise truth over all other aspects can be potentially damaging by reinforcing such negative coping.

Foregrounding ambiguity as both the source of individual and family stress and as the target of intervention has dramatic implications for work with families of the Missing. Whilst many individuals and families can live well despite ambiguity, those who have coped least well have become fixated with the ambiguity of their loss and obsessed

with seeking closure. Human rights interventions with families of the Missing have habitually emphasised issues of 'truth and justice' despite the fact that for the families of the Missing "closure is a myth" (Boss, 2004: 560), both because the majority will never receive an answer concerning their loved one, as demonstrated by Timorese families who are still waiting after some 35 years, and because even if an answer and a body are received the psychological impacts continue. Interventions driven by a search for 'closure' or for 'truth' focus attention on ending ambiguity, rather than living well despite it, and can of themselves construct meanings that are both negative and that encourage the worst types of coping. Such emphases militate against a coming to terms with ambiguity and, at their worst, can serve to valorise the trauma of ambiguity where closing emotional wounds is perceived as betraying the Missing. The data of this study suggest that interventions with families of the Missing that emphasise truth over all other aspects can be potentially damaging by reinforcing such negative coping. The broader conclusion of this study is that rights-based interventions will necessarily have impacts, positive or negative, on the psychosocial well-being of family members and as a result it may be necessary for all interventions to accommodate psychosocial expertise.

### ***Exhumation and identification as reparation***

Here, the implications for victims of both the "political trauma" (Hamber, 2009) of disappearance, and the emotional and psychological aspects are discussed as they impact on the need for exhumation and return of human remains to families. Implicit in this discussion is the understanding of the body as both a *social body*, a symbol for thinking about relationships between the family, society and culture, and a *body politic*, an artefact of social and political control (Scheper-Hughes and Lock, 1987).

An end to the ambiguity that defines the relationship of a family with a missing loved one drives the need for an 'answer' that is simultaneously an emotional and psychosocial need, and a broader socio-political need for recognition. The data of this study show that for most families the body is the most effective answer, and even where the fact of death can be accepted without human remains, the body is sought for ritual purposes. The resolution of ambiguity, most obviously through exhumation, creates new identities for both the missing person and their family, and gives new meanings emotionally, socially and politically to the disappearance. The most extreme example of this is in the traditional cultures of Timor, where appropriate burial of the body and the rituals around interment are perceived to impact on the spirit of the dead in a way that for the family fundamentally remakes their world. In a more Western understanding, the

uncertainty and ambivalence that families feel is resolved by such a concretisation of the fate of the Missing. Socially, the concept of the Missing is not well understood and so ambiguity increases the disconnection between families and communities that is created by a family becoming victims of political violence. Exhumation serves to resolve this detachment, permitting both the family and the Missing (now simply dead) to resume their places in society. "Community includes both the living and the dead: manipulation of the dead affects relations with the living" (Verdery, 1999: 108) An end to ambiguity also empowers the family of the Missing by challenging the powerlessness that disappearance confirms in all aspects of their lives.

At the socio-political level, disappearance aims not just to kill and ensure bodies are not found, but to dehumanise both its victims and their communities. Thus, in Nepal for example all those disappeared by the state were 'terrorists' and thus not deserving of a grave or a place in memory. Exhumation concerns the challenging of the assumption that the Missing and their families have no value, and the *process* of exhumation serves to demonstrate that value, and is thus intrinsically reparative. As part of a reparations process this can accompany other value giving mechanisms, such as the granting of a certain status ('martyr', for example) and memorialisation. The recognition that a family seeks from exhumation thus operates at various levels. Firstly they seek to recognise their dead themselves and many families felt that they would visually recognise the body of their loved one regardless of its condition. This recognition restores the missing person to the realm of experience, beyond the null identity of the disappeared. It also returns 'ownership' of the loved one who was taken from them, allowing the dead to take their place physically, in a family grave for example, as well as psychologically and spiritually. In both Nepal and Timor-Leste the dead are unable to assume their proper place without appropriate ritual. In Timor, for the dead to satisfy their role as ancestors with great implications for the well-being of both the family and wider community, requires that the rituals of death be performed. In contrast to some families of the disappeared in Argentina who opposed exhumations in order that "their spirit ... can never be buried and forgotten" (de Bonafini, 1989, quoted in Robben, 2000: 93), families in Timor and Nepal insisted on exhumations and reburial (or other ritual), precisely so that the spirit could rest. This serves to demonstrate that the meaning of exhumation is contingent upon the cultural context in which it occurs.

The second form of recognition that families seek is social, within family and community, primarily because their identity is often contingent upon the fate of the

Missing, particularly in the highly collective societies studied here. Once the Missing is known to be dead, the wife of the Missing becomes a widow, a mother becomes childless and so on. Since identity is constructed socially, exhumation creates identity as it concretises the fate of the (no longer) Missing and removes the ambivalence that ambiguity creates. The ritual, such as reburial, that can follow exhumation is a way of making a public statement about the death and aiding both social and individual construction of meaning. The final identity that exhumation remakes is political: restoring a place in memory for the Missing, both individual and collective. It affirms family narratives and gives the Missing a place in historical memory. This is the traditional understanding of reparations as something that both 'repairs' victims and allows society to confront the truth of the past and construct new narratives on which to build the future. These are a direct attempt to challenge the discourse of perpetrators around denial of the disappearance and to confront the lies that so often accompany political violence. As such violence threatens identities, erodes social relations and devalues both individuals and communities politically, so exhumation can reconstitute meanings and identities that undo that damage. Truth and prosecutorial justice that can be an important consequence of exhumations also contribute to these processes. Exhumation makes the violations of the conflict visible, and the body it produces can be made to serve a range of agendas, including both healing the wounds of conflict and the instigation of new cycles of violence. "The concept of 'the body' too is always caught in a deployment of power. The 'body' is always already a biopolitical body" (Agamben, 1998: 187), and this is perhaps truer of a dead body than a live one. Whilst reparations can aid recovery of victims of conflict, it should not be forgotten that reparation is necessarily political, subject not only to decisions about who reparations address and how, but how any reparative act is interpreted. In Timor-Leste the exhumations and reburials that have taken place serve to eulogise the resistance, and the present government that has assumed their mantle. Exhumations in Bosnia of the dead from previous wars aided the creation of nationalist history that helped initiate the conflict of the 1990s (Verdery, 1999). This resulted in deaths that are today the subject of exhumations (Wagner, 2008).

The principal challenges to comprehensive programmes of exhumation and identification in Nepal and Timor-Leste are a lack of both resources and political will. Whilst the use of technology in the process of exhumation and identification of the Missing, notably DNA, has become standard in the last two decades as a result of processes in the Balkans (Wagner, 2008), it is extremely expensive. There also remains a gap between the job such technology can do and the understanding of it among the

families of the Missing in traditional societies. In the absence of such technologies, a victim-centred approach may find that families choose to use accessible and affordable techniques from their own culture. Here the issues arising from this are discussed.

Families in Timor talked of indigenous spiritual techniques that would enable traditional healers to identify the body of a loved one through contact with the spirit of the dead, even when bones were comingled with those of others:

If there were two or more people together [in the same grave], we will speak many ritual words and mention the name of the person that we looking for, such us: 'Kandido are you there?'. Even though he is dead when we go there, we should call or mention his name. When we mention his name among many bodies, we will get the symbol or signal from one body. This tells us that this is his or her body. [...] *the spirit can show itself*. (Wife of Missing man, Timor-Leste; author's emphasis)

This echoed work with the Missing in Vietnam:

[T]he [exhumation] mission usually begins with a communication with the missing dead to ask for the location of their bodies before the costly trip to the site is initiated. The communication is done by traditional magical means and requires mediation by certain ritual specialists. (Kwon, 2008: 44)

In this sense the Missing are perceived as actors, "vital partners" (ibid), in the actions concerning their future. In Timor, one family talked of techniques redolent of DNA testing, where a traditional healer would pour the blood of family members onto bones found and the reaction would confirm or deny their family connection. This appears to be a demonstration of the dynamism of tradition as it 'learns' from science.

The logic of a victim-centred approach is that victims will drive reparative processes, such as exhumations, which most concern them. In the absence of scientific techniques they will seek their own solutions, as they are doing in both Nepal and Timor-Leste. This is unproblematic as long as the conclusions and results of such indigenous process are not challenged by techniques, potentially Western scientific ones, which can also claim families' confidence. In Timor-Leste, efforts to exhume the victims of the Santa Cruz massacre have already encountered such conflicts. In one case the body of a victim of the Santa Cruz massacre long thought by a family to be their relative was shown by DNA testing to not be: the concerned family decided the test was wrong and

remained unshaken in their belief that it was the remains of their relative. The same foreign forensic team has been confronted with evidence concerning the location of remains that have been passed to families by the spirits of the Missing. The forensic team has been reluctant to commit resources based on evidence in which it had no confidence, while families were perplexed at their refusal to act on information which they believed to be beyond doubt. Such questions will haunt any process that mixes traditional and scientific approaches, and represents a genuine dilemma in efforts to let families lead such processes whilst also using relevant technologies where they are available.

### ***Memorialisation: The political economy of memory***

Why do they just recognise the living and forget the dead? They forgot all the dead now. (Father of missing man, Lautem, Timor-Leste.)

The politics of death is at work in a time of transition as much as at the time when the disappeared were taken and killed. Just as during conflict sovereign power demonstrates itself through the ability to let live or make die (Agamben, 2005), so in a time of transition the right to memorialise is contested as the right to possess the memory of the death and define how it will be remembered. Memory after violence, both individual and collective, concerns the representation of the events that led to disappearance and death, and construction of narratives that will determine both how those most affected will live and what history will be written about those who died. Here, the implications of the data for the politics of memory will be discussed. This will focus on how and why victims seek certain forms of recognition and memorialisation, including their psychosocial motivations, and how this constitutes part of a contested politics of memory after conflict.

Memory is about recognition, largely socially, of what has happened and who it has happened to: the recognition of who has suffered and how, and ultimately who is a victim. Taylor (1994) has claimed that identity is shaped by recognition and that recognition underlies conflicts over identity, even that it is a basic human need. This serves to emphasise the role of recognition in societies emerging from conflict in establishing sustainable peace. The model of ambiguous loss indicates that the meanings families give to disappearance are crucial to their ability to cope with it and are constructed relationally, through social interaction in family and community (Berger and Luckmann, 1966). Memory is “the means by which the coherence of our identity and our history is constructed and sustained” (Terdiman, 1993: vii) and similarly emerges from

the representations ascribed to disappearance by both the larger community and the state (Halbwachs and Coser, 1992). 'Collective memory' is here understood as "the selective reconstruction and appropriation of aspects of the past" (Wood, 1999: 2) that serve as the 'social frameworks' (Halbwachs and Coser, 1992) onto which personal recollections are woven. As such, all collective memory emerges subject to the expression of a social group or power to organise representations of the past in their own interest. For their families, remembering the disappeared is an act of resistance against perpetrators, redeeming the humanity of the Missing: to memorialise is to reckon with invisibility, and this is perhaps what drives families' needs to see the names of the Missing on a memorial:

A monument is something that stays forever [...] words fly away but whatever is written will stay. Today people talk about it but if nothing is written nothing will remain and all will be forgotten. (Sister of missing man, Dili, Timor-Leste.)

The ambiguity of disappearance demands that families revise attachment to the Missing and one effective means is through memorials, which honour them without necessarily formalising the acceptance of death. Winter (1998) describes normal mourning as leading to recovery, which he sees as simultaneous with forgetting. This is one way of understanding the trauma of disappearance, since normal grief is interrupted and forgetting is hugely challenging, given the need to keep the memory of the disappeared alive. Memorials, and other rituals, offer one way to do this:

Ritual here is a means of forgetting, as much as of commemoration, and war memorials, with their material representation of names and losses, are there to help in the necessary art of forgetting. (Winter, 1998: 115)

Ironically, this may explain why families need to see the name of their loved one memorialised; this is a step towards the forgetting that is a part of normal mourning denied by disappearance. Žižek discusses the forgetting of trauma in the context of Lacanian psychology:

The true choice apropos of historical trauma is not the one between remembering or forgetting them: traumas we are not ready or able to remember haunt us all the more forcefully. We should therefore accept the paradox that, in order to really forget an event, we must first summon up the strength to remember it properly. In order to account for this paradox, we

should bear in mind that the opposite of *existence* is not nonexistence, but *insistence*: that which does not exist, continues to insist. (Žižek, 2002: 22, emphasis in original).

This appears to be relevant for both families of the Missing dealing with personal trauma, for whom the non-existence of the Missing is most definitely *insistent*, and for states, attempting to address the collective trauma of a violent past.

In the politically charged atmosphere of a state emerging from conflict, memory itself is contested, as demonstrated in the data, the “absent presence of violence” (Bell, 2009: 347) driving the social dynamics of memory. There is a “political economy of memory” (Küchler and Melion, 1991: 30) in which memory is sanctioned by power and politically deployed. Victims’ needs for memorialisation are to invest their understanding of disappearance with powerful and culturally salient meanings that can affirm the value of the Missing and their experience of disappearance. Much of the field of transitional justice, reparations and truth-telling as much as trials and exhumations, is nothing but memory politics, driven by a search for truth but inevitably finding a range of truths. Memory is the product of social contestation, manipulated by “political entrepreneurs” (Tilly, McAdam and Tarrow, 2003: 34) to prolong conflict or to end it. Victims of violence however are the most heavily invested in memory, precisely because their resilience in the light of their experience can depend on affirmation of their own understanding of events (Section 9.2). This study has shown how whether a missing relative is a hero or a terrorist, a martyr or a victim, determines how both the disappeared and their families are perceived and in turn how they perceive themselves. The data of this study show both the range of victim agendas, often bitterly polarised according to the divisions of the conflict, and how they are instrumentalised or ignored by those driving the transition.

Memorialisation of the dead after conflict has been conceptualised by Judith Butler as distinguishing between persons who are ‘grievable’, whose lives are seen to matter and to be worthy of grief after death, and those who are not (Butler, 2009). This allows a connection to be made between those marginalised in life, from disempowered communities who are most likely to become victims of conflict, and those ungrieved in death. An argument can be made that only by giving such people a value in life can they have a value in death. The norm-setting role of reparations is thus not only to address the value of those who died in conflict, but of those who remain poor and wretched who survived the conflict: “grievability is a presupposition for the life that matters” (ibid: 14).

Like all reparative acts, memorialisation primarily concerns the assigning of value to victims and their experience.

The links between individual memory and political memory (Assman, 2008) become clear in the testimony of families of the Missing. The 'liberation struggle' against Indonesia has become the founding myth of the Timor-Leste state. A narrative has been constructed of a war in which the resistance was both glorious and unanimous, in which all Timorese were victims of an external aggressor (e.g. Rei, 2007). For a missing family member to be a part of that myth validates the suffering of the family and gives meaning to their sacrifice.

[W]e need this [memorial] built so that one day we can explain to our children, generation to generation, so they know what happened and to transmit the messages to their children that their grandparents died because of the struggle for independence. (Brother of missing man, Bobonaro, Timor-Leste)

War myths "serve multiple functions including the creation of meaning out of suffering" (Hutchinson, 2009: 415): this meaning can be a crucial aid to resilience of families of victims. Interviews with families of those disappeared by the Indonesians revealed how valuable this narrative is to them, particularly where this has been reinforced by concrete reparations such as a medal or pension (Section 7.2.2). Those who became the victims of the resistance however feel victimised a second time by the lack of political memory of missing loved ones. Their experience has not only been ignored but the dehumanisation necessary for them to have been killed or disappeared appears vindicated. It is less the impunity that threatens such families' well-being, than the denial that anything untoward ever happened, apparently confirming the dehumanisation of the disappearance.

We just feel pain in our heart because, for example, if I am a founder [of Fretilin] then my followers kill me, what do you think of that? The leaders should know about this, or did my father do something wrong? (Man whose father and three other relatives were executed by Fretilin, Manatuto, Timor-Leste)

In Nepal, the contestation over interpretation of the conflict between Maoists and the traditional political parties continues, polarised between opposing rhetorics of

'terrorism' and 'people's war'. The dominant official language of Government is currently one of all victims being equal, reflecting the political balance that exists between the parties to the conflict. No official memorialisation is ongoing beyond the martyrs of the 2006 'people's movement', a victory shared by both sides. At the local level memory politics is vibrant, with victims of the state constructing memorials with Maoist support, and reinforcing narratives of resistance that feed into ongoing political struggles at both central and local level. The CPN-M both claim and recognise the Missing through recording their names in public places (Figure 14) and giving annotated photographs of the Missing to families.



**Figure 14 A 'Martyrs' gate' built by the CPN-M in Bardiya district, Nepal, including the names of the dead and the Missing; the lack of discrimination between these two categories has angered families of the Missing.**

For the Maoist party the People's War was fed by sacrifice, and a culture of martyrdom encouraged that saw memorialisation as a political tool. A Maoist publication elaborated: "The people who commemorate the martyrs have developed a new culture in which martyrs' doors and pillars are created, martyrs' photos are exhibited and villages, hamlets, companies, battalions and brigades are named with martyrs' names." (Janaawaj, 2003: 50-51, quoted in Lecomte-Tilouine, 2006: 53). The walls of the office of Sofad, the Maoist association of families of the Missing, in Kathmandu were entirely

covered with photos of the disappeared, both a secular shrine to the Missing and a place where families could come together and remember collectively. This confirms the understanding that collective, and in particular political, memory is performative: it comes into existence through specific kinds of memorial activity (Wood, 1999). Whilst these are typically elite led, one important role of victims' groups is to construct memory, and thus meaning and value, at a local level and on victims' terms (see Section 6.2.3), especially relevant where national efforts in the capital are remote and inaccessible. Contestation also occurs within those groups associated with one side of the struggle: a result of the Maoist eulogisation of martyrdom, particularly since the end of the war, has been that the CPN-M has considered the Missing as martyrs, denying the ambiguity of their fate, both because martyrs are perceived as more valuable to their cause, and because confronting the Missing issue would demand disappearances they had perpetrated be examined.

Contestation takes place not only among elites but also between victims and within communities. In Nepal at the grassroots victims are polarised by their efforts to advance their own narratives and in many areas this prevents families of the Missing working together across the perpetrator divide. A positive narrative about someone disappeared by the state is perceived to require the discrediting of the narrative of someone taken by the Maoists. This zero sum is reinforced by the active engagement of political parties. Such political language provides a framework around which victims can make their demands of memory: the CPN-M has recognised those disappeared by the state as martyrs and families are encouraged to demand the same acknowledgment from the state. In Timor-Leste, the dominance of a single narrative has left the families of those whose victimhood falls outside it with little recourse: victims of the resistance have no political representation and appear reluctant to challenge the myths of the conflict and this has an emotional impact. Where the hegemonic narrative fails to encompass families' memory, the telling and re-telling of stories in family and community becomes a crucial coping mechanism (Section 7.3) in support of the construction of *local* memory (Osiel, 1997).

Memory of the dead in the traditional societies studied here differs from that in Western cultures in the important aspect that whilst the body of the Missing is absent, the spirit of the dead may well be present. This serves to emphasise that memory works at several levels. For the family, and maybe the community, the spirit presence keeps the memory of the loved one alive but is negatively perceived since the spirit should be

'at rest'. What families seek in terms of memorialisation is the sanctioning of their experience of disappearance by the state through a public and state funded memorial. Families' understanding of the spirit world is such that many also see a connection between such public memorialisation and the apparently private world of a relative's spirit:

Up to now the spirits will not have peace or rest, if we don't do anything concrete [...] We all know that the spirits do not need much but only a memorial with all the names of the missing written down. (Father of missing man, Dili, Timor-Leste.)

This serves to demonstrate the very strong connections between memory and meaning constructed locally and that at the public level: collective memory reshapes meanings at the level of the family and individual and this is what drives families' need for formal recognition, with memorialisation a principal route to this.

### **9.3 Contextualising approaches to legacies of violence in traditional societies: Indigenous approaches and the spiritual**

This study has shown that approaches to legacies of political violence that derive entirely or largely from Western understandings fail to address the needs of victims in traditional societies. Here, the implications for transitional justice, and broader recovery for families of the Missing, of the spiritual aspects of culture will be considered, with an emphasis on Timor. In both Nepal and Timor-Leste conflict largely occurred in rural areas and the most affected are those with little historic engagement with the institutions of the state. This is revealed in the data through the lack of enthusiasm to seek solutions through those institutions, such as courts and truth commissions. In such communities traditional leaders and spiritualists have long been involved in conflict resolution, reconciliation and local judicial process (Hohe and Nixon, 2003; Bellamy, 2009), playing roles that coincide with those foreseen for transitional justice mechanisms. In practice, these local approaches substitute for national processes that have either not occurred or have failed to reach most victims. Rooted as they are in their communities, such processes have as their ultimate goal the maintenance of social stability, an aim shared with post-war recovery and peacebuilding. At the heart of this approach is an understanding that local institutions, such as family, community, traditional governance and traditional healers,

are far more relevant to recovery and social reconstruction than the formal institutions that globalised discourses and the international community seek to establish.

The discussion here will emphasise how trauma, as a collective experience, dictates how communities in Timor-Leste perceive the role both of the spirits in addressing its impact, and how the human rights discourse constructs the subjects of violations in a way add odds with such understandings.

### ***Trauma and the collective in traditional spiritualism***

The data from Timor demonstrate both the importance of the role of the spirits of the Missing as actors in recovery from conflict, and the highly collective nature of the trauma of disappearance. The majority of families expressed concerns about the spiritual implications of disappearance, including impacts on animals, agriculture and the health of family members, where ritual demands are not satisfied. The data show that spirit manifestations are *collectively* experienced, confirming that the experience of pain and suffering is fundamentally social in nature (Good et al. 1994), even more so when it is the result of political violence that targets a community. That such historically constituted pain is experienced socially serves to confirm the role of the spirits for affected communities. This demands that intervention to address trauma target not individual relatives of the Missing but families and communities, with ill-health considered primarily a social phenomenon:

[Ritual] is the only way to solve the problem. If this is not done babies will get sick and the community will be unable to stay in peace, it will make problems. (Interview with a traditional spiritualist [*lia nain*] in Timor-Leste, discussing how to address the problem of the Missing.)

Ceremonies of interment or cremation of the bodies of the Missing, or an equivalent ritual with a substitute body, aim to restore order: “the rites of passage not only remove the corpse and the dead soul from the secular world and fixes them firmly in the sacred, but also separates lineage kin ties from the sacred world and restores the living to secular life.” (Rawnsley, 2004: 6, discussing Timor-Leste) These are social events that serve as highly visible collective rituals that address community needs. There is evidence in the literature (Field, 2004; Cole, 2004) and in the data of this study that the effectiveness of such ritual derives from its performative nature, echoing the mechanism of truth commissions but using the language of spirit not catharsis and operating in a

local social space rather than that of a state institution. Such social healing is directly related to the construction of collective memory in a community, with ritual reducing pain by drawing it into a process of producing and reconstructing memories (Cole, 2004). Memory links individuals (both living and dead) with wider social narratives: rituals can address both the spiritual manifestations reported by families of the Missing as well as individual physical and somatic ailments:

[H]is spirit was appearing and made problems before we did the ritual, but there were no problems again with his spirit after we did the ritual. [...] His spirit also will not be angry with us because we have sent him to the spirit of our grandfathers through the traditional process. (Uncle of Missing man, Timor-Leste)

He [the spirit] was screaming in the night-time and we got sick. Therefore, we took his shirt and made his ritual. The traditional elders [*lia nain*] came together to make the funeral ceremony. He came and showed himself through the scream. We did not find him, but we found some blood: it means that he was already dead. [...] The blood appeared suddenly on the road in front of my house. I was surprised at the time and I said to myself that he was already dead. We put his shirt with flowers to bury him. [...] His spirit was silent once we did the ritual. We did not hear his voice after the ritual process. (Son of Missing man, Timor-Leste.)

In Timor, the *lia nain*, the elders who deal with spiritual issues, mediate between the community and the spirit world and lead ritual. These rituals were desired by families not out of a blind adherence to tradition, but pragmatically, because they produce the desired result. Field describes the impact of such rituals in Timor as “providing opportunities for reducing anxiety and for incorporation into the social body that sees such rituals as necessary” (2004: 340), a statement of the fact that individual healing results from the social role ritual plays. This is implied by ambiguous loss theory which sees the (social) construction of meaning and identity as a way of countering the negative impact of ambiguity, which in Timor was less about the fate of the Missing than about the spirit itself. The quotations from families clearly demonstrate the extent to which the spirit world can create powerful meanings for families. The appearance of blood following the ritual is seen as confirming the death of the Missing, resolving ambiguity and opening routes, again spiritual, to the addressing of the psychic impact of death. In a traditional society such meanings can be constructed though ritual rather than

through Western approaches requiring the verbalisation that 'counselling' demands: for traditional peoples the performance of ritual resonates far more than narrative. Beyond this, there is the connection between ritual and what anthropologists have called 'anxiety', where ritual is used to address something otherwise out of control of a family (Homans, 1941), reducing the lack of mastery over a situation where a relative is missing. One crucial element of ritual is that it restores *agency* to families of the Missing. The experience of disappearance is one of a loss of mastery over important aspects of life: funerary ritual is something steered by families that restores their control over aspects linked to their dead relative, whilst simultaneously restoring order spiritually and cosmically, in a way that is socially affirmed. Issues of agency are discussed further in Section 10.2.

Ritual after death or disappearance may also have a critical role in the fostering of solidarity in communities divided by conflict. Funerary rituals in Timor, even in normal times, foster socialising and confirm family and other alliances. Funerary feasts have no social distinctions or invitations and are thus events in which anyone in any way connected with the deceased can participate (Field, 2004). As such their potential role in reconstructing communities riven by the impact of political violence is clear. Ritual permits community to both return to a past that preceded the disruption of conflict and rebuild links degraded by the experience of violence through the extension and reassertion of social networks. In contrast with remote processes that purport to reconcile, these events embedded in the social fabric and traditions of communities can serve to bridge divisions created by times of conflict in ways that emerge naturally from shared values. Field observed in a community in Dili that, following the conflict: "[t]hrough participation in rituals [...] residents contributed to and shared in psychosocial recovery" (2004: 346).

The data also suggest that the recognition families seek through a place in political or historic memory (Section 9.2) is linked to the addressing of the trauma of disappearance. That Timorese sacred tradition is linked to memory is clear from the imperative that ancestors should be buried in the clan graveyard in order to satisfy their spiritual role, in practice providing a place where families can remember their dead. The construction of graves according to traditional prescription remakes space socially, healing individuals and communities. As for other aspects of ritual, this memorialisation restores the Missing to their 'proper' place, both physically and psychically, and permits a spiritual harmony that ensures prosperity and good health for all. Traditionally, such

memorialisation accompanies burial and can become especially important where funerary ritual is impossible or substitute rituals must be performed. Half of the families of the Missing met in Timor had made rituals and graves, burying a substitute for the body in the absence of human remains. Similarly, annual rituals on the anniversaries of events that led to mass disappearance or killing, such as the Santa Cruz massacre (see Section 4.3.1) serve to air both collective grief and to express solidarity with families of the dead and Missing.

In summary, where pain is said to “unmake” the world (Scarry, 1985), the addressing of the impact of disappearance requires a remaking of the social fabric in which victims live. In traditional societies ritual provides a framework from which both meaning and memory can be constructed from events taking place in social spaces that heal the traumas of disappearance. In contrast to Western approaches to trauma, based on verbal expression of experience, traditional societies will use rituals that have a performative component serving to create meanings socially. The implications for interventions with families of the Missing are clear: where remains cannot be recovered local processes that permit the social addressing of trauma must be facilitated. In Timor-Leste and indigenous Nepali communities this demands the performance of rituals rooted in tradition that permit the healing of trauma in both impacted individuals and their communities.

### ***Human rights as fetish: Where globalised discourse meets indigenous tradition***

An ethnography such as this is that is able to challenge the culturally based assumptions that drive discourses such as that of human rights. Many of those met in this study do not share ideas of political causation with Western social science and as a result challenge the epistemologies with which we approach how disappearance can be addressed. This section will explore the implications of traditional beliefs in which the spirits of the dead play a far larger role in the lives of families of the Missing than any other actor, including the authorities. It asks what implications this has for practice with such victims.

It is a fundamental assumption of social science that there are objective causes of social phenomena and that understanding these is a principal aim of such science. Transitional justice and human rights more generally are constructed on the understanding that changes in law and behaviour impact on people in certain ways. An

alternative understanding of political causality is that which emerges from a religious or spiritual outlook in which consequences flow from sin or virtue or, as in the case of Timor and the indigenous people of Nepal, from the actions of spirits. Many families met for this study prioritise an addressing of spiritual needs above all others:

We raised chickens, pigs and all animals but they always died because of his spirit. The spirit of the victim made our life have no movement. Maybe he [the spirit] sits alone and thinks, 'you get a good place to live but I am suffering'. As a result I do not have anything, including money, in my life. (Son of missing man, Lautem, Timor-Leste.)

Rural Timorese see their lives as not just influenced but determined in many ways by spirits, whose actions can in turn be impacted by human behaviour, notably by the correct performance of ritual. The problems caused by a malign spirit can be addressed by performing relevant ritual, with or without the body of the Missing (Section 7.2.3). In contrast, rights activists see a route to change in the lives of victims through the discourse of rights, which promises truth, justice and reparation, through the action of the authorities.

The history of modernity is seen as one of human liberation from false beliefs and fetishisms and human rights emerges directly from this tradition. The traditional Timorese confronted with human rights discourse is told that she should abandon her belief in the agency of the spirits that have long sustained her community and rather pursue the legal and political routes to action that underlie modern, and Western, notions of political causality. Modernity seeks to free the indigenous subject from her thrall to the fetish of the spirit and realise the true character of human agency and emancipation. However, what appears quite natural to someone immersed in the Western tradition has huge implications for the indigenous subject. Modernity constructs her not as a member of a community, linked to family, clan and ancestors through blood and spirit, but as an autonomous agent whose humanity alone, independent of the very things which define her identity and create life's meanings for her, determines what she can be. The radicalism of this agenda is consistently under-estimated by those who advocate it, for whom the 'naturalness' of individual rights is self-evident. The apparent success of the rights discourse in low income contexts such as Nepal and Timor-Leste is testament both to the fact that it is disseminated by power and well resourced (Section 9.1) and that the persistence of understandings that are resistant to it are largely invisible.

The collision between the modernity of individual rights and traditions of ancestral ritual seen in this study echoes the missionary encounter between Christianity and the non-Western 'primitive' (Keane, 2007). Victims of conflict are being asked to see agency not in rites, spirits and the bodies of the Missing as they have traditionally believed, but in the concept of rights and bodies of law. The concept of redemption in abstract notions of truth and justice is redolent of missionary claims that agency lies not in fetish and ritual but in the power of a Christian god. Despite the emancipatory implication of the rights discourse, in practice in Timor-Leste and Nepal rights are something claimed by others on behalf of victims (Section 9.1): rights are used not to give agency to victims, but to persuade them to place trust in the discourse and its practitioners. Fetishism is concerned with the difference between subjects and objects: missionary Christianity's contempt of fetish was most exercised by the ascription of agency to non-human subjects (Keane, 2007), in the same way as are contemporary discourses of secular modernity. And yet it is clear that human rights practice with rural victims in both Nepal and Timor-Leste objectifies victims, and in this sense can itself be seen as a fetish, ascribing agency to ordinary people whilst actually denying it to them, echoing the very critiques of fetish by missionaries:

By ascribing agency to things that in truth lack it, they thereby deny, perhaps even rob, the agency of those who properly possess it. (Keane, 2007: 180-181, writing of a Dutch missionary view of 'primitives' in Indonesia.)

There are also analogies in the conflict over narrative between missionaries and ritualists and those seen in the interaction of the rights discourse with rural Timorese. The power of ritual language lies in words and acts, while both the missionary and the rights activist seek to enable the agency that lies not in the words of their texts, but in the ideas those words express. However, the language of rights becomes for many a form of words emptied of political or other contextual context, as seen in the repetition of demands of mobilised victims in Timor-Leste for an international tribunal, despite the lack of a clear idea as to what that was. Modernity in both its religious and secular forms has shifted attention from practices to belief, to sets of propositions that command assent (Asad, 1993).

This analysis does not aim to disparage rights as having no role in addressing the needs of families of the Missing in traditional societies. Claims to rights are some of the very few claims that the marginalised feel able to make of power. However, it is a

concern that the language of rights appears to be an effective tool to reinforce existing social relations and to empower external and Western discourses that are articulated by voices of power, and ultimately to objectify victims. The data demonstrate that much of the populations of both Nepal and Timor-Leste live an essentially pre-modern life, not only in terms of the lack of realisation of individual rights but also in their relationship with the state. Whilst both have modern norm-based liberal democratic regimes in their capitals, many live in communities where the state has little presence and that remain largely clan based, where ritual and other community obligations are pre-eminent. In such a society the rule of law, that constitutes a central focus of rights and transitional justice is simply less relevant. In such contexts a state-based discourse such as human rights will always have both limited appeal and value: in many cases the state is in no position to enforce such rights. This serves as a basis for defining approaches to legacies of violence that are rooted in such communities and the addressing of needs that spring from traditional understandings of the world. It promises a transitional justice that values local agency and tradition: this is discussed further in Chapter 10.

## **9.4 Summary and conclusions**

Using the critique of existing transitional justice practice of Chapter 8 as a starting point, this chapter has attempted to consider those needs articulated by victims that remain neglected by contemporary praxis, driven by the philosophy of a victim-centred approach. The goal is to contextualise the needs expressed by families of the Missing, to understand how the most acute needs arise as a direct response to the impact of disappearance in a particular social and cultural environment. The aim has been not merely to identify unaddressed needs, but to understand *why* as a global practice transitional justice has the focus it has. This focus is seen to arise not only from the legalism of the rights discourse discussed in Section 8.3, but also because it is a discourse both more accessible and more useful to elites in urban centres than to the marginalised communities who are over represented among the victims met in this study. The practice of human rights after conflict reflects a liberal bias both in how it is articulated globally and how it is instantiated in particular contexts. As a result, in both Nepal and Timor-Leste transitional justice practice largely ignores the social, economic and cultural whilst emphasising those elements that least threaten existing socio-economic hierarchies, namely issues of truth and judicial process. Whilst transitional justice has always perceived judicial process as the most sensitive issue in terms of

individual accountability, it neglects that social and economic issues have the greatest potential to upset existing social relations. This becomes even more true when the economic and social origins of conflict such as those in Nepal are considered.

The remainder of the chapter attempted to understand the nature of the local and particular needs that dominate victim agendas in the two contexts. Psychosocial impacts have been understood through the ambiguous loss model, and this serves to demonstrate that families seek the reconstruction of meaning and identity that is challenged by the ambiguity of disappearance. This resonates with what families demanded of the state, in terms of acknowledgement and recognition that can challenge the goals of political violence that deny disappearance and give no value to victims, or to their families and communities. Psychosocial impacts were seen to range from disabling mental illness to stigmatisation in family and community. Such impacts are considered beyond the remit of transitional justice in both contexts, and are largely absent from the broader transitional justice debate. Interventions rooted in the communities in which victims live can address such needs, but this demands approaches that focus on the grassroots and challenge the legalistic and institutional bias that characterises transitional justice discourse in both Nepal and Timor-Leste.

Families in both contexts demonstrated that a need for answers and for the bodies of the Missing was their priority, as well as recognition of the suffering of the family and of the sacrifice of the Missing. These needs were understood in terms of meaning and identity at both a local level, i.e. for families and communities, and concerning their broader national consequences and drivers. Both exhumations and processes of memorialisation construct particular meanings that families value and are literally reparative, at the family, community and national levels. This shows the link between a need to find truths that create local meanings and the norm-setting role of reparations on the national stage, where an acknowledgement of what has happened and a recognition of those damaged by violations of conflict sets norms for the post-conflict state (see Section 10.3.3)

The other element that links both exhumation and reparation, and the local and the national, is memory, which serves as an arena of contestation in which meaning is assigned to the violations of the conflict. The demands of memory made by victims are clear: they seek acknowledgement of their suffering and the assigning of value to their missing relative, through memorials, compensation or the granting of a status that

confirms that value. Whilst all such measures can serve political or other agendas, permitting memorialisation of all victims regardless of perpetrator permits an even-handed approach that maximises the recognition of those who suffered and thus of a comprehensive coming to terms with the past. When such process is on the terms of victims it impacts not at the national level like a trial or a truth commission, but in the communities in which victims live: as such it is far more accessible. Chapter 10 will pursue this and conceptualise a victim-centred approach, not only in terms of its impact on victims, but also as to how it can allow societies to better deal with legacies of violence and move on after conflict.

The topics addressed here reveal that all of the elements that families most value in addressing the impacts of disappearance are linked to a need for structural change, for an addressing of the inequalities and disempowerment that underlay violations. Psychosocial needs are rooted in addressing the need for both victims and their families to be valued socially and by the state: a explicit demand that marginalised by challenged and the Missing be considered *grievable*. The same issue drives demands for an end to the ambiguity of loss and for a body and a grave. The power of global discourses serves to marginalise traditional understandings of both trauma and how violations are addressed. Whilst the local elites who articulate liberal modernity use the language of rights and PTSD, indigenous understandings see the mental and emotional impacts of disappearance as both collective and spiritually driven, and challenge the very idea of agency in law and government. A victim-centred approach thus has two implications: firstly, to challenge existing power relations and seek a socially transformative process after conflict and, two, to privilege everyday understandings that are marginal to current approaches to transitional justice. Concrete proposals to address these issues are discussed in the following chapter.

The emphasis on the local and the particular discussed the nature of the traditional societies investigated here, with an emphasis on the spiritual issues that were primary for many families and the irrelevance to them of much of what underlies the rights discourse. Families whose identity has always been defined by their place in a community and whose points of reference are issues of clan and the ancestors will struggle to see the resonance of the priorities of transitional justice as it is globally articulated. Individual rights and the secular modernity in which they are rooted are not concepts that such families will readily grasp, and the data show that they rather make demands that echo their own relationships, not to a remote state that has never served

them, but to pre-modern understandings of obligation to family and community. Part of that obligation is to the spirits of the ancestors and many of the Missing are considered by family members not to be individual victims of violations, but spirits whose dishonouring has very concrete implications for the health and welfare of the family and the wider clan. For such families' agendas to impact on a transitional justice process it must not only be consultative, but must operate in the same social spaces as the impacts it seeks to address. The following chapter pursues this direction, conceptualising a victim-centred transitional justice that begins from the preoccupations of victims to construct mechanisms that can operate on a national basis, but driven from the grassroots.

## **Chapter 10 Towards victim-centred transitional justice**

This study reveals a gap between the goals of transitional justice in both theory and practice and the needs of families of the Missing, emblematic of conflict victims in those two states. Victims' greatest concerns are issues that are either invisible to the discourses that drive such process, for example spiritual matters or social issues embedded in the daily lives of victims, or are simply not prioritised, as is seen with issues related to livelihood and human remains. The data suggest that current approaches to the development of mechanisms to address legacies of violence are largely incapable of advancing the agendas of the poor and the marginal who are most often the victims of contemporary conflict. This failure has implications not only for the success of the transitional justice process, but also for the broader transition and for sustainable peace. This study seeks to address this deficit by proposing victim-centred transitional justice to address both the needs of those most impacted by violations and the broader issues that drive conflict. In this chapter such an approach is conceptualised, advocating a transitional justice steered by what victims seek for recovery from the impact of violations and ultimately to be evaluated according to its success in meeting such needs. This requires a refocusing of such praxis to include the psychosocial, the economic and elements, such as the spiritual, that derive not from universal discourse but from the everyday lives of victims. This chapter encompasses a dilemma between the pursuit of a novel approach to addressing violations - the victim-centred, grassroots driven process advocated here - and a pragmatic aim of incrementally improving current practice. Here, a victim-centred vision of transitional justice is presented, whilst an engagement with ongoing processes in Nepal and Timor-Leste and proposals for concrete action that could serve to address victims' needs in those states are discussed in Appendix IV.

Whilst here victim-centred process is discussed in terms of transitional justice and broader responses to violations, it is not simply a way to make transitional justice do 'more', but is a paradigm intended to construct bottom-up approaches to peacebuilding and post-war recovery more generally (Section 2.1). Indeed, assuming a victim perspective serves to demonstrate the artifice of separating such disciplines when prioritising a people-centred approach rather than a state-centred one. Victim-centred process can challenge hegemonic approaches rooted in liberal agendas that have ill-served communities such as those met in Timor-Leste, challenging a top-down,

prescriptive approach to transition as well as many of the assumptions of what constitutes the 'liberal peace'. Whilst the demands of such process are broad, a victim-centred approach aims not to expand the demands on, and expense of, dedicated institutional processes, but to replace them with a participatory framework that can catalyse broader political processes that deliver on victims' goals. A victim-centred approach makes the politics of transitional justice explicit by highlighting the transformative nature of victims' demands and undercuts partisan threats to peace by privileging subaltern priorities.

This chapter begins with a discussion of the importance of methodology in understanding victims' views: if a process is to be steered by the agenda of victims it is crucial that accurate and representative understandings emerge from efforts to study victim views. The relationship between needs and rights as approaches to understanding and addressing impacts of mass violence are discussed, with an emphasis on how they relate to the local and the global, the particular and the universal. Victim-centred process is conceptualised in terms of emphasising empowerment: mobilisation of victims is perceived as a way of driving such process 'from below' and a route not only to overcoming the failures of representation, but to challenge the subordination of transitional justice to political agendas, including liberal ones, and to maximise its transformative potential. The possible divergence between the needs of victims and those of the wider society are then discussed, and victim-centred process presented as positively impacting on issues of legitimacy and governance in post-conflict states.

## **10.1 Understanding victim agendas: The importance of method**

For all work with victims of political violence human rights has become a hegemonic discourse, providing what has been called the "dominant emancipatory vocabulary" (Kennedy, 2004: 9). In the contexts examined here however, human rights has become a language that is far from emancipatory in practice (Section 9.1): rights praxis is centred on the violation, rather than harms suffered, considering the victim primarily as the object of a violation rather than a subject in her own right (Section 9.1). The culture of rights practice in both Nepal and Timor-Leste remains driven by such factors, with truth and justice the normative priorities of interventions, resulting in a rights practice that is concerned far more with the *ends* of accessing victim testimony than the *means* by which this is done. The net result is a positivistic and thin human rights that emphasises legal remedies, most notably prosecutions, and that has few tools to engage with victims

in understanding both the contextual harm that has resulted from the violation and any needs victims may have that are beyond the frame of the typical rights intervention. Research in human rights has successfully transcended these limits, engaging with methodologies more common in anthropology or sociology and in so doing dramatically broadening the understandings and potential of rights-based interventions (Section 1.2). On the basis of the data of this study however, such approaches have not significantly impacted on rights praxis after conflict of either national or international agencies in the contexts investigated. A victim-centred practice seeks to move beyond perceiving victims as primarily a source of testimony and towards a practice where an engagement with victims permits the broadest response to the highly contextual impacts of a violation.

The most fundamental critique that this analysis makes of contemporary transitional justice process is its lack of an evidence base. In parallel with much research in the field, practice has remained largely non-empirical (van der Merwe, Baxter & Chapman, 2009), driven normatively rather than on the basis of data collected. Additionally, transitional justice has been perceived as a set of institutional mechanisms, and research largely restricted to examinations of such mechanisms, neglecting the many other processes occurring at a local or community level that remain invisible to outsiders. An example of this is the little attention that victims' groups have received (see Section 3.2), despite this study suggesting that they are a principal coping mechanism for many, far more important to victims than the institutional processes that are the subject of most studies. As long as the transitional justice 'tool-kit' contains a small and non-extensible set of mechanisms (trials, truth commissions, reparations) contexts emerging from violent pasts will be examined through the lens of these approaches, leading to a "tendency to over-attribute [impacts] to mechanisms rather than a complex social reality" (Hamber, 2007: 3) The data of this study suggest that communities emerging from violence have both a far larger range of needs and a larger range of resources to address those needs than has been imagined by those steering transitional justice interventions.

Empirical work to understand the needs of victims in transition or to gauge the impact of transitional justice process on them is rare (Section 3.4.2). When such studies are done, they are often methodologically limited, and examples that contradict the results of this research, suggesting that victims prioritise truth and prosecutions, can be found from both Nepal and Timor-Leste (ICTJ and Advocacy Forum, 2008; Pigou, 2004; Kingston, 2006). These appear to be the result of the purposive sampling of respondents

largely from among activists who were unrepresentative of the victim population (Robins, 2009a), demonstrating the importance of method in attempting to understand victims' views. Observing this lack of reflexivity has driven the methodology here: using an ethnographic approach which demanded immersion in victim communities, combined with representative sampling and active victim participation, allowed stories to emerge which have not otherwise been told in either context (Chapter 5). It remains a dilemma for practitioners, as for researchers, to represent the 'other' of the global South whilst simultaneously talking of the need to counter marginalisation (e.g. Kapoor, 2004; Madlingozi, 2010). This study has attempted to allow the voices of victims to be heard through its participatory element, with the aim of advancing empowerment and mobilisation on the terms of victims themselves. Moving away from positivism to the treatment of knowledge as a social product and towards research as a process of empowerment leads to such studies having a direct political implication. It not only grounds an approach to transition in the everyday lives of the marginalised but it drives transitional process away from efforts to enforce a status quo and towards a politically transformative practice that responds to human needs. Whilst this thesis represents only a modest exploration of such possibilities, it is hoped that it shows the potential of such approaches.

The concrete steps required to enable victims to be heard on their own terms emerge from the data concerning family associations. Such victims' groups are seen to not only address victims' urgent needs, for support and the construction of meaning from their experience, but also serve to mobilise victims to challenge their powerlessness. Perhaps the only documented case of such a mobilisation, on victims' terms, is that of the Khulumani support group in South Africa, where an effort to empower victims around the TRC process turned into a social movement with goals that demand social transformation (Madlingozi, 2010). This demonstrates that when victims of conflict represent themselves the agenda that emerges is qualitatively different from what has become the 'transitional justice agenda'. Khulumani's initial interaction with victims is on the basis of *needs* (ibid: 8) and this has driven its work to move beyond a narrow focus on violations of the conflict to broader issues of social justice, with an emphasis on empowerment and 'active citizenship'. The philosophy of Khulumani is that of "refusing representation" (ibid: 14), rejecting how experts and others see victims and their needs, and how they ultimately produce victims, in favour of victim agency. Whilst Khulumani, as a product of its time and place, cannot be a model for victims everywhere, it does demonstrate how victim mobilisation can challenge what have become conventional

ways of 'doing' transitional justice and of speaking for victims. The challenges of mobilisation are discussed further in Section 10.3.1.

## **10.2 Needs and rights, the local and the global**

The needs prioritised by the respondents of this study in both contexts fail to resonate with the preoccupations of rights activists. Victims are constructed as subjects of rights talk in ways that serve to almost entirely deny the subjectivity that victims construct of themselves. While victims are members of families and communities, with a range of social and spiritual connections to the Missing and significant resources at their disposal, rights discourse constructs the families of the Missing as atomised individuals passively waiting for justice to be done and truth revealed, in remote institutions in the capital. Within their communities relatives of the Missing have a complex set of identities of which 'victim' is only one, navigating constantly between agency and a passivity often prescribed by their social position. This lack of victim agency emerged from their ongoing marginalisation, both as victims of conflict and as members of ethnic, caste and gender groups that have long been disempowered. Marginalisation was in turn reinforced by elite led human rights engagements with their issues, in which transitional justice discourse does not see families' homes and villages as sites for the assertion of rights, but rather that human rights after conflict are instantiated exclusively in elite spaces on the terms of those familiar with its language. There is no human rights in the vernacular (Merry, 2006) in such communities, where the impacts of violations are expressed as needs.

The data suggest several motivations for ensuring that needs, defined by victims themselves from within their culture and context and therefore necessarily local and particular, are a part of approaches to address legacies of violence. One is to ensure that the range of needs articulated by victims that go beyond rights are considered valid claims of transition; the second is to challenge narrow rights agendas, emerging from elites and rooted in current global practice, that prioritise civil and political rights over and above the priorities (such as the social and economic) of those most impacted by violations; third, the agency of victims in any process can best be ensured by using the language and concepts that victims themselves use: for victims to be mobilised to be actors in transition, their own agendas must be privileged.

Families of the Missing articulated a range of needs, dominated by social and economic challenges, the need for an answer concerning the fate of the Missing, and access to their remains; issues of memory, emotion, and the spiritual were hugely important to many. Whilst some of these demands can be framed in terms of rights claims, many do not fit the expectations of what transitional justice attempts to deliver. Where rights talk was used with reference to the families of the Missing it was seen that civil and political rights dominated discussion of both rights activists and decision makers, in contrast to victims' priorities. Rooting approaches in victims' needs rather than in the rights discourse can most readily challenge such narrow agendas and the leading role that experts play, and reveal the gap between a liberal rights-based approach and what victims seek. The range of needs articulated by families in Nepal and Timor-Leste resonated with theories of need in which *intermediate needs*, for food, shelter, identity, recognition and autonomy, are recognisably universal, but which are expressed through *satisfiers* that are highly contingent (see Section 2.2.4). Whilst there is potential for a bottom-up universalism to be constructed around intermediate needs, the way in which these are addressed in any particular context must be highly local: this is demonstrated in the data where local social and spiritual demands are key for many. The addressing of such needs challenges a discourse dependent exclusively upon rights and demand an emphasis on the local, rather than a universalising globalism.

An example of impacts of violations that occur in the *social spaces* of family and community can be seen by considering the wives of the Missing in Nepal. Structural violence against women is exacerbated as a direct result of violations committed against a man through whom a woman's relationships to both family and community are defined. Gender is always enmeshed in a nexus of discursive practices, including the legal, political and social. Transitional justice, with its roots in rights and law, has always preferentially sought to address the legal while acknowledging the political discourse around its practice. The social remains however an area where transitional justice appears to fear to tread; a peculiarity that resonates with feminist discourse that has long seen the distinction between the public and the private as serving to depoliticise the domestic space (Giles and Hyndman, 2004). Prioritising needs alongside rights as a driver of action to address the impact of violations highlights the failures of a rights discourse largely blind to such power relations.

The most fundamental criticism of a needs approach is that, in contrast to rights, needs have no explicit philosophical foundation through which to prioritise agency.

These data challenge this understanding: human rights as practised in the contexts studied here appear to sustain as much as challenge power, and whilst using the language of agency actually deny it to many victims. The existence of rights as a technical vocabulary, inaccessible to most, allows it to be used by a narrow class of practitioners to further marginalise the excluded. Social stratification and exclusion will always be factors in marginalising the agendas of the disempowered, this is not a unique result of the use of the rights discourse. However, the power relations that drive such processes can be made more visible when needs are the lens used, enabling those who claim to seek to represent victims to more readily see the gap that exists between the promise of current practice after conflict and victims' goals of transition. Taking needs as the focus of victim demands can thus both broaden the range of issues that post-conflict processes address, and serve as a tool to make visible the lack of agency that victims have. The data of this study suggest that challenging processes that serve the agendas of elites is crucial to realising victim-centred approaches, and empowering the language that most victims used, that of needs, is one step in doing this, accompanied by mobilisation that enables victims to articulate their agendas (Section 10.3).

This study suggests that for responses to political violence to be relevant and emancipatory for its victims they cannot be universal. Grounding such approaches in local needs demands that global ideologies, including that of a hegemonic and externally derived liberal democracy, must be discarded. The human rights discourse can remain a powerful tool for improving the concrete lives of victims and others, but must not become a constraint used to deny victims agency by shrinking the vision of what responses to violence can include. The understanding that the needs of victims are necessarily contingent upon their context and circumstance, that they are local and particular (Section 2.2.4), leads to the subordination of the universal to the local intrinsic to the victim-centred approach.

### **10.3 Conceptualising victim-centred process**

Victim-centred transitional justice has been referenced by a number of processes, most notably the South African TRC (Republic of South Africa, 2003), but has never been well conceptualised (Section 3.2). One important distinction that emerges from this study is that between a process that understands victim-centred as simply involving the victim in a procedural sense and that which delivers agency, where the victim has a role in *driving* a process. Whilst Timor-Leste's truth commission claimed to be "victim-centred" (CAVR,

2005: Part 10: 18), this meant only that victims had a central role to play in the performative component of that process (Section 8.2), but no role in determining what process took place or what its goals were. This understanding of 'victim-centred' thus encompasses the instrumentalisation of victims, whilst continuing to deny them any agency in the process itself. One can consider the 'typologies of participation' (Arnstein, 1969; or, with an explicit Nepali focus, Lawoti, 2009) of victims in transitional justice processes and see that almost all those examined here constitute modes of inclusion of victims that can best be defined as either instrumental or nominal. The term *victim-centred* here is used to define transitional justice processes that are at least consultative, in that they represent a response arising from an effort to understand victims' views, but at best are participatory and transformative. This section concretises what a victim-centred process would look like and how it could be created. It begins with a discussion of how needs of victims and their communities can become the basis for such process, and then discusses victim mobilisation as its key driver. It engages with the issue of how victim priorities can be balanced against the broader societal aims of transitional justice process and concludes with the implications of such process for governance and legitimacy after conflict, through an engagement with the concept of recovery.

The data of this study imply that prescriptive and mimetic approaches to transition be jettisoned in favour of those that are context specific, participatory and bottom-up: what Lederach (2002) has called 'elicitive'. This challenges the model of transitional justice as implemented largely by national or supra-national institutions, proposing a process that evolves from the grassroots and is as likely to operate in local spaces where victims live as in state institutions in the capital. The political project in which such approaches are embedded should change from being primarily restitutive to being perceived as part of a broader movement of social change that is politically transformative and empowering for the marginalised. Such approaches challenge the nature of broader discourses such as peacebuilding, seeking to move beyond a peace that emerges fully formed 'from above' with an everyday peace that is constituted in and of the lives of ordinary people.

### **10.3.1 Victim agency: empowerment and mobilisation**

Perhaps the greatest impression that emerges from an engagement with the data of this study is that of a set of victims who feel powerless to affect their own destinies; this lack of mastery over their own lives as well as over the life, death and remains of missing

relatives was a source of significant emotional and psychological distress (Section 9.2). Here the issue of victim agency in transitional justice process will be discussed and proposals made for enabling such agency in the context of a victim-centred approach, through victim mobilisation.

Agency can counter the dehumanisation of political violence which serves to emphasise the powerlessness of victims. Here, the enabling of victims as agents will be considered a prerequisite to a victim-centred approach, in contrast to top-down approaches that are imposed on victims and emphasise their disempowerment. This challenges the idea of a dichotomy between victim and agent,<sup>54</sup> by proposing that mobilisation around the concept of victim can both provide support to victims and enable positive change in their lives. Whilst the concept of agency is at the heart of Western notions of liberalism, including that of rights, the victims met in this study construct themselves very often in a pre-modern, collective and spiritual way that can potentially deny the individual agency (and indeed the individual rights) of the modern subject. Here, it is assumed that recognising local agency demands that this be respected, seeing agency as self-determination, in contrast to the rights discourse that perceives this solely as a lack of consciousness to be remedied. In the traditional societies of Nepal and Timor-Leste the individual subject constructed by human rights is at odds with identities that are far more complex and through which a violation is experienced at a social level. The identities revealed in the data of this study show that victimisation and agency are not extremes in opposition (Schneider, 1993), but lived realities of everyday life.

Just as becoming a victim of conflict adds to the complexity of socially constructed identity, so mobilisation must be around the totality of a victim's experience. Mobilisation of women for example cannot be exclusively around the issue of missing husbands, but must also include issues of domestic hierarchy which are an integral part of their experience of victimisation, magnified by the loss of husbands (Section 6.2.3). Such mobilisation necessarily challenges the narrower interpretations of the role of transitional justice that are integral to liberal understandings of transition and articulated by the rights discourse. Richmond writes of ensuring "contextual legitimacy" in such a situation: "Here the task of politics is to uncover local, everyday agencies, and to make

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<sup>54</sup> This is reinforced by the effort to rename victims 'survivors', which serves to confirm 'victim' as a negative identity (see Section 2.3) rather than seek to make it a positive and enabling one.

each capable of translating, engaging, recognising, assisting and negotiating, without reverting to older colonial and racist patterns of understanding.” (2010: 18) This reveals the challenge of mobilisation of the most disempowered: to find ways in which those with access to resources, both intellectual and otherwise, can support such empowerment without imposing external agendas.

Legalist approaches put the perpetrator and the violation at the centre of transitional justice process and see victims as passive, which “replicates the former subordination of the victims of past abuse by rendering them the passive recipients of government actions that they have little or no control over.” (Waterhouse, 2007: 3) A victim-centred approach counters their exclusion and serves to challenge the devaluing of victims that is an aim of political violence through a process of empowerment within both their communities and the broader nation. The victim’s experience is one of marginality: derived from exclusion and inequality in many cases and only amplified by the experience of conflict. Mobilisation is then the first step in the “retrieval of voice” (Das and Kleinman, 2000: 20). The identity of ‘victim’ is a social construct (Rombouts, 2000-2003) and that is why a victims’ group serves to validate experience, by sanctioning it on victims’ terms. Such a group can then serve to construct a victim identity acceptable in broader social worlds, such as the community and the nation.

It was only when we met other families of those disappeared, we felt that we had common problems; we knew that we had the same pain. For this reason, we could share our sorrows. We wept and cried together and that helped us ventilate our sorrows. Then we formed this association. It helped us to meet friends having similar problems. Then we organised the sit-ins. As many friends gathered we felt greatly relieved. From that time onward, we felt courageous to fight for our cause. (Wife of missing man, Kathmandu)

The empowerment of solidarity and collective action can transform experiences of victimhood, and help victims to “reinhabit the world” (Das, 2000: 223). Even where it leads to no action from the authorities, mobilisation allows victims to meet others in the same position and to construct the meaning and identities that permit them to cope (Section 9.2), aiding recovery and addressing social impacts of violence in families and communities, even without the engagement of the state. Such local agency can also serve to drive the creation of processes that directly address the needs of families at the local level. The data show victims’ groups allowing victims to move from passive isolation

to active engagement, and from there to concrete action that can influence the authorities: an example of 'active coping' (Colic-Peisker and Tilbury, 2003; Section 9.2). It is crucial to differentiate such mobilisation from civil society, an "often liberally projected artifice" (Richmond: 2010: 667), that in both Nepal and Timor-Leste represented not victims, but a discourse largely alien to them.

Seeing self-organised victims' groups as the route to representation in a transitional justice process redefines the meaning of *participation*. Rather than victims joining a process or mechanism created by Government or NGOs, victims themselves create the most decentralised units of the transitional justice process; such victims' groups initiate processes to address the impacts of victimhood in their communities as well as advocating for the required central mechanisms. Victims' groups can act to democratise the creation of transitional justice mechanisms, serving as drivers of a bottom up process, in principle with few limits to the degree of participation. The role of civil society in such a victim-centred process is then to encourage and support the creation of grassroots associations and reflect the agendas that emerge, rather than themselves seeking to represent victims. The agendas that victims articulate, as has been shown here, encompass issues of exclusion, social injustice and development, and their organisations will reflect this; ultimately such groups may aim to become national social movements with political goals. The Khulumani group has demonstrated what is possible, but in societies such as Nepal and Timor-Leste, whilst the challenges to such mobilisation remain great, such organisations have even greater promise precisely because these societies are characterised by social exclusion and lack of a route between rural people and governance. The evidence of this study in Nepal is that with adequate support, such mobilisation is feasible.

Participation on victims' terms is seen here as both a means and an end in transition: mobilisation can impact on the creation of institutional transitional justice mechanisms, but in victims' communities can itself begin to address victims' needs (Section 10.3.1). Victims' groups can themselves constitute a mechanism with effective access to affected communities at a fraction of the cost of central institutions. Participation in development has been widely critiqued (e.g. Cooke and Kothari, 2001), largely around issues between the NGOs driving participatory approaches and the 'participants' themselves, and a lack of understanding of the importance of power relations within communities. The conclusions of this research echo such critiques in that NGOs are themselves part of a hierarchy that fails to advocate for victims' agendas

(Section 9.1). True participation demands not that 'participants' take part in realising the agendas of others, but that agendas are themselves determined by those being empowered. Such a modality threatens the power not only of political elites but of NGO and human rights elites, whose ownership of transitional justice discourses and the resources it brings both drives and justifies paternalistic approaches. Mobilisation of victims to impact on transitional justice processes can learn from discussion around rights-based approaches (RBAs) in development and elsewhere (see Section 2.2.3), which can challenge such paternalism. RBAs have been accused of being co-opted by elites prioritising formal and often legal avenues, failing to acknowledge the informal strategies many of the disempowered adopt (Cornwall and Nyamu-Nusembi, 2004). These data make clear that to both address the psychosocial needs of victims and to ensure that agendas articulated represent those of victims, mobilisation has to challenge such formulaic participative approaches and ensure the genuine agency of victims.

The challenges of representation are core to a victim-centred process, both in the sense of 'speaking for' victims and of 're-presenting' their stories and needs (Madlingozi, 2010). The assumption here is that victims represent themselves; that victims self-organise and choose their own representatives from amongst themselves, as in the victims' associations in both Nepal and Timor-Leste. There remains a limit to representativeness that is clear in the data, in the sense that leaders will reflect hierarchies of gender, ethnicity and power, but even where leaders are predominantly male, or of a higher educational level than the typical victim, they are *of* the community, both that of victims and those in which victims live. It has been observed in some Asian contexts that within such highly collective societies, there is widespread acceptance of the power and status of key decision makers (Hailey, 2001); indeed this was seen in Family Associations in Nepal, where CVC in Bardiya for example was led by a local schoolmaster. Such societies depend on networks of highly personal relationships (ibid), suggesting that the informal connections that are prioritised in the communities met here, potentially with a traditionally higher status individual leading such associations, may be a better way to construct empowering structures than a formal NGO - community relationship. This emphasises that the individualistic understanding of participation in development orthodoxy is very different from the more collectivist approaches seen in these two Asian contexts.

A greater threat to representation is the fragmentation of the victim community, most notably according to the divisions of the conflict, but also potentially along longer

standing fault lines. The politics of transition necessarily leads to partisan positioning over which mechanisms to create and which issues to prioritise, with truth and justice seen as tools that, as servants of memory, advance particular political positions. It has been seen in the data of this study however that at the grassroots, in the villages of Nepal and Timor where victims of all sides live alongside each other, solidarity on the basis of victimhood can be, and usually is, stronger than many partisan divisions. The evidence of these data is that it is precisely the influence over victims of political actors at regional and national levels that is largely responsible for polarisation; this can best be countered by the grassroots empowerment of a victim-centred approach. This is in contrast to centralised approaches to transitional justice that most effectively empower political actors in the capital with the greatest interest in seeing such processes fail. Victim-centred process can thus serve to depoliticise transitional justice process in the partisan sense, whilst repoliticising it in that issues of social justice and marginalisation are integrated into it.

### ***Integrating the everyday into transitional justice: Examples from Nepal and Timor-Leste***

An additional implication of empowerment is that processes can occur in communities to address the many impacts that occur there, using local resources that are often of greater relevance to victims than centralised state-led processes. These aim not to expand the holism of transitional justice to address every post-conflict issue (the transitional justice demand to 'design interventions' must be resisted), but to create space in communities such that local process can emerge there: the role of the central authorities is not to create such process, but to empower communities to be able to. Whilst tradition has been most used in transitional justice processes in a judicial role (e.g. Waldorf, 2006; Huyse and Salter, 2008), data from both Nepal and Timor-Leste suggest the positive role that traditional structures can play, even where perpetrators are absent.

In Bardiya, Nepal, the *badghar*, the traditional elected headman in Tharu communities (Bellamy, 2009), were arbitrating the separation of women from families from which their husbands are missing, and negotiating the division of property. The Bardiya association of families of the Missing, CVC, had advocated on behalf of such women and supported such process. CVC had also created a local truth-telling process, by initiating what they called 'social harmony discussions' at the village level. These were seen to permit an understanding of the impact on the most vulnerable, notably women, in

ways that allow communities to collectively address issues of stigma and marginalisation, as well as constructing the shared meanings and identities that this study suggests best address the impacts of ambiguous loss in a highly collective society, serving as both reconciliatory sharing and collective counselling. Supporting such truth-telling with the resources available to a national transitional justice mechanism would permit the documentation of histories of violations in a participatory way, serving to drive national truth-telling and reconciliation practice from the local level, inverting current top-down approaches.

In Timor-Leste an informal proposal has been made to address serious crimes, such as disappearance, through a process analogous to the Community Reconciliation Programme (CRP, Section 4.3.3).<sup>55</sup> Such a process would be rooted in the community, be led by local traditional leaders and would demand truth-telling at a local level. The emergence of such truths could potentially address many of the needs of families of the Missing, allowing for information about the location of remains to emerge in Timorese perpetrated cases as well as in the many cases where local people assisted Indonesian crimes. Whilst such truth is already emerging informally in some cases, within an explicit framework of reconciliation and with the support of the authorities, such a process can address a range of needs of victims and communities.

Whilst customary healing processes appear to be the most useful and relevant to victims of conflict in traditional societies, they have rarely been used as part of transitional justice processes. This in itself reflects a Western perspective, since in Timorese culture, as many other traditions, the sacred and the secular are inextricably linked: custom encompasses both, and traditional law and governance gain their authority from relations with ancestors (Hohe and Nixon, 2003). In both Nepal and Timor-Leste traditional healers are providing support to families in terms of addressing health needs and psycho-spiritually. One demand of Tharu community leaders was that a reparative process should attempt to both strengthen and legitimate tradition. This could be done by integrating the badghar into local government structures, both in terms of governance and as the lowest rung of the justice system, and by ensuring that traditional healers (the *guruwa* in Tharu communities) who constitute the principal health system for many could be supported as the lowest level of a health system that currently struggles to reach most. In addition to delivery health services such approaches would also serve

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<sup>55</sup> Pat Walsh, Private communication.

to represent recognition for the indigenous community and underwrite the social and cultural rights that have long been denied indigenous people in Nepal, acting as a valuable part of collective reparation.

These examples demonstrate ways in which *local* structures and understandings can be engaged to support local process that doesn't challenge central mechanisms but informs and potentially drives them. All are inconceivable as part of the top-down processes that currently characterise transitional justice process, but represent the most natural approaches for the families of the Missing and their communities in the contexts studied. One dilemma in seeking to work with traditional structures in an emancipatory approach is the conflict between structures that are male and (locally) elite, and an agenda that seeks to be representative and transformative. All the structures discussed here, the badghar and guruwa in Bardiya, the lia nain (Sections 4.3.2 and 9.3) in Timor, and many (but not all) the leaders of the family associations, are men; many are older and linked to hierarchies of family, wealth or status. A risk of working through such structures is that this does not challenge existing power relations in a community, but reinforces them (Merry, 1992). A compromise must be found between the "tendency to idealize local spaces" (Khadiagala, 2001: 58) and processes that have the greatest emancipatory potential. Resolving such dilemmas must be done at a local level, case by case, and ideally by those most concerned with them. Mobilisation of victims, where this includes the most marginalised, represents one of the few routes to empowerment of women and others seeking to both work with and challenge traditional hierarchies, and to negotiate solutions that can find a path through such apparent contradictions.

### **10.3.2 Victims needs and societal priorities in transition**

This study proceeds from the understanding, common to all peacebuilding approaches and underpinning transitional justice, that the goal for societies emerging from violence is to resolve conflict and create sustainable peace. More than this, it contends that addressing the needs of victims of conflict is an important component of this process, and this drives the victim-centred approach. This section will attempt to understand what the data communicates about the broader benefits to societies emerging from conflict of an approach steered by the addressing of victim needs and concerning potential conflicts between victims' needs and broader societal goals. The victim-centred approach acts as a lens to look at a cross-section of the most vulnerable in a society, as a result of the fact that victims are ordinary people who face the same challenges as most, albeit

heightened by victimhood. Such an approach therefore serves as a way to interrogate the needs of the population at large, serving as an intrinsically 'bottom-up' view of a post-conflict society. This contrasts the individual focus of the rights discourse with needs that are collective and shared widely beyond direct victims. This has significant implications for concepts of the legitimacy of post-conflict governance, and these are discussed in Section 10.3.3.

The evidence of this study is that contemporary transitional justice process is driven by a small minority in most contexts, whose interests diverge from those of the majority. These 'national processes' are in fact often far from representing societal priorities, but serve to advance elite interests and legitimate new regimes. The greatest value of a victim-centred approach is that it can challenge the priorities of such a process with the views of those most impacted by conflict. Since much contemporary conflict targets marginalised communities and individuals, a victim-centred process highlights the addressing of the needs of the most vulnerable, whoever they are. In both Nepal and Timor-Leste large fractions of the population were impacted by the conflict, with few untouched by it. Nevertheless, even where the victim constituency is small, a victim-centred perspective creates an approach to post-conflict societies that emphasises the addressing of disempowerment and it is precisely this which permits a transformative agenda to emerge. Whilst acts of violence are emphasised by transitional justice process, it is an argument of this thesis that structural violence and issues of social injustice must also be brought within the remit of efforts to address legacies of violence. As such, issues of marginalisation, gender and poverty will ensure that issues facing a broad mass of the disempowered propel the post-conflict agenda: the aim is not that transitional justice will expand to address all such issues, but that a victim-centred approach can coincide with and drive a broader progressive politics. Additionally, many of the reparative demands of victims serve to link the addressing of the range of individual and collective needs arising from violence with norm-setting processes in society (Section 3.1), something necessary for societies to come to terms with their past if they are to succeed in inclusive peacebuilding (Section 8.4). Whilst a broad reparations process could face resistance in a poor state, the linking of such process to structural violence, communal reparations and development (Section 8.4) can be aligned with agendas that enjoy a wide consensus of both political and public support.

In both Nepal and Timor-Leste the transitional justice debate has been characterised by a sterile stand-off typical of many transitional contexts between rights

activists advocating for prosecutions and authorities linked to perpetrators who seek to avoid any retributive process. The data suggest that the preoccupation of rights activists with prosecutorial justice as a prerequisite for sustainable peace is normatively driven and has little empirical basis in the expression of the priorities of victims and implications for governance.<sup>56</sup> Victims generally do not share one of the founding assumptions of transitional justice that retribution and an end to impunity are central to ending cycles of violence: for victims in Nepal and Timor-Leste the law is remote, inaccessible and often perceived as something used against them (Sections 6.2.5 and 7.3.1). This finding counters perhaps the greatest potential drawback of a victim-centred process, that it will be held hostage to victim insistence on prosecutions independent of the political environment, or to agendas that represent one party to the conflict. The evidence of this study is that victims perceive economic issues and acknowledgement as most driving their acceptance, or rejection, of post-conflict dispensations. Where victims saw prosecutions as important they sought a process that was accessible and local, exactly the opposite of the remote tribunals that the internationalisation of post-conflict justice has created.

This finding leads the victim-centred approach to point to a potential resolution of the conflicting demands of victims and the rights discourse. The concept of *sequencing*, which was central to early transitional justice practice when faced with political obstacles to prosecutions, is largely absent from current practice, as a new absolutism has seen accountability emerge as the key non-negotiable rights-based demand of transition. In asserting the predominance of a need for retribution and ignoring the politics that necessarily envelops all transitions (McGrattan, 2009), such absolutism almost necessarily results in an abandonment or suspension of transitional process (as seen in Nepal), since those in power are threatened by such an approach. Rigby (2001) has suggested that such sequencing should prioritise the 'securing of peace', through an imperfect process, and only once this is done move forward with issues of truth, justice and acknowledgement. The victim-centred approach permits such sequencing to be driven by victim priorities: where victims do not see retributive justice as a priority there may well be no internal constituency to drive prosecutions and no compelling reason to prioritise them. Challenging such legalistic approaches can then serve to ensure that

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<sup>56</sup> Care should be taken in generalising this finding to other contexts, since it appears this is a consequence of both disempowerment and overwhelming basic needs; whilst likely to be replicated in many low income states, the extent to which other factors play a role is unclear.

concrete domestic agendas drive the creation of transitional justice mechanisms, creating process that serves both a sustainable peace and the needs of victims, and questioning the aligning of victim agendas with a largely prosecutorial approach. This then allows victim needs, notably for economic support and recognition, to be met in the short term, while postponing issues such as prosecutions that may be politically problematic.

### **10.3.3 Navigating justice and recovery: implications of a victim-centred approach for governance and legitimacy**

A victim-centred approach to addressing the impact of political violence has implications for actors on the national stage and beyond, and for the understanding of governance and legitimacy in states emerging from conflict. Victims articulate a demand for *recovery* both individually and collectively. One element of this is restitutive, permitting a return to normality and the everyday, to the situation that preceded violence:

Everything would be different and easier in our life if my sons were here today. We wouldn't be lacking anything in this house. I don't want anything else if they will return my sons. (Mother of missing men, Bardiya, Nepal.)

Another element looks forward, providing hope of a future better than the past; a third seeks the addressing of issues of both individual and collective memory. This section will attempt to summarise how the range of disciplines that seek to address the consequences of conflict and violence can best be harnessed to meet victim needs.

Typically, understandings of post-conflict recovery include reactivating social and economic development, as well as the addressing of vulnerabilities and a corrective dimension to righting wrongs (Barakat, 2005). In this latter aim recovery overlaps with understandings of transitional justice, but acknowledges that much of the impact of conflict is on the individuals and communities who were most exposed to it, and that this has legacies that can lead to renewed conflict: "Post-war reconstruction begins in the hearts and minds of those who suffer the horrors of war and want to change societies so there is no return to mass violence." (ibid: 1) One way of bridging the perceived gap between the justice of transitional justice and broader recovery is to understand what victims mean by justice. Where the rights discourse prioritises processes centred on recognition, notably of victims and perpetrators, victims in the low income states studied also seek distributive justice, perceiving justice as *social* justice, including elements

related to class, gender, caste, ethnicity and livelihood, as well as linked to recognition and public memory. In practice the range of needs expressed by victims shows that neither transitional justice nor post-war recovery can alone address all their needs. The lack of interchange between the discourses of justice and recovery has led to an artificial compartmentalisation, where respective experts are reluctant to acknowledge repercussions of efforts to deliver one on the other. An example in Nepal is the refusal of rights agencies to concern themselves with the livelihood of victims, despite engaging them in ways that impinge on it. Conversely, in Timor the institution building and economic development driven by post-war recovery neglected issues of recognition and memory that are considered the remit of a transitional justice approach.

It is the experience of this study that compartmentalising justice and recovery is an artificial division of issues that necessarily overflow such efforts to contain them. The creation of disciplines and areas of expertise imposes these divisions on societies and on efforts to address the impacts of conflict, rather than permitting inclusive processes to emerge from the context. Responses in Timor-Leste have reflected such approaches, with little connection between internationally sponsored efforts at institution building, the addressing of legacies of violence and the needs of ordinary victims (Cohen, 2006; Kent, 2008). Victims do not compartmentalise their social, economic and legal demands; whilst they express priorities, they seek an addressing of all their needs and see them as linked; this study shows how such needs are in practice always interconnected. Only a holistic approach that spans both transitional justice and recovery, and that is firmly situated in the context in which victims live, will resonate with their concerns. Efforts to separate issues of law and truth from the social and economic represent an attempt to impose an external and artificial division onto the social worlds of victims and act to reduce the effectiveness of interventions. The victim-centred approach advocated here challenges this paradigm by allowing the victims' worldview to drive action.

The data can be used to draw conclusions concerning the impact on governance of issues raised by families of the Missing from the two studied contexts. Whilst issues of legitimacy are typically understood by examining governance structures in the light of global benchmarks, here legitimacy is approached as the collectively constructed perception of the state *of the governed*. The victim-centred approach allows the most crucial component of legitimacy, the consent of the population, to be explicitly probed. These empirical studies confirm that a state's ability to deliver certain services to families and communities drive local concerns above the existence of state institutions or the rule

of law. This echoes concepts of *performance legitimacy* (Francois and Sud, 2006) that construct perceptions of authority in terms of the perceived effectiveness of the state in addressing needs. For victims in the two states studied those needs considered most important are basic needs, such as can best be satisfied through adequate livelihood and an addressing of the impacts of conflict which, for the families studied here, are dominated by the need for an end to ambiguity about the fate of missing relatives.

In Timor-Leste the greatest implication for the state of a transitional justice process that has failed victims is their alienation from those who govern them. The Timorese leadership's emphasis on the charismatic authority of a few individuals for legitimacy fails as a strategy when these figures are themselves perceived as a source of betrayal by victims of the conflict. The lack of victim participation or voice in either the transitional justice process or the broader political sphere apparent from the data confirms perceptions that commitments to inclusivity are tokenistic. In Nepal the conflict was driven by a crisis of legitimacy that emerged from the absence of the state in rural parts of the country and a remote Government perceived as unrepresentative. The ethnic and caste issues that drove the conflict impact legitimacy, with victims perceiving that such social identities drove exclusion that has been deepened by victimisation. Victims of the state in particular link attitudes to Government, even that led by the Maoist party, to the addressing of the impact of violations:

Although there are many problems to be solved, the Government should first of all solve the problems of the family members of martyrs as they have sacrificed their lives for this change and if the Government will not address these problems at the proper time, the country may go back towards the previous stage of civil war. (Son of missing man, Siraha, Nepal.)

Transitional justice advocates typically claim that that a lack of accountability reduces the legitimacy of the state, but in both contexts this study finds that economic and social issues are far more important contributors. Fairness is seen as doing right by victims in a *reparative* way through expanding participation and inclusiveness and reducing inequality: where this fails to happen, the authorities are held responsible and legitimacy is threatened. This emphasises the importance of grassroots approaches:

Legitimacy [...] includes a relatively simple process of "meeting people where they are" and fulfilling their needs and expectations rather than prioritising

external agendas associated with state-centric approaches to good governance. (Barakat, Evans and Zyck, 2010: 1)

This study reveals the challenges to legitimacy where this is not done and suggests that efforts to address the impact of conflict require governance that gives voice and agency to those most impacted by it. A victim-centred approach can deliver this.

These data indicate that opposition, armed and otherwise, is bolstered by resentment of the post-conflict leadership, demonstrating a direct link between a failure to address victim needs and insecurity. In Timor, families linked the impression of neglect generally with the specific issue of the Missing, perceiving that their loved ones had been ‘forgotten’ by their rulers. Whilst the missing issue is far from the sole driver of such resentment, the issue crystallises the grievances of many in Timor-Leste, combining as it does issues of conflict, poverty and the spirits. In Nepal, the state continues to face many armed threats, largely from ethnically motivated groups in the Terai and elsewhere. Families of the Missing in Nepal, largely close to the CPN-M, saw the missing issue as one that could bring them into conflict with both the authorities and what they have traditionally seen as ‘their’ party,<sup>57</sup> with a significant minority threatening to take up arms: “If the government of this twenty first century does not understand our problem, the counter-revolution will take place.” (Brother of Missing man, Gorkha) A clear message from the data is that victims’ families in both contexts question the legitimacy and effectiveness of the authorities as a result of needs not being addressed, in ways that have implications for security, notably through their potential participation in violence against the state.

#### **10.4 A programme for future research**

This study has examined the addressing of the issue of missing persons in conflict and of transitional justice more generally from a perspective, that of victims’ needs, that remains underexplored. In so doing it has demonstrated that non-elite perspectives can radically alter approaches to addressing the impact of violations of human rights. Here, the potential for such an approach to be extended is examined, in terms of both deepening understandings of the impact of disappearance and of constructing a transitional justice from below. Implicit in this is that such approaches must transcend

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<sup>57</sup> The Nepal fieldwork was undertaken at a time when the Maoists led the Government,

disciplinary boundaries and be driven by the needs of individuals and societies, rather than by definitions that reinforce boundaries in both the academy and praxis.

The lack of empirical approaches in transitional justice is a critique from which much of the value of this study derives. The optimal approach to seeking an evidence based transitional justice is through longitudinal methods that permit the understanding of the impact of transitional justice mechanisms on a context as they unfold. A victim-centred approach would then use a particular victim population and seek to understand their evolving attitudes towards unfolding process. For example, the families of the Missing studied here could be met repeatedly over the coming decade to determine if and how any process that emerges impacts upon their needs: the Nepal data lays a foundation for such future studies. Similarly, should a reparations process be initiated in Timor-Leste its impact on the needs of families met here can be investigated. Such diachronic research permits empirical work that is independent of many of the biases and uncertainties that arise when comparing two different contexts.

Methodology has been seen as a crucial driver of the research perspective here, steered by an effort to be participatory and empowering. There are however limitations to the depth of this approach possible in the studies described here, and clear routes to increasing the role and agency of victims in such studies. The optimal methodology would perhaps be one where families, led by the most vulnerable such as women, would conduct the research themselves, with only minimal support from an 'expert' outsider. This would then constitute a maximally emancipatory approach that would lead naturally to participatory interventions driven by the most disempowered. The challenges of such a modality, however, are significant: such Participatory Action Research demands the investment of significant resources in terms of training and technical support, and the very fact of spending money on such research, rather than assisting the most vulnerable, raises ethical issues. An approach that combines both the research demands and the empowerment agenda would be to embed any future study in a mobilisation process, such that the research could itself be an investigation of mobilisation processes. This is consistent with the conclusion of this thesis (Section 10.2) that victim mobilisation is the principal route to empowerment. Such a study could build on preliminary efforts in Nepal to create an independent national association of families of the Missing and serve to both support that process and learn lessons that could be applied in other contexts where marginal communities are seeking to mobilise and advocate for their rights. Such a study would necessarily engage with the significant literature on social movements, and

constitute a test of the extent to which the victim-centred approach to transitional justice is feasible.

This study is one of few to explicitly use the model of ambiguous loss to understand the impact of conflict related disappearance on families, and novel in applying ambiguous loss in a non-Western cultural context. Ensuring that interventions encompass the psychosocial can increase the possibility that they address the full range of needs of families of the Missing. The Nepal research has prompted an intervention on exactly this basis and the most obvious next step in terms of optimising practice is to evaluate the impact of the ICRC intervention in Nepal, using both the qualitative methods of this thesis and quantitative psychological methods. Given this first understanding of ambiguous loss in two Asian contexts, it would now be interesting to attempt to ask a similar research question in other cultures, to both attempt to confirm the universal relevance of the model and to understand better its cultural dependence. The natural extension is to make studies of families of the Missing in other non-Western contexts, where family structure, religion and culture are radically different from the two contexts studied here. This would permit an understanding of those elements of human response to disappearance that are culturally dependent and any which appear universal.

The broader peacebuilding agenda is explicitly addressed in this thesis as something that efforts to address legacies of political violence cannot ignore. It is hoped that this study represents an attempt to fuse empirical social science approaches with critiques of liberal peacebuilding that typically use analytic tools that derive from international relations perspectives. There is a huge potential for exploring such empirical approaches 'from below' to complement the large body of existing work on emancipatory peacebuilding that whilst emphasising the importance of 'the everyday' (Roberts, 2011) largely fails to engage with actual instances of it.

## **10.5 Conclusions**

This study has attempted to reach a broad and deep understanding of the needs of families of the Missing in Nepal and Timor-Leste with the aim of evaluating the actual and potential impact of transitional justice process on those needs. Whilst there has been a focus on the violation of disappearance, which creates very particular needs, conclusions have also been drawn for the broader impact of such process on victims of conflict and political violence. This thesis positions itself as an empirical counter to the

largely normative literature on transitional justice, seeking to play a role in the creation of an evidence base on which such process can be steered.

A relative missing in conflict has a range of impacts on individuals, families and communities that are social, emotional, psychological and economic in nature. Disappearance is seen to be situated in contexts where it represents the extension of existing disempowerment, constituting a special case of the liminality with which such marginalised people live. The Missing occupy a space of absent presence, both unforgettable and unmournable: the emotional, social and psychosocial impacts appear to be well described by the model of ambiguous loss, which provides a set of guidelines that can be operationalised according to culture and context. Whilst families seek an answer about the fate of the Missing that can only be delivered by investigation and exhumation, the many denied such process must be supported to live with ambiguity. The insistence of the Missing, for both their families and their societies, puts issues of memory at the heart of efforts to address the issue, and this permits the framing of efforts at recognition, acknowledgement and reparation around concepts of collective and political memory that can give value to victims and their families.

Victims have not been well served by transitional justice process which is elite driven and prescriptive, institutional and remote from victims' everyday lives. Families in both Nepal and Timor-Leste expressed the needs with which they are confronted daily, that are a product of their local and particular circumstances, not least their poverty and disempowerment, derived from traditional spiritual beliefs and from social hierarchies in family and community. Transitional justice processes are driven by a global rights discourse that is abstracted from this social context and whose universalism necessarily reduces its relevance to the everyday lives of those most impacted by violations. The mechanisms of transitional justice that have become a part of global practice, exemplified by trials and truth commissions, have had little impact on the victims met in Timor-Leste, despite the transitional justice process being considered largely complete. The single mechanism which had most impact on the families of the Missing was the valorisation scheme in which medals and pensions were awarded to those who had died as part of the resistance to the Indonesian occupation, demonstrating the value of both acknowledgement and economic support to victims in low income states.

This study proposes that a *victim-centred* approach be adopted towards transitional justice, such that victims' needs can be placed at the heart of processes to

address legacies of violence. Such an approach challenges one-size-fits-all prescriptions with processes that are rooted in the cultures and contexts of those most affected by conflict and can be situated not in remote institutions in the capital, but in affected communities. Such process can challenge the elite understandings that currently drive transitional justice as a universal project of transition towards liberal democracy, and attempt to ensure a degree of victim agency in such schemes. In both Nepal and Timor-Leste most who became victims of conflict had been historically marginalised and see their needs as deriving not only from the direct impacts of violence but also from the poverty and marginalisation that facilitated violations. As such they seek an approach to transition which is transformative, which promises them not just a return to the poverty of the past but that encompasses broader political goals of challenging their disempowerment. The transformative agenda that emerges from the data is a critique of the disappointments of transitional justice process in recent decades, emphasising issues of social exclusion and structural violence, poverty and development and embracing the challenging of oppressive hierarchies of gender, ethnicity and caste.

The everyday is a space where it can be expected that global norms have to compete with visions of the world rooted in local understandings. In the contexts studied here indigenous perspectives are seen to exist largely independently of global discourses such as rights. Meanings are constructed collectively in ways that are often unique to the cultures from which victims and the conflict itself emerges, and these define how both war and peace are perceived and how community is understood: culture has a constitutive role in the initiation and cessation of conflict (Avruch and Black, 1987). Whilst basic needs have a degree of universality, many of the everyday impacts on victims emerge directly from local and highly particular social or spiritual understandings. That culture is important, indeed perhaps “the most important issue of all” (Ramsbotham et al., 2005: 302) in conflict resolution, is seen in the range of needs that victims articulate in this study. This thesis suggests that there is a need for a “cultural turn” (da Costa, 2010) in transitional justice, steered by processes rooted in the everyday lives of victims of conflict. Challenging the universalism of the discourse of transitional justice also demands that efforts be made to subvert the normal research practice of defining the local only with reference to its deviation from the Western.

For approaches to post-conflict contexts to be relevant to victims, a novel approach is required that renegotiates agency in the addressing of the impact of violent pasts, replacing mimetic models imported from remote contexts with action and

intervention rooted in the everyday lives of the conflict-affected. Such processes can resonate with local approaches and cultural preferences, and can build on custom and tradition and relevant understandings of society and politics. They will take from the paradigm of the liberal peace what they can, but will resist those elements that are not consistent with a locally owned and driven vision of a post-conflict future. Not only can such autonomously driven processes address the needs of victims of conflict, they can begin to address the causes of conflict rooted in inequality and disempowerment.

## Appendix I. The Missing in Law

In this section the legal and other definitions of missing persons will be discussed, and a working definition for this work identified.

Persons missing in conflict are those: “unaccounted for as a result of international or non-international armed conflict or internal violence” (Crettol and La Rosa, 2006: 355). The issue of missing persons is relevant in a large number of contexts, with almost every contemporary conflict leaving significant numbers of families with no news of loved ones. Legal definitions can be used to identify those whose absence violates international humanitarian law or international human rights law and from these legal definitions flows an implicit definition of missing persons. These emphasise the difference between the “missing” and the “disappeared”, since the latter refers only to those arrested or abducted by a state party. In some states the term “missing” is itself defined in law.

Various bodies of law can be used in referring to the issue of persons missing in conflict or political violence, and these will be discussed here:

- *International humanitarian law*, also known as the law of armed conflict, defines the conduct and responsibilities of *nations* and *individuals* engaged in warfare, in relation to each other and to protected persons.
- *International human rights law* codifies legal provisions governing human rights in various international human rights instruments, and obligates *states*.
- *International criminal law* deals with international crimes and the courts and tribunals set up to adjudicate cases in which *individuals* have incurred international criminal responsibility.

### ***International humanitarian law***

International humanitarian law (IHL) places obligations on parties to conflict regarding persons arrested and detained as well as those killed and injured. Violation of these obligations may lead to persons becoming missing, and so can be used to define the term.

IHL contains a significant body of constraints on warring parties in international conflicts regarding the maintenance of contact between family members when someone is captured (Geneva Conventions, 1949: IV: Art.26). Such communication should ensure that a captive is not considered missing by his family. Further to this, IHL states that families have the right to be informed of the fate of missing relatives (Geneva Conventions, Add. Protocols, 1977, I :Art. 32). The parties to a conflict must search for persons reported missing by an adverse party (Geneva Conventions, Add. Protocols, 1977, I :Art. 33) and facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and to reunite. It is also incumbent upon the parties to a conflict that lists showing the exact location and markings of graves, together with particulars of the dead interred therein, be exchanged (Geneva Conventions, Add. Protocols, 1977, I :Art. 34). Whilst these demands apply only in international conflicts, the International Committee of the Red Cross (ICRC), which has a mandate as the guardian of the Geneva Conventions, has stated that "...similar treaty-based and customary rules apply in non-international armed conflicts" (ICRC, 2007) and that "[T]he great majority of the provisions of the Geneva Conventions ... are considered to be part of customary international law" (Henckaerts, 2005). The most complete study of customary international humanitarian law reports a customary rule valid in both international and non-international armed conflict:

Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. (ICRC, 2005)

From this body of international humanitarian law can be drawn a definition of missing persons, i.e. those where the legal obligations regarding the informing of relatives have not been met. Those detainees who do not have contact with their families, and those killed but whose families are not aware of the death or of the location of the body, are missing. This definition of missing persons, according to the ICRC, includes:

- Those arrested, abducted and killed on capture, but whose families are unaware of their fate;
- Those held incommunicado;
- Members of armed forces or armed groups whose fate is unknown;

- Children separated from families when fleeing or by forced recruitment;
- Refugees of those displaced with no means of communication;
- Those dead whose identities are not recorded.

(Crettol and La Rosa, 2006)

### ***Human rights law***

Human rights law is that most often applied to disappearances, although in many contexts both IHL and international human rights law will be relevant. The broad definition of the missing arising from IHL can be contrasted with narrower definitions arising from human rights discourse. Human rights (HR) law is concerned with rights that can be violated or denied, any this implies an “active” violation in contrast to the “passive” definition of IHL, where it is the failure to pass information concerning the missing person that itself constitutes the violation. In practice the definition of disappearance in human rights law includes an active violation (arrest or abduction) *and* a passive one (a failure to inform). The other substantive difference between IHL and HR law is that HR law obligates state parties only, and not non-state actors, although the law regarding non-state actors continues to evolve.

Whilst HR law prohibits the extra-judicial killing that gives rise to some missing cases, it generally gives little recourse in a situation where nothing is known of the fate of a missing person. Traditionally such issues have been tackled through the use of *habeas corpus* in domestic courts, but this requires evidence that the state was involved in the circumstances that led to the person being missing. Additionally, protection is provided against disappearance by basic rights contained in the UN universal declaration of human rights, including: right to recognition as a person before the law, the right to liberty, security of the person and the right not to be subjected to torture and other cruel and inhuman or degrading punishment. An example of the use of this type of law to define disappearance was demonstrated by a judgment of the European Court of human rights that found that the right of relatives of the Missing to be free from torture, cruel and degrading treatment had been violated by the lack of knowledge of the fate of the Missing (ECHR, 1998 and 2001).

HR law has attempted to tackle cases where the state is involved, defining this phenomenon as “enforced disappearance”. In the early 1980s the Organisation of American States defined forced disappearance as a crime against humanity (OAS,

1982), and the Inter-American Court of Human Rights (IACHR) cited this in the Valasquez Rodriguez case (OAS, 1988). The IACHR has also indicated that where the illegal act of disappearance is perpetrated by a non-state actor, the state is responsible where it has acquiesced or not taken measures to prevent it or punish those responsible (Clapham, 2006).

The issue of disappearances has also been addressed through the finalisation of the International Convention for the Protection of All Persons from Enforced Disappearance (UN ICPPED, 2006). The convention defines disappearance as follows:

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. (UN ICPPED, 2006: Article 2).

This convention was adopted by the UN General Assembly in December 2006 and has been signed by 72 states and ratified by one (OHCHR, 2007). It will enter into force following ratification by 20 state parties. This instrument makes the prevention of disappearance an obligation of states. The declaration's preamble (intended to guide interpretation) also contains nuances implying that disappearance is a crime against humanity when "systematic" since it may incur individual criminal responsibility (Clapham, 2006).

However, since in all definitions disappearance demands an active violation by the state, this definition excludes many of those missing persons implicitly recognised in IHL. Those persons missing in action or children recruited forcibly or separated from parents during conflict are excluded from the provisions of the convention on enforced disappearance. Additionally, the convention applies only in cases where state parties are responsible for disappearance<sup>58</sup> and excludes those disappearances perpetrated by the

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<sup>58</sup> In May 2006, the UN Working Group on Enforced and Involuntary Disappearance reiterated: "enforced disappearances are only considered as such when the act in question is perpetrated by state actors or by private individuals or organized groups (e.g. paramilitary groups) acting on

many non-state actors involved in contemporary conflict. Disappearance thus defines a subset of those missing according to the IHL derived definition.

### ***International criminal law***

International criminal law has begun to deal with the issue of the missing through international and hybrid criminal tribunals as well as the International Criminal Court. The Rome Statute of the International Criminal Court includes a definition of enforced disappearance:

Enforced disappearance of persons` means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. (Rome Statute, 2002: Article 7(2)(i))

And notes that this is a “crime against humanity” when “...committed as part of a widespread or systematic attack..” (Rome Statute, 2002: Article 7(1)). ‘Political organization’ here permits such a violation to be perpetrated not only by states, but also by non-state actors.

Similarly to that from human rights law, this definition describes the active violation of deprivation of liberty combined with the passive violation of the withholding of information. Commentators interpret the latter as the refusal to supply information when requested by families: a simple failure to provide information without a request is not a violation (Werle, 2005). This is in contrast to IHL since international criminal law places a stricter test, as it addresses *individual*, rather than state, responsibility

### ***National law***

During or following conflict states can legislate to support families of missing persons. In Bosnia Herzegovina, following the conflicts of 1991-6, a Law on Missing Persons (Bosnian Ministry for Human Rights and Refugees, 2006) was passed in which families were spared the process of having to declare a family member dead to deal with legal

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behalf of, or with the support, direct or indirect, consent or acquiescence of the Government.” (UN WGEID, 2006).

issues related to disappearance. Additionally, this enshrined in national law a definition of a missing person, based on both IHL and the convention on forced disappearances.

In Argentina, following pressure from families, a legal status of “forcibly disappeared” was created. This was the legal equivalent of death in terms of inheritance, but allowed for the possibility of the Missing returning alive and acknowledged the fact of disappearance and the state’s role in it (Hayner, 2011).

### ***The Missing in practice***

In the various contexts where the Missing are an issue, both the IHL and HR derived definitions have currency. The narrower definition of “disappeared” is however often privileged, both because it is a discussion that the human rights narrative tends to dominate, and because it refers to a situation where there is a clear perpetrator. When a society is emerging from conflict the disappeared is often a more straightforward category than the Missing to define, comprehend and ultimately to address. There may also be political motivations for attempting to advance a certain definition, since the “disappeared” are restricted to victims of the state.

The ICRC defines missing persons as follows, extending the definition arising from IHL and in doing so acknowledging the primacy of families in determining the status of the missing:

The missing persons are those persons whose families are without news of them and/or are reported unaccounted for, on the basis of reliable information, owing to armed conflict or internal violence. The term family and relatives must be understood in their broadest sense including family members and close friends and taking into account the cultural environment. (ICRC, 2003)

This family-centred definition is an articulation of the fact that without families to inform others, the missing will remain invisible. The ICRC extracts from IHL a “right to know” (Crettol and La Rosa, 2006; Naqvi, 2006) for families of those missing in conflict, which implies that all those whose relatives are unaware of their fate, whether dead or alive, are considered missing and the state has an obligation to seek answers for the family. The deep subjectivity of whether or not someone is missing remains a challenge for the addressing of the issue, but in any victim centred approach cannot be avoided.

In this work the IHL derived definition will be used, since it is the most inclusive, and in a needs based approach, the needs of families of all types of Missing have been seen to largely coincide.



# Appendix II. Interview scripts

## A2.1. Nepal: Semi-structured research instrument

### 1 Introduction

- Wish to talk about the impact of Missing relative - have no news.
- Researcher: seeking to work with families, understand what they want and try to ensure process considers them – a report will be passed to authorities
- All information will be confidential: would like to record and quote, but without naming or identifying
- If you don't want to talk about some issues that is fine; you can choose to stop whenever you like – don't want to upset.

### 2 General Information

#### 2.1 The Interviewee

- Name
- Ethnicity / caste
- Responsibilities within the family / employment
- Who else is present?
- Relation to the missing person
- Nature & size of family
- Educational level

#### 2.2 The Missing person

- Name
- Married?
- Responsibilities within the family / employment
- (income generation?)
- civilian / political activist/ PLA / security forces
- (what reason could there be for the disappearance?)
- Age:
- Children? (number of):
- Educational level
- Date / Circumstances of disappearance (if known)
- emphasis on place of arrest (more trauma when the arrest took place at home?); violence committed during arrest against person arrested and other family members; which members of the family witnessed the arrest;

### 3 General Priorities

*Aim to understand what families articulate as their needs, without prompting of possibilities.*

- What are the greatest problems that they face as a result of the Missing?
- What action would the family like to see?

### 4 Attitude to the fate of the missing person

#### 4.1 What do you think personally has happened to your relative (since the disappearance)?

- seek articulation of general beliefs: hopes and fears

-

**IF believe still alive**

- What leads you to this conclusion?
- Did you, or does someone in the family, think about other possibilities regarding the fate of your loved one? Could he be dead? If yes: explain. (**Go to -**)

-

**IF believe dead,**

- What made you believe that your missing relative might be / is dead ?
- Do you, or does someone from the family, believe that he could still be alive? (**Go to 4.2**)

-

**IF clearly ambiguous,**

- The interviewee / the family still has doubt about the fate of their missing relative (going **clearly** from hope he/she is alive to acceptance of death) Where on the spectrum are they?
- Have you, or others in the family, considered that he could be dead? Could be alive?

**4.2 Have any rituals been made concerning the missing person? If yes, what led family to do this? If not, why not?**

- What rituals would the family seek to make?

**4.3 Does the wife consider herself a widow?**

**4.4 Would it be important to know where his/her body is? Is knowing the gravesite sufficient?**

**4.5 to get his/her body back ?**

- Why? (religious reasons, confirmation of death, need for gravesite etc)
- What do you expect from the body? Recognise? Bones?

**4.6 If it is not possible to retrieve the bodies of missing persons, what do you think could help you to deal with such situation ?**

**4.7 What would constitute a satisfactory answer concerning the fate?**

**4.8 Would you trust officials who returned remains to you claiming they were of your relative? Why (not)?**

**5 Psychological and Psychosocial issues**

*Observe body language of the interviewee. Note if others are present that may inhibit discussion of emotional and psychological issues.*

**5.1 From a general point of view, how does the disappearance change something in your life? What would be different if he/she were still here?**

- "Your" life here can be that of the individual, the family or the community, as the subject chooses

<b>EFFECT ON THE INDIVIDUAL</b>
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**5.2 What effect did the disappearance have on your heart (man)?**

**5.3 How do you feel now compared to at the time of the disappearance?**

**5.4 What specific problems do you have related to your heart (man)? Ask probing questions**

- Is the missing person constantly on your mind? [Flashbacks] (obsession, this is NOT just remember the missing)
- Nightmare / recurrent dreams: did the Missing appear in your dreams?
- Sleeping problems
- Depressed mood/ sadness: dukha
- Anxiety/ faear / worry: cintaa
- Isolation, withdrawal, suicidal tendencies
- Uncertainty, irritation, frustration
- 
- **If yes:** Detail content of thoughts:

**5.5 Do these problems affect you in your daily life and activities?**

- understand level of disability, if any, and impact on functioning
- how does it affect you:
  - behaviour
  - social
  - emotional
  - physical

**5.6 How do you cope with these problems? (Resilience, coping strategies)**

- Where do you go? What do you do?
- With whom do you share problems?
- Does this allow you to manage?

**5.7 Have you any physical problems since your relative went missing? What? Where?**

- Have you consulted any medical person or healer concerning these problems? Was any problem identified?

**5.8 (If thought to be dead) Have you been troubled by spirits?**

**5.9 Do other members of the family seem affected ?**

- If other family members are present during the interview, it is best to ask them directly. Emphasis on the impact on children. If yes: who and how ?

**PSYCHOSOCIAL ELEMENTS: FAMILY AND COMMUNITY**

*Social ecology / Human capacity / Material environment / Culture and values*

**5.10 Has the disappearance of your relative affected your situation within your family?**

- Emphasis on the daughters-in-law: Dilemma between staying with the in-law family (who might treat her as a 'slave' and without the necessary link to the in-law family which was the missing husband) and going back to live with her family without her children and in most cases without any skills for earning a living. (Note, this question may be worthwhile only where in laws are not present.)

**5.11 Who now fulfils the role of the Missing person in the family? How has the absence of a family member affected the family structure and the family responsibilities?**

**5.12 Did the fact that your relative went missing change something in your relations with others: friends, peers, neighbours, community, etc? If yes, how?**

**5.13 Is the community divided in any way due to the conflict? Does this affect you / your family?**

**5.14 Does your community have needs arising from people Missing? What?**

**5.15 What is / are the most difficult thing(s) to overcome / to deal with ?**

**5.16 What helps you to feel better? (Prioritise)**

- To talk and share with a friend or family
- My religious beliefs
- My belief in the future - hope
- Meeting with the Government bodies
- Being member of a family association
- Having work and income
- Meeting and discussing with other families of missing - knowing others have the same difficulties
- Receiving support from different organisations
- Local leaders

**5.17 Did you participate in:**

- Rituals (religious, traditional, political)
- Collective / commemorative ceremonies
- Did these help? If so, why or if not, why not?
- Are there rituals you want to make but cannot?

**5.18 Did you contact a traditional healer (dhama / jhakri)?**

**5.19 Do you talk about your missing relative and/or your difficulties?**

- If yes: With whom? Does it help ?
- If no: why not?

**5.20 Would you like to discuss your missing relative or your situation with someone (else) in particular?**

- If yes: With whom?

**5.21 Did you contact a family association / NGO / other victims (for psychological or other support) ?**

- If yes: Which one? Why?
- What kind of help/support do you get there?
- If no: Why not?
- Do you think it could be important for you? Why?

**5.22 How do you feel about the future?**

**5.23 Did your political activity increase as a result of the disappearance? Does this help you in any way?**

**6 Economic Situation of the Family**

**6.1 Describe the members of the household: number of persons, status, sex, including children, elderly or handicapped people**

**6.2 What are the family's dwellings (private house / apartment, property/rent, village/city) ?**

**6.3 What are the main sources of income (e.g. agriculture, salary, etc.) ?**

- If rural how much land owned.
- Other sources of income?
- Any debt?

**6.4 Do/did you encounter economic problems because of the absence of your relative?**

**6.5 Did/Do you receive economic support from :**

- Extended family, neighbours, friends and/or other community members
- Non Governmental Organizations
- Compensation?

**6.6 Do these sources of income cover your basic needs (including access to education and health care)?**

- What does the family go without as a result of financial hardship?
- If no: how do you make ends meet?

**7 Legal / Administrative Issues**

**7.1 How did you learn of the disappearance of your relative ?**

- Witnessed (by whom?), formal notification from authorities?

**7.2 Did you yourself (or someone from your family) report / register the disappearance of the missing person?**

- If yes :Who? When ?
- If not,: why not ?

**7.3 Did you (or someone from your family) make personal investigations to know the fate of your missing relative?**

- **If yes:** when? Do such efforts continue?
- Result of the investigations/search ?
- Did you receive particular information ?
- 
- **If Yes**, what, and from whom?
- Have you transmitted this unofficial information (or other)?

**7.4 Do/did you encounter legal / administrative difficulties because of the absence of your relative? (inheritance, bank loans etc.)**

- Would a “declaration of disappearance” help?

**8 Justice, acknowledgement, reconciliation and rights**

*Start with an open question and then ask details, depending upon what emerges...*

**8.1 What does the family expect from the authorities responsible for the disappearance?**

**8.2 What does the family understand as their human rights?**

**8.3 What does the family understand by justice?**

- - acknowledgement, compensation, prosecutions?

**8.4 Do they believe that someone should be punished for what has happened?**

**8.5 Who should be punished? (informers, perpetrators, politicians?)**

- Where should judicial process be? (local, Kathmandu, international?)
- Is the Nepali justice system capable of such process?

**8.6 Would the family accept amnesty for perpetrators if that gave access to the truth? Even if there was no guarantee that truth or justice would emerge otherwise?**

- Could the family forgive the perpetrators?

**8.7 Has their situation has been recognized / acknowledged by the authorities?**

- Has there been any acknowledgement from authorities (e.g. CPN-M, Government, compensation etc) ?
- What about acknowledgement from others (agencies, lists etc.)? Is this important?

**8.8 What do they understand by compensation?**

- Why is compensation important?
- Compensation/ reparations – do they mention need for truth and/or *admission* of responsibility?

- Would they accept compensation with no truth or admission of responsibility?
- What is their opinion of the Rs. 1 lakh that has been offered to families of the dead?

**8.9 How should compensation be given? To individual families, to communities?**

**8.10 Does the family consider some sort of memorial appropriate? What? Where?**

**8.11 How should Nepal try to record and remember what happened to the Missing?**

**8.12 Is there a need for reconciliation between people in Nepal?**

- Between whom?
- How could this be done?

## **9 Institutions and response of the state**

**9.1 What is the family's opinion of the army/ police/ CPN-M now? What could be done that would give you confidence in these institutions?**

- should people who have committed violations be permitted to hold public office or political positions?

**9.2 What confidence do you have the new Government will address the issue of the Missing?**

**9.3 What will you do if it does not?**

**9.4 Have you heard anything about the TRC or the Disappearance Commission?**

- - What do you think of this?

## **10 Feedback**

**10.1 Are there any issues that have not been discussed that are important to you?**

**10.2 Does the family have any questions or comments?**

## **A2.2. Timor-Leste: Semi-structured research instrument**

### **1 Introduction**

- Wish to talk about the impact of Missing relative - have no news.
- Researcher: seeking to work with families, understand what they want and if what, if anything, has helped; ICRC will use this to advocate with the authorities
- All information will be confidential: would like to record and quote, but without naming or identifying
- If you don't want to talk about some issues that is fine; you can choose to stop whenever you like – don't want to upset.

### **2 General Information**

#### **2.1 The Interviewee**

- Name
- Ethnicity / language
- Responsibilities within the family / employment
- Relation to the missing person
- Nature & size of family

#### **2.2 The Missing person**

- Name
- Married?
- Responsibilities within the family / employment
- (income generation?)
- Date / Circumstances of disappearance (if known)
- Age:
- Children? (number of):

### **3 General Priorities**

*Aim to understand what families articulate as their needs, without prompting of possibilities.*

- What are the greatest problems that they face as a result of the Missing?
- What action would the family like to see?

### **4 Attitude to the fate of the missing person**

#### **4.1 What do you think personally has happened to your relative (since the disappearance)?**

*Seek articulation of general beliefs: hopes and fears*

##### **IF believe still alive**

- What leads you to this conclusion?
- Did you, or does someone in the family, think about other possibilities regarding the fate of your loved one? Could he be dead? If yes: explain.

##### **IF believe dead,**

- What made you believe that your missing relative might be / is dead ?
- Do you, or does someone from the family, believe that he could still be alive?

##### **IF clearly ambiguous,**

- The interviewee / the family still has doubt about the fate of their missing relative (going **clearly** from hope he/she is alive to acceptance of death) Where on the spectrum are they?
- Have you, or others in the family, considered that he could be dead? Could be alive?

**4.2 Have any rituals been made concerning the missing person? If yes, what led family to do this? If not, why not?**

- What rituals would the family seek to make? Traditional - stone from place of death / Church
- Is it a problem that no rituals have been made? Why? What would constitute a satisfactory answer concerning the fate?

**4.3 Would it be important to know where his/her body is? Is knowing the gravesite sufficient?**

**4.4 to get his/her body back ?**

- Why? (rituals, religious reasons, confirmation of death etc)

**5 Psychological and Psychosocial issues**

*Observe body language of the interviewee.*

**5.1 From a general point of view, how does the disappearance change something in your life? What would be different if he/she were still here?**

- "Your" life here can be that of the individual, the family or the community, as the subject chooses

EFFECT ON THE INDIVIDUAL
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**5.2 How does the disappearance affect you emotionally? (How are things going?)**

**5.3 How do you feel now compared to at the time of the disappearance?**

**5.4 What specific problems do you think it has caused?**

**5.5 Do these problems affect you in your daily life and activities?**

- understand level of disability, if any, and impact on functioning

**5.6 How do you cope with these problems? (Resilience, coping strategies)**

- Where do you go? What do you do?
- With whom do you share problems? Family Association?
- Does this allow you to manage?

**5.7 Has the family any contact with the spirit of the Missing?**

Has the spirit given any problems?

**5.8 Have you had dreams of the Missing?**

What was the content?

PSYCHOSOCIAL ELEMENTS: FAMILY AND COMMUNITY
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**5.9 Has the disappearance of your relative affected your situation within your family? Has it changed your identity in the family or community?**

- Any problem for the daughters-in-law:
- *If remarried:* What happened to children?
- Does the wife consider herself a widow?

**5.10 How has the absence of a family member affected the family structure and the family responsibilities? Who now fulfils the role of the Missing person in the family?**

**5.11 Did the fact that your relative went missing change something in your relations with others: friends, peers, neighbours, community, etc? If yes, how?**

**5.12 Is the community divided in any way due to the conflict? Does this affect you / your family?**

**5.13 Does your community have needs arising from people Missing? What?**

## **6 Economic Situation of the Family**

**6.1 How do you live day by day?**

**6.2 Describe the members of the household: number of persons, status, sex, including children, elderly or handicapped people**

**6.3 What are the family's dwellings (private house / apartment, property/rent, village/city) ?**

**6.4 What are the main sources of income (e.g. agriculture, salary, etc.) ?**

- If rural how much land owned.
- Other sources of income?
- Any debt?

**6.5 Do/did you encounter economic problems because of the absence of your relative?**

**6.6 Did/Do you receive economic support from :**

- Extended family, neighbours, friends and/or other community members
- Non Governmental Organizations, church
- Compensation, pensions, veteran's payments

**6.7 Do these sources of income cover your basic needs (including access to education and health care)?**

- What does the family go without as a result of financial hardship?
- If no: how do you make ends meet?

## **7 Legal / Administrative Issues**

**7.1 Do/did you encounter administrative difficulties because of the absence of your relative?**

- Property / land, marriage, pension

## **8 Justice, acknowledgement, reconciliation and rights**

*Start with an open question and then ask details, depending upon what emerges...*

**8.1 What does the family expect from the authorities regarding the disappearance?**

**8.2 What does the family understand as their human rights?**

**8.3 What does the family understand by justice?**

- - acknowledgement, compensation, prosecutions

- 8.4 Who do they think should deliver justice?**
- 8.5 Do they believe that someone should be punished for what has happened?**
- Who should be punished? (informers, perpetrators, politicians?)
  - Where should judicial process be? (local, international?)
- 8.6 Has anyone been punished for the disappearance?**
- Any *nahe biti bot*, or other local discussion of such issues?
- 8.7 Is the family aware of any trials of persons responsible for such crimes? The following processes:**
- UN Special panels
  - Indonesian human rights court
- 8.8 Did they give any information to CAVR?**
- Do they know what CAVR is?
  - If so, what happened?
  - What do they feel about this process?
- 8.9 Could they reconcile with or forgive those responsible?**
- 8.10 Has their situation been recognized / acknowledged by the authorities?**
- 8.11 Is the Missing person considered a veteran? CAAC / CAVF / CAQR?**
- Has this helped the family in any way?
- 8.12 Has the family received any compensation or reparation? Why is compensation important?**
- Compensation/ reparations – do they mention need for truth and/or *admission* of responsibility?
  - Would they accept compensation with no truth or admission of responsibility?
- 8.13 Does the family consider some sort of memorial appropriate? What? Where?**
- What about the Falintil martyrs' cemetery?
- 8.14 How should Timor-Leste try to record and remember what happened to the Missing?**
- 8.15 Is there still a need for reconciliation between people in Timor? In their community?**
- Between whom?
  - How could this be done?

## **9 Feedback**

- 9.1 Are there any issues that have not been discussed that are important to you?**
- 9.2 Does the family have any questions or comments?**

## Appendix III. List of persons interviewed

This Appendix lists all those persons interviewed in Nepal and Timor-Leste for this study, notably families of the Missing (where the principal interviewee is noted in terms of their relationship to the Missing and anonymity maintained) but also elites in Government and civil society. (It should be noted that in many cases several relatives were met and in others several different relatives are missing and so the interviewee had multiple relationships with the Missing.)

### A3.1. Nepal

#### *Families of the Missing interviewed*<sup>59</sup>

Reference	Relationship to missing person	Location	Date interviewed	Comments
<b>KATHMANDU</b>				
FK001	Brother	Baluwatar, Kathmandu	25.04.08	Sofad family association leader
FK002	Sister	Kalimati, Kathmandu	15.05.08	
FK003	Wife	Min Bhawan, Kathmandu	16.05.08	
FK004	Mother	Chhabil, Kathmandu	04.06.08	Interviewed at workplace <sup>60</sup>
FK005	Brother	Ratnapur, Sindhuli	13.08.08	Interviewed at workplace <sup>60</sup>
FK006	Brother	Bishalnagar, Kathmandu	14.08.08	
FK007	Son	Chatisghar, Nawalparasi	15.08.08	
FK008	Brother-in-law	Sindhukot, Sindhupalchowk	17.08.08	
FK009	Brother	Gyaneshwor, Kathmandu	25.08.08	
FK010	Wife	Dhapasi, Kathmandu	26.08.08	Three wives met together at place of work. <sup>60</sup>
FK011	Wife	Baluwatar, Kathmandu	22.09.08	
FM001	Brother	Balaju, Kathmandu	05.06.08	
FM002	Brother	Kathmandu	07.06.08	
FM008	Wife & Brother	Koteshwar, Kathmandu		
<b>BARDIYA &amp; BANKE</b>				
FB001	Father	Balapur, Gulariya	06.05.08 & 23.07.08	
FB002	Father	Balapur, Gulariya	06.05.08	
FB003	Wife and brother	Dhaulagiri, Bageshwori	08.05.08	
FB004	Wife	Balapur, Mahadevpuri	08.05.08	
FB005	Brother	Pattabhar, Rajapur	17.07.08	
FB006	Mother	Pattabhar, Rajapur	17.07.08	
FB007	Mother	Pattabhar, Rajapur	18.07.08	
FB008	Daughter-in-law	Madhavpur, Pattabhar-6, Rajapur	18.07.08	

<sup>59</sup> Cases perpetrated by the Maoists were differentiated using the code FM in some cases in preference to the district code.

<sup>60</sup> During the CPN-M led Government of 2008-9 a large number of members of families of the Missing were appointed to Government jobs, notably at the Ministry of Information.

FB009	Wife & Mother	Jaipur, Badalpur-6, Rajapur	18.07.08	
FB010	Daughter	Belasa, Bhimapur-7, Rajapur	18.07.08	
FB011	Mothers	Nawranga, Manau-8, Rajapur	19.07.08	Group of four mothers of missing men
FB012	Wife	Bikrapur, Manpur Tapara-8, Rajapur	19.07.08	
FB013	Wife	Dallapur, Suryapatuwa-4, Rajapur	20.07.08	
FB014	Mother & Father	Badke Tadumwa, Suryapatuwa-4	20.07.08	
FB015	Mother	Madaha, Motipur	22.07.08	
FB016	Wife	Madaha, Motipur	22.07.08	
FB017	Wife	Nawada, Motipur	22.07.08	
FB018	Brother	Jainpur, Gulariya	23.07.08	
FB019	Son	Baidi, Dhadawar	24.07.08	Founder of CVC Bardiya
FB020	Father	Baisahi, Mohammedpur	25.07.08	
FB021	Wife	Sujanpur, Neulapur-4	28.07.07	
FB022	Mother	Sujanpur, Neulapur-4	28.07.07	
FB023	Son	Thaukdwara, Thakudwara-6	28.07.07	
FB024	Mother, Father &	Shivpur, T'wara-9	28.07.07	
FB025	Mother	Khusalpur, T'wara-7	28.07.07	
FB026	Mother & Wife	Bhurkaiya, T'wara-1	29.07.07	
FB027	Wife	Takiya, Bagnaha-6	29.07.07	
FB028	Wife	Laxmana Chowk, Deudakala-7	30.07.08 & 12.04.09	One of two wives of missing man; other wife left home leaving 3 children behind
FB029	Father	Masurikhet, Banke	31.07.08	Two sons missing
FB030	Wife	Lakna, Belawa-4, Bardiya	01.08.08	
FB031	Mother	Betahani, Belawa-7,	01.08.08	Two sons missing
FB032	Mother & Father	G-gaun, Bankatwa-4, Banke	04.08.08	
FB033	Wife	Chhumaniya, Bankatwa-8, Banke	04.08.08	
FB034	Wife	Chanahauwa, Samserganj-4, Banke	04.08.08	
FB035	Mother & Father	Habrahawa, Phattepur-8, Banke	05.08.08	
FB036	Mother & Father	Ladahaura, Naubasta-4, Banke	06.08.08	
FB037	Brother	Godahana, Sonapur-9, Banke	05.08.08	
FB038	Wife	Near Sitala Bazzar, Kalika	05.08.08 & 10 – 11.04.09	Vice President of CVC Bardiya
FB039	Wife	Macchaghar, Deudakala	13.04.09	
<b>ROLPA</b>				
FR001	Two brothers	Darbot, Kotgaun	11.06.08	
FR002	Sister	Satali Khola, Liwang-5	12.06.08	
FM003	Wife	Bhawang	14.06.08	
FM004	Wife & Daughter	Liwang	10.06.08	
FM005	Father	Kotgaun, Kotgaun	12.06.08	
FM006	Wife	Majhing, Dhabang-3 (met in Liwang)	12.06.08	

FM007	Brother	Thulo Gaun, Uwa	12.06.08	
<b>DHADING</b>				
FD001	Son	Worcharang, Jogimara	19.08.08	This group represent the families of more than 20 men from Jogimara disappeared while working in Kalikot district.
FD002	Father	Worcharang, Jogimara	19.08.08	
FD003	Father	Worcharang, Jogimara	20.08.08	
FD004	Mother	Khirraghari, Jogimara	20.08.08	
FD005	Wife	Worcharang, Jogimara	20.08.08	
FD006	Mother	Ghatto, Jogimara	20.08.08	
FD007	Wife	Dharke, Maubise	21.08.08	
FD008	Wife	Archabe, Thakre	21.08.08	
FD009	Wife	Fogatpur, Dharke	21.08.08	
FD010	Wife	Mahadevbesi bazzar, Thakre	21.08.08	
<b>GORKHA</b>				
FG001	Brother	Khoplang-2, Pokharabesi	16.06.08	
FG002	Brother	Choprak-9, Chorkate	16.06.08	
FG003	Daughter	Khoplang-2, Pokharabesi	17.06.08	
FG004	Brother	Arupokhari-8, Kausini	17.06.08	
FG005	Husband	Hansapur-4, Tintare	17.06.08	
FG006	Brother	Prithvinarayan-1, Tindhara	18.06.08	
FG007	Sister-in-law	Gorkha HQ	18.06.08	
<b>SIRAHA / DHANUSA</b>				
FJ001	Father	Janakpur, Dhanusa	09.09.08	
FS001	Father	Bhulke, Bhadaramal-6	15.09.08	
FS002	Wife	Ramnagar Mirchaiya	15.09.08	
FS003	Father	Fulabriya, Mulabari	15.09.08	
FS004	Wife	Pariharpur, Mahadewa	16.09.08	
FS005	Brother	Danghadi (Siraha)	16.09.08	
FS006	Son	Tetsihbigaha, Phulkaha	16.09.08	
FS007	Wife	Brahmpuri, Arnama	16.09.08	
FS008	Wife	Siraha municipality,	17.09.08	
FS009	Brother	Malhaniya, Malhaniya	17.09.08	
FS010	Wife	Saharwa, Sanhaitha	17.09.08	

### ***Focus groups with families of the Missing***

DISTRICT	PLACE	TYPE	NO. OF PARTICIPANTS
Bardiya	Katarniya	Wives of the missing (Tharu & Muslim; state & CPN-M)	6
	Gulariya	Family members (state & CPN-M)	6
	Nawranga, Manau, Rajapur	Family members from single village, Tharu victims of state	7
Dhading	Jogimara	Family members of victims of the incident in Kotwade, Kalikot	9
Gorkha	Gorkha	Victims of state	7
	Gorkha	Victims of state, women	6
Kathmandu	Balaju (Sofad)	Victims of the state	7
	ICRC	Victims of CPN-M	9
Rolpa	Liwang	Victims of CPN-M, displaced	8

## ***Elites interviewed***

Contact was maintained with a large number of actors in Kathmandu and outside, from Government, political parties and civil society (national and international), with many met repeatedly through the period of the study. Included here are those where a formal interview was made and recorded.

<b>Name</b>	<b>Organisation</b>	<b>Position</b>	<b>Date interviewed</b>	<b>Comments</b>
<b>GOVERNMENT</b>				
Prabhakar	Ministry of Peace and Reconstruction	Minister	24.09.08	Ex-PLA commander
Janak Joshi	Ministry of Peace and Reconstruction	Secretary	28.08.08	
Madhu Regmi	Ministry of Peace and Reconstruction	Joint Secretary	15.04.08 18.05.08 15.07.08 11.08.08 31.03.09	
Binod Singh	Nepal Police	Senior Superintendent of Police / Head, Human Rights cell	24.08.08	
Shiva Prasad Nepal	Bardiya district	Chief District Officer	25.07.08	
<b>CIVIL SOCIETY</b>				
Jitendra Bohara	Advocacy Forum (NGO)	Transitional Justice responsible	14.07.08 02.04.09	
C.P.Singh	FORCE Nepal (Nepalgunj based NGO)	President		
Kashi Ram Dungana	Advocacy Forum (NGO)	Bardiya district in-charge	09.05.08 10.04.09	
Shrestha	CAHURAST (NGO)	President	02.04.09	CPN-M affiliated Human Rights NGO
Govinda Bandi	International Commission of Jurists		04.09.08	
Yagya Adhikari / Basudev Bajagain	Nepal Human Rights Commission	Head of Protection / Protection Officer	02.06.08	
Gopal Dahit	Tharu academic and activist		Repeatedly 2008 - 2009	Met to discuss history of landlessness in Bardiya and Tharu cultural tradition
Ekraj Chaudhary	Nepalgunj Media Centre (Tharu advocacy group)		Repeatedly 2006 - 2009	A regular interlocutor who gave details of Tharu tradition, particularly spiritually and concerning traditional healing.
<b>Political parties</b>				
Ekraj Bhandari	CPN-M	CA member/ Sofad central member	28.05.08	Son is missing
Kabir	CPN-M	Bardiya in-charge	26.07.08	
Gagan Thapa	Nepali Congress	CA member	28.08.08	

Pasang	CPN-M / People's Liberation Army	CPN-M central member / PLA Deputy Commander	11.09.08	
Shankar Pokharel	UML	CA member / UML central member	27.08.08	In 2009-10 Minister of Information
Krishna Prasad Sitaula	Nepali Congress	Senior NC leader	03.09.08	Negotiated the CPA on behalf of the non-Maoist parties

## A3.2. Timor-Leste

### *Families of the Missing interviewed*

Reference	Relationship to missing person	Location	Date interviewed	Comments
<b>DILI</b>				
DIL001	Father	Colmera, Dili	13.07.09	
DIL002	Father	Santa Cruz, Dili	15.07.09.	
DIL003	Wife & / Brother	Lesibuta, Comoro, Dili	16.07.09	Met in ICRC Office
DIL004	Brother-in-law	Comoro, Dili	16.07.09	
DIL005	Father	Audian, Dili	16.07.09	
DIL006	Mother & Father	Matadoro, Dili	04.08.09	2 brothers taken together
DIL007	Sister & Brother	Lahane, Dili	04.08.09	2 brothers taken in 1975 & 1979
DIL008	Brother	Becora, Dili	05.08.09	2 brothers missing at Sta Cruz massacre
DIL009	Sister	Becora, Dili	05.08.09	
DIL010	Wife, Son & Daughter	Bairo Pite, Delhi	07 & 09.08.09	Mother met alone, then 2nd interview made together with 3 children
DIL011	Brother	Bairo Formosa, Dili	07.08.09	
DIL012	Wife & Son	Santa Cruz, Dili	15.08.09	
DIL013	Sister	Bairo Formosa, Dili	16.08.09	
DIL014	Mother	Aiutlaran, Santa Cruz, Dili	19.08.09	
DIL015	Daughter & Son	Becora, Dili	20..08.09	
DIL016	Brother and Sister-in-law	Taibessi, Dili	21.08.09	
<b>MANATUTO</b>				
MAT001	none	Behau, lilimanu, Umaduak	18.07.09;	
MAT002	Brother	Behau, lilimanu, Umaduak	18.07.09;..	
MAT003	Husband / Father	Behau, lilimanu, Umaduak	18.07.09;	
MAT004	Mother & Brother	Salamata, Ailili	19.07.09	Boy taken as TBO age 15 in 1978
MAT005	Mother & Brother	Salamata, Ailili	20.07.09	Boy taken as TBO age 7
MAT006	Mother & Sister	Rembor, Aiteas	20.07.09	
MAT007	Daughter	Rembor, Aiteas	20.07.09	
MAT008	All	Behau, lilimanu, Umaduak	21.07.09	Joint interview, two men, both with relatives Missing by Fretilin
MAT009	Niece	Weali, Umakaduak	21.07.09	
MAT010	All (Entire family missing)	Weali, Umakaduak	21.07.09	Entire family killed by Fretilin
MAT011	Wife & Daughter	Laclo town	22.07.09	Man known to be dead, but body burnt
MAT012	Mother, Sister & Niece	Raidodok, Lakumesak	22.07.09	
MAT013	Son & Nephew	Taha Gamu, Lakumesak	22.07.09	Three family members killed by Fretilin

MAT014	Two Sisters	Lanao, Lifau, Laleia	22.07.09	
MAT015	Sister	Lanao, Lifau, Laleia	22.07.09	Interview terminated after some minutes due to upset.
MAT016	Sisters	Uma Clalan, Lifau, Laleia	23.07.09	
MAT017	Daughter	Ralan, Hatularan, Laleia	23.07.09	
MAT018	Son	Tuketin, Cribas	23.07.09	Mother killed in front of them, body not retrieved.
<b>BOBONARO</b>				
BOB001	Uncle	Ibuc, Lebos, Lolotoi	28.07.09	
BOB002	Brother	Ibuc, Lebos, Lolotoi	28.07.09	
BOB003	All	Ibuc, Lebos, Lolotoi	28.07.09	Entire family killed in mountains
BOB004	Wife	Cailaco	29.07.09	
BOB005	Wife	Dau Udo, Cailaco	29.07.09	
BOB006	Wife	Dau Udo, Cailaco	29.07.09	
BOB007	Son	Oepo, Tapo	29.07.09	Falintil veteran, CPD-RDTL activist
BOB008	Mother	Oepo, Tapo	29.07.09	
BOB009	Wife	Tunubibi. Memo	30.07.09	
BOB010	Father	Simololo, Memo	31.07.09	
BOB011	Father	Meligo, Cailaco	01.08.09	
BOB012	Wife	Meligo, Cailaco	01.08.09	
BOB013	Wife	Meligo, Cailaco	01.08.09	
BOB014	Brother	Faturasi, Rairobo, Atabae	06.08.09	
<b>LAUTEM</b>				
LAU001	Brother	Lequidica, Samalari, Ililai	10.08.09	Interviewed when working as part of community road gang.
LAU002	Nephew	Saegeli, Daudere	10.08.09	
LAU003	Son	Soikili, Parlamento	10.08.09	
LAU004	Uncle	Iparira, Parlamento	10.08.09	Raised children of missing man
LAU005	Brother	Poruwari, Serelau	11.08.09	
LAU006	Brother	Poruwari, Serelau	11.08.09	
LAU007	Father	Irapala, Baduro	11.08.09	
LAU008	Daughter	Laruara, Fuiloro, Los Palos	11.08.09	
LAU009	Son	Lilapuhu, Home, Los Palos	12.08.09	
LAU010	Wife	Lilapuhu, Home, Los Palos	12.08.09	
LAU011	Wife & Son	30 de Augusto, Fuiloro, Ls Palos	12.08.09	
LAU012	Son & family	Larinatcha, Home, Los Palos	12.08.09	Knows where body is - with support could retrieve it; Lulik can identify body.
LAU013	Father	Motolori, Fuiloro, Los Palos	13.08.09	
LAU014	Brother & ex-comrades	Lali, Souro, Los Palos	13.08.09	Focus group style discussion with group of Falintil veterans
LAU015	Son & Grandson	Souro Kecil, Leuro, Los Palos	13.08.09	
LAU016	Sister	Central, Fuiloro, Los Palos	13.08.09	
LAU017	Wife and Brother-in-law	Ira-ada, Fuiloro, Los Palos	14.08.09	
LAU018	Wife	Central, Fuiloro, Los Palos	14.08.09	Body recently exhumed with three others, but no identification possible.
LAU019	Mother	Bemoris, Fuiloro, Los Palos	14.08.09	
LAU020	Brother & Nephew	30 de Augusto, Fuiloro, Los Palos	15.08.09	

LAU021	Wife & Son	Lospala, Fuiloro, Los Palos	15.08.09	
<b>LIQUICA</b>				
LIQ001	Wife	Liquica	15.07.09 & 21.08.09	

### ***Focus groups with families of the Missing***

DISTRICT	PLACE	TYPE	NO. OF PARTICIPANTS
Bobonaro	Cailaco	Families of the Missing, mixed gender.	14
	Maliana	Wives of the Missing: highly mobilised and active women's	11
	Atabae	Families of the Missing, all men: included <i>Xefe suku</i> and Administrator.	9
Dili	Comarca Balide (ex-CAVR)	Komite 12 Nov. (Families of victims of the Santa Cruz massacre)	35 (In 4 groups)
Manatuto	Behau, Umakaduak	Most family members known dead, 3 families of the Missing, mixed gender: Fretilin perpetrated	8
	Bahadik, Iliheu	Families of the Missing and the dead, and chefe aldeia; village	4

### ***Elites met***

In Timor-Leste the advanced stage of the transitional justice process and the large amount of documentation available made formal elite interviews largely unnecessary. During the research was however continuous contact with both Government and civil society was however maintained, notably as part of advocacy around the study and efforts to mobilise a formal mechanism to address the Missing issue (see Section A4.5). Those met include those listed below.

Name	Organisation	Position	Comments
<b>GOVERNMENT &amp; POLITICAL PARTIES</b>			
Zacarias Albano da Costa	Ministry of Foreign Affairs	Minister of Foreign Affairs	Guest of honour at the launch of the report of the research results
Brig. Gen. Lere Anan Timur	Falintil - Timor-Leste Defence Force	Chief of Staff	Recently reunited with missing son after 30 years.
Fernanda Borges	Member of Parliament / Leader of PUN party	Chair of Parliamentary Committee 'A'	Leading process to pass law on the Missing issue.
Manuel Tilman	Member of Parliament / Leader of KOTA party	Member of Parliamentary Committee 'A'	Interviewed 13.05.10
Vicky Tchong	Ministry of Foreign Affairs	Secretary General	Met around meetings of the for Joint Ministerial Commission July 2009 with Indonesian ministers, on the Missing issue.

Aniceto Guterres	Member of Parliament / Fretilin	Member of Parliamentary Committee 'A' / Party Parliamentary leader	Ex-CAVR Commissioner
Jose Teixeira	Member of Parliament / Fretilin	Party spokesperson	
Olandina Caeiro	Public Service Commission	Commissioner	Ex-Commissioner CAVR
<b>INTERNATIONAL AGENCIES</b>			
Ben Larke	UNDP		Ex-CAVR staff
Soren Blau	Intl. Forensic Team / Victoria Institute for Forensic Medicine	Forensic anthropologist	
Luis Fondebrider	Intl. Forensic Team / EAAF	Forensic anthropologist	
Julia Alinho	Serious Crimes Investigation Team / UNMIT	External Relations Officer	Met repeatedly during data taking
Marek Machan	Serious Crimes Investigation Team / UNMIT	Senior Investigator	Met 24.07.09
<b>CIVIL SOCIETY</b>			
Isabel Amaral-Guterres	Cruz Vermelha de Timor-Leste	Secretary-General	Ex-Commissioner CAVR, Commissioner CTF
Pat Walsh	Post-CAVR Secretariat	Senior Advisor	Ex-CAVR staff
Lia Kent	University of Melbourne	Researcher	Ex-CAVR staff
Mark Harris	-		Ex-Serious Crimes Unit
Naomi Kinsella	Int. Center for Transitional Justice		Ex-CAVR staff

## **Appendix IV. Recommendations and impact of the study in the two contexts**

These recommendations were those that appeared in the reports of the research published with an advocacy aim in both Nepal (ICRC, 2009) and Timor-Leste (ICRC, 2010a).

### **A4.3. Recommendations to the Government of Nepal**

These recommendations are derived from the findings of the study and represent an attempt to address the needs of the families of the Missing within the current strategy of the Government around a Disappearance Commission and, at some future time, a Truth and Reconciliation Commission (TRC).

#### ***General recommendations regarding the transitional process***

- The Government to consult as broadly as possible among victims, beyond easily accessed urban activists, to ensure that needs of typical victims, who are overwhelmingly poor and rural, are understood.
- Victims' organisations, including associations of families of the Missing, to be involved in the creation of any mechanism to address victim needs; victims' representatives to be included as commissioners of the Disappearance Commission and TRC.

#### ***Clarifying the fate of the missing: the Disappearance Commission***

- The Commission's mandate to include all those missing as a result of the conflict and not only those taken into custody by the parties.
- The Commission to have a presence in every region of the country and to embark upon a programme of dissemination of its role such that victims in remote areas are informed.
- The Disappearance Commission to not only inform the family of the death of the Missing person but to be obliged to inform the family of all information about the missing person found during the investigations, including place, time and manner of death.

- The Disappearance Commission to be explicitly given the role of clarifying the fate of the Missing; this demands that:
- The Commission receives access to the required capacity in terms of investigation, exhumation and identification of human remains, either within the Commission itself, or through a specialised agency for that purpose;
- the Commission is funded and staffed at a level where it is able to administrate a broad programme of exhumations nationwide;
- the duration of the Commission is open ended to ensure that work can continue for the many years likely to be required to complete this task beyond the lifetime of the Constituent assemble that is implicit in current legislation;.
- Those missing persons determined by the Commission to be dead to be given the status of martyrs and their names published.

### ***A legal status for the Missing***

The Government to create a legal category of “Missing” that can be declared by an appropriate competent authority (such as the Disappearance Commission) such that on receipt of a well founded claim of a person being Missing, a certificate is issued declaring such a person officially missing, granting a well defined legal status to that person and permitting property to be transferred to heirs.

### ***An end to impunity for those who committed offences that led to persons going missing***

- Individuals, political parties and state institutions leading Nepal’s transition to make a commitment to prosecute all persons suspected to have been involved in criminal offences that led to persons going missing during the conflict, whether they are members of security forces, political parties or otherwise.
- Trials of persons suspected of crimes that led to persons going missing to be held wherever possible in a way that is accessible to the victims of those offences, whether this be through broadcast of proceedings or through direct access for the families of those missing.
- The pattern of disappearances at the most intense times of conflict and in the worst affected areas to be considered by the authorities to determine if these

constitute crimes against humanity in light of their systematic and widespread nature.

### ***Relief and reparations policy***

- The Government to urgently embark upon a programme of economic support to victims of the conflict, through the provision of interim relief, independent of any other transitional justice mechanisms; such a programme should not discriminate between relief to families of the dead and families of the Missing.
- A reparations policy to be prepared, drawing on the needs of victims and international experience, and including:
  - compensation policy to families of the Missing to be drawn up with reference to compensation received by families of members of the security forces killed during the conflict; compensation and reparation payments to be made once the truth concerning the fate of the Missing is known; compensation to consider long-term educational support for children and health care support for the family of the Missing;
  - a dedicated programme of reparations to be developed to target the wives of the Missing who may have special needs; this to be done in conjunction with the Ministry for Women, Children and Social Welfare, relevant bodies at district level and victims' representatives;
  - reparations policy to include explicit public acknowledgement of the fate of the Missing once it is known, and an admission by the authorities that the security forces and the CPN-M were responsible for violations leading to persons going Missing; a programme of memorialisation of the Missing to be funded at both the local (District, VDC) and central levels;
  - an additional programme of community reparations to be drawn up for the most affected communities, e.g. Tharu communities in Bardiya, in conjunction with local authorities and victim representatives.

### ***Psychosocial support to families and communities***

The Government to engage with affected communities, district authorities and agencies having appropriate capacities in a programme of psychosocial assessment

and intervention with families of the Missing. These should build on the capacities of families and communities to address their own needs.

### ***Reconciliation process in communities***

The Government to engage with conflict affected communities, district authorities, victims' groups and agencies having appropriate capacities in a programme of community reconciliation, potentially as part of the TRC process, such that communities divided by the conflict can address such issues where judicial action is impossible. Such process will notably have to address the issue of informants presumed to have provided information that led to persons going missing, even where those informants have committed no criminal offence.

### ***Transformation of institutions***

A policy of vetting to be introduced for the army, police and Government service: where a member of the Nepal Army or Nepal Police is found to have been responsible for persons becoming missing, in addition to any prosecutorial action, that person to be dismissed forthwith from the security forces; any member of a political party found to be responsible for persons becoming missing to be excluded from Government office or employment.

#### **A4.4. Recommendations to the Government of Timor-Leste**

The contact with victims that this study has permitted allows a series of recommendations to be made to the Timor-Leste authorities to further the addressing of the needs of families of the Missing.

##### ***Establishment of an Office for Missing Persons***

There exists no entity in Timor-Leste tasked with assisting families of the Missing, or acting as a focal point for families, despite the issue affecting thousands of families in the country.

- An Office for Missing Persons (OMP) to be established as an independent body, as envisaged in the recommendations of the Working Group on Reparations advising Parliamentary Committee A. The OMP's structure and activities to be informed by the ICRC Model Law on the Missing, and the Draft Law on Missing Persons in Timor-Leste.

- The objectives of the OMP to be:

- To assist families to learn about the fate of loved ones, and reunify families where possible;

- To determine the whereabouts of the remains of the Missing and to assist with exhumations and reburial where they have died.

##### ***Clarifying the fate of the Missing and accessing human remains***

Understanding the fate and retrieving remains are one of the highest priorities for families: whilst many cases require the involvement of the Indonesian authorities, a number of cases can be solved using information available in Timor-Leste.

- Continue an engagement with the Government of Indonesia on the issue of missing persons, using the inter-ministerial Joint Ministerial Commission as the forum for this; continue the ongoing initiative regarding minors missing from 1999, and engage the Gol on the broader issues of missing persons wherever possible.

- The Office for Missing Persons or other entity in Timor-Leste to have responsibility to liaise with families of the Missing and fulfil other domestic functions as required to support the JMC process on the Missing.

- The OMP (or other body) to work independently to determine the fate of those Missing at the hands of Timorese perpetrators, and to exhume bodies where they have died.

- The OMP (or other body) to support families in Timor-Leste who have significant information concerning the location of improper graves of loved ones to exhume and rebury them with appropriate ritual.

- The F-FDTL exhumations programme to continue in conjunction with the OMP, and be funded, as long as it is able to retrieve human remains.

### ***Reparations and recognition for families of the Missing***

The Missing have not been acknowledged or recognised by any Government programme to date, and families of the Missing are not eligible to receive any benefits as a result of their status.

- The GoTL to consider creating a medal to honour civilians and others who were not part of the resistance effort who are dead or missing as a result of the conflict in Timor-Leste, as part of its valorisation programme.

- The GoTL to initiate a programme of memorialisation, potentially under the post-CAVR institution, to commemorate those persons who died or are missing in the conflict and who have no graves; funding to be provided at sub-district level, where this is requested by district authorities, to support the efforts of communities to build memorials to the dead and Missing.

- The GoTL, in consultation with the 12 November Committee and families of the Santa Cruz victims, to support construction of a memorial to the victims of 12 November 1991.

- The GoTL to define in law the status of Missing, such that families can address any issues arising from the absence of their loved one, including inheritance and valorisation, without having to declare him or her dead.

### ***Assistance to families of the Missing***

The scale of victimhood during the conflict in Timor-Leste likely prevents a comprehensive programme of individual reparations to families of victims. Given the

efforts of the state to develop social assistance programmes to the vulnerable, it is recommended that families of victims be explicitly included in these:

- Having a missing relative, or otherwise having been victimised during the conflict, to be considered as an additional indicator of vulnerability in the evaluation of suitability to benefit from social assistance programmes of the Ministry of Social Solidarity.

### ***Psychosocial programmes to be developed with Family Associations***

Family members of the Missing are still suffering from both the impact of the violence during the conflict and of the long-term uncertainty over the fate of loved ones. Existing Family Associations can serve as a framework through which to develop psychosocial interventions to assist affected persons.

- The GoTL to develop, in cooperation with relevant agencies, a programme to assist Associations of Families of the Missing in offering psychosocial support to their members. These activities to include:

- Events for women and others where victims can share experiences and issues;
- Creation of peer counselling capacity in Family Associations;
- A referral service so that those suffering from mental illness or the impact of trauma can receive appropriate treatment;

### **A4.5. Impact of the study in the two contexts**

This study seeks to advocate for policy concerning legacies of armed conflict in the studied contexts and beyond to be evidence based. More than this the research seeks to use a modality derived from concepts of Action Research, constituting not just an academic inquiry but a process that impacts on both the community of victims who are its collaborators and on decision makers in the concerned contexts (Chapter 5). This challenges the ontological dilemma revealed by this study: actors in Government and donors who seek to support peacebuilding have power but no knowledge of needs, while victims of conflict who are all too intimately aware of the needs arising from victimhood have no power. Here, the impact of the research on the two contexts is described in terms of that on the families of the Missing and the family associations, changes in policy

of the authorities in the two states, and changes in approaches to the Missing issue by other actors, notably the ICRC who collaborated with the research. The study contributed to a reconceptualisation of the ICRC approach based on the needs and expectations of the families consistent with guidelines established in 2003 (ICRC, 2003; ICRC, 2010b), and in particular concerning the development of an ICRC methodology to assess the needs of the families of the Missing. It is of course clear that there can only be a limited impact in the short time since the research was completed and the data published; it is hoped that greater impacts may follow. This section summarises the measurable impact of the study in both contexts, and as such discusses those changes, necessarily the more incremental, that can occur in the 1 - 2 years since the two studies were completed.

### ***Impact of the study in Nepal***

The most direct way for the study to impact on families is through the research contact with them and more especially the long term engagement with family association representatives. In Bardiya, a leader of CVC said that for families the study served as a form of recognition that they had not otherwise received, “it gives them satisfaction [...] it is important for the children that they understand what missing means and what is the pain of the families” (CVC leader, Bardiya, July 2010); he also saw the report as an antidote to the fatigue of families speaking to many visitors from agencies who never return. This confirms the ethical imperative of taking the research ‘back’ to participants and the report of the study as an appropriate way to do this. He considered the report important enough that he sought that all families of the Missing should receive a copy, even illiterate families who, aware of its contents, would value it. This suggests that such a report, even in a form not directly accessible to many, can confirm meanings and identities that are useful to families, demonstrating that acknowledgement need not come only from the state. The ICRC assistance programme (see below) that flowed from the report began only after the completion of this study and thus its impact on perceptions of the research has not yet been well understood.

For leaders of family associations, the study appeared to legitimate feelings that rights agencies in Nepal did not accurately represent families’ needs, encouraging them to assert their independence from them. The empowerment agenda has most clearly been realised through the creation of an independent association of families of the Missing, that seeks to bring together all those district based groups (such as CVC) that

are not associated with either a political party or a rights NGO. This national grouping<sup>61</sup> was initiated by the leader of a group in Lamjung district met during the study and with whom contact was maintained over the period of the study and beyond. Whilst this group is only beginning its work, it has 16 district associations associated with it, and is receiving seed funding from international agencies. It has the potential to act as a national voice for all families of the Missing in Nepal and to serve the needs of providing a conduit for victims' needs to reach decision makers.

The ICRC has seen the research as a trigger to initiate further advocacy that uniquely in the context focuses not on the violation to which victims have been subject, but its impacts. This has included a series of documentary films addressing the missing issue including one that specifically focussed on the needs of a selection of relatives of the Missing with a focus on their needs.<sup>62</sup> This took its direction entirely from the results of this study. This has permitted elites in civil society and Government to be exposed to implications of disappearance that have not to date featured prominently in advocacy around the issue or in proposals to address it. Rights agencies working on disappearances have made informal acknowledgement in the light of this study, both in the field and in Kathmandu, that they have devoted insufficient attention to social, economic and cultural rights as well as to the global needs of families of the disappeared. This has however led to no change in the emphasis of their work, with there still being not a single publication from a major Nepali rights organisation that focuses on social and economic rights: rights advocacy on the issues of disappearance remains legalistic, focussed largely on prosecutorial elements. Whilst this represents a failure in one aspect of the aims of this study it is unsurprising, given the hegemony both in Nepal and globally of such approaches. There has however been a recent upsurge in agencies discussing reparation (e.g. IOM, 2010; Advocacy Forum, 2010a), which is to be welcomed, but cannot necessarily be claimed as an impact of this study.

The most important advocacy target of this work is the Government of Nepal that was explicitly addressed in the publication of results. A report of the research, summarising the principal findings, was published in English and Nepali (ICRC, 2009) in Kathmandu in May 2009 and launched by the ICRC at a function in Kathmandu with the

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<sup>61</sup> The National Network of Families of the Disappeared and Missing Nepal, NEFAD.

<sup>62</sup> Shadows of Hope: missing persons in Nepal, ICRC: 2010. <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/nepal-news-060810>

Chairman of the Constituent Assembly Human Rights Committee, in the presence of a group of family members of the Missing from around the country. The report has been widely reported in the Nepali media (e.g. NepalNews, 2009; Kathmandu Post, 2009) and internationally (The Guardian, 2010), and has been shared with all Constituent Assembly members and with those working in relevant Government departments. It has also been quoted in the grey literature that has emerged since its publication (International Crisis Group, 2010). Since then the report has served as a basis for advocacy with the authorities by both Family Associations and others, notably the ICRC. Such advocacy around the report succeeded in impacting on drafts of the Disappearance Bill, with later versions broadening the definition of disappearance beyond the narrow understanding of Human Rights Law (Appendix I) to include all those missing. In the longer term the report continues to be used by family associations as a reference for the full range of their demands of the state.

The greatest impact of the study in Nepal however has been the implementation by the ICRC of a broad intervention with families of the Missing. This has attempted to take the entire range of needs identified by this study and construct approaches to address all of those that can be addressed, in a substitutive modality, by a non-governmental agency. This is unprecedented in the two decades that the ICRC has worked on the Missing issue and reflects the increased opportunity to respond to needs offered by a comprehensive understanding of them. This programme begins from the needs identified in the study and uses the ambiguous loss model (Section 9.2) to drive a holistic approach that aims to address needs that include social and family stigma, the need for peer support, livelihood and alternative rituals derived from local cultural and spiritual traditions, as well as containing a livelihood component. The initial programme restricts itself to women, wives and mothers of the Missing, and includes:

- The initiation of local support groups of wives or mothers of the Missing that are funded to meet regularly, and led by a trained 'accompanier' through discussions of the impact of disappearance.
- Support of local commemoration activities in communities, organised by support groups that include the building of resting places marked with the names of the Missing, community prayer ceremonies and other locally driven memorialisation.

- Interaction programmes with local communities and community leaders to encourage an understanding of the challenges families of the Missing face.
- Provision of family mediation capacity.
- Provision of economic assistance in terms of animals (pigs and goats) to assist with livelihood.

The intervention is being piloted in the district worst affected by disappearance, Bardiya, and initial results are encouraging: a full evaluation is underway which will constitute an empirical victim-centred evaluation of the efficacy of such an approach. Similar interventions will be initiated in ten other districts in 2011.

### ***Impact of the study in Timor-Leste***

It had been assumed that the advanced stage of Timor-Leste's transitional justice process would predicate against this study having significant impact on policy. In fact, whilst Nepal's process remained substantially blocked by the political stalemate over the period of the study, in Timor-Leste the Government began to address unresolved issues from the CAVR process and the research of this thesis was able to influence those processes as they unfolded.

As a result of the few Family Associations active in Timor-Leste the study worked far more with individual victims than in Nepal, with most interactions lacking the mediation of victims' representatives. As such, there are fewer routes for the study to mobilise such groups. At the time of the study an initiative was underway to create a national victims' movement, through the holding of Victims' Congresses in all districts and then a national meeting in Dili (National Congress of Victims of Human Rights Violations, 2009). This study focuses on a set of victims whose needs had emerged in the Victims' Congress's own work and it is hoped that it can support their future advocacy.

The ICRC's response to the study has, in analogy with Nepal, been to initiate a psychosocial programme with families. A pilot project will shortly begin in one of the districts visited for this study, supervised by a dedicated expatriate psychologist. The psychosocial component will consist of both group counselling, likely to benefit from the experience of the ICRC Nepal programme, as well as individual support from trained

local service providers. This will be accompanied by a programme of economic assistance to the most vulnerable families and the continuation of support to burial and other ritual processes. Since the completion of the study the ICRC has been supporting a small number of families to permit both the retrieval of human remains where their location is known and the performance of death rituals and construction of graves. In parallel with this action to target families ICRC will support the forensic capacity of the Timor-Leste Police and the Dili mortuary to increase local capacity to make exhumation and identify human remains.

During the field work the researcher engaged closely with the Government of Timor-Leste, notably the Foreign Ministry as it developed the bilateral Joint Ministerial Commission (JMC) with the Government of Indonesia, established following recommendation in the CTF report. This was a mechanism that aimed to address outstanding issues between Indonesia and Timor-Leste, including pensions of ex-Indonesian civil servants in Timor, visa arrangements between the two states and management of borders as well as issues related to the conflict. The latter included proposals for the management of Indonesian memorial parks in Timor-Leste, support to Timorese health facilities with a focus on treatment of trauma and the issue of the Missing. For the first ministerial level meeting of the JMC in 2009, the researcher drafted the submission of the Timor-Leste Government on the missing issue and was invited to join the Government's delegation as an advisor. Whilst the Indonesian Government has shown interest in addressing issues concerning children taken from Timor who may now be living in Indonesia, it is clear that the broader missing issue remains extremely sensitive and a deeper engagement with it is likely to require further confidence building.

As for the Nepal study, the results of the research in Timor-Leste were published in Dili in relevant languages (Tetun, Indonesian, Portuguese and English) by ICRC (ICRC, 2010a) in May 2010. The report was launched at a ceremony in Dili held at the site of the main prison in Indonesian times that had served as the national headquarters for CAVR. The report was launched by the Minister of Foreign Affairs and was attended by the Chair of the Parliamentary Committee preparing legislation to address issues remaining from the CAVR and CTF processes (AlertNet, 2010). Family members met during the research made contributions from the floor. Since publication of the report the Parliamentary committee has published draft legislation that will create a new institution, the Public Memory Institute (*Instituto da Memória*). The new institution aims to develop

programmes of reparation and memorialisation for victims; the draft includes the following commitment:

It is also imperative to remember and to honour those who died in the context of the conflicts that happened in Timor-Leste between 1974 and 1999, and to provide support to the families of those who have disappeared, who are as yet unaware of what happened to them and who are believed to have died. (National Parliament, Timor-Leste, 2010: 1)

The draft also commits to: “assist the Government in fulfilling the State’s obligations with regard to missing persons” (ibid: 15), to create a database of missing persons and to undertake forensic work and investigations. In June 2010, an additional draft bill was prepared on reparations that commits the Government to provide “symbolic and material reparations” (National Parliament, Timor-Leste, 2010a: 2) to victims of the 25 year conflict, and explicitly includes the families of the missing as victims (ibid: 3). During the research and immediately following the report’s publication both the researcher and the ICRC maintained a close dialogue with relevant Government actors and the impact of this is clear in the draft legislation. In June 2010, the same Parliamentary Committee produced a draft law on reparations. Elsewhere the study was referenced in other media concerned with Timor (e.g. Rai Ketak, 2010).

The Public Memory Institute and the planned framework for a National Reparations Programme represent the creation of structures that could potentially address a range of needs of the families of the Missing discussed here. In combination with an ongoing process of engagement with the Government of Indonesia on the issue of the Missing, this allows for some optimism that some of the needs discussed here will be addressed. Whilst there remain significant obstacles, both in terms of political will on both sides of the border and in terms of availability of resources to address needs for reparation, recognition and exhumation, the situation is far more favourable than could have been conceived at the start of this research.



## Glossary of terms and abbreviations

aldeia	(Timor-Leste: Portuguese) Village, smallest administrative unit.
badhgar	(Nepali) Traditional leader of the Tharu community at the village level
Brahmin	(Nepali / Sanskrit) Brahmins are the highest, priestly class of Indo-Aryan origin, also known as <i>Bahun</i> s in Nepal
CA	(Nepal) Constituent Assembly
CAVR	(Timor-Leste: Portuguese) Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste (Commission for Welcome, Truth and Reconciliation)
CPD-RDTL	(Timor-Leste: Portuguese) Conselho Popular pela Defesa da Republica Democratica de Timor Leste (Popular Council for the Defence of the Democratic Republic of Timor-Leste), a political party that sees itself as the heir to the original republic declared in 1975.
CTF	Commission of Truth and Friendship Indonesia-Timor-Leste
CPA	(Nepal) Comprehensive Peace Agreement
CRP	(Timor-Leste) Community Reconciliation Process
chautara	(Nepali) Resting place on a path or road
Chepang	(Nepali) The commonly used name given to an indigenous ethnic group living in central and southern Nepal.
Chhetri	(Nepali) The warrior and ruler caste group or <i>varna</i> of Hinduism
chinta	(Nepali) Worry, anxiety, care or concern
CPN-M	(Nepal) Communist Party of Nepal (Maoist)
CVC	(Nepal) Conflict Victims' Committee: An association of families of the Missing in the district of Bardiya.
dalit	(Nepali / Hindi) Self-designation for a group of people of low caste ( <i>shudra</i> ), traditionally regarded as Untouchables.
dimaag	(Nepali) Brain-mind, centre of mental process
dukh	(Nepali) Sadness or depression
Falintil	(Timor-Leste: Portuguese) Forças Armadas da Libertação Nacional de Timor-Leste; Fretilin's armed wing and later broad armed liberation movement.
F-FDTL	(Timor-Leste: Portuguese) Falintil - Forças de Defesa de Timor

	Leste; armed forces of independent Timor-Leste.
Fretilin	(Timor-Leste: Portuguese) Frente Revolucionária de Timor-Leste Independente.
Gurung	(Nepali) An indigenous ethnic group that migrated from Mongolia in the 6th century to the central region of Nepal.
guruwa	(Nepali) Tharu traditional spiritualist and healer
Hansip	(Indonesian) Abbreviation of <i>Pertahanan Sipil</i> – ‘Civilian Defence Organization’: an Indonesian militia raised locally in Timor-Leste
ICRC	International Committee of the Red Cross
Jana Andolan	(Nepali) <i>Lit.</i> ‘People’s Movement’: Used to reference both the 2006 movement that overthrew the king’s authoritarian rule, and the 1990 democracy movement.
Janajati	(Nepali) Indigenous people, defined as persons who have their own language and traditional culture, and who are not part of the conventional Hindu caste structure
hanoin barak	(Tetun) <i>Lit.</i> ‘thinking too much’, a term indicating anxiety or intrusive sadness.
katha	(Nepali) A measure for land area (1 katha = 130.2 m <sup>2</sup> )
kus	(Nepali) A grass used in death rituals as a substitute for an absent body.
lia nain	(Tetun) <i>Lit.</i> ‘culture speaker’: Those in Timorese communities entrusted with spiritual matters.
liurai	(Tetun) Traditional former kings who maintain some political power.
lulik	(Tetun) <i>Lit.</i> ‘sacred’: the practise of spiritual matters.
Madeshi	(Nepali) Persons considered to be of recent Indian origin, living largely in the Terai, who constitute about 35% of Nepal’s population
Magar	(Nepali) An indigenous ethnic group of mongoloid origin living largely in western hill districts.
mangalsutra	(Nepali / Hindi) Traditional necklace worn by Hindu wives, as a yellow thread, gold chain, or string of black beads
man	(Nepali) Heart-mind, centre of emotion
mestiço	(Portuguese) A population of mixed Portuguese-Timorese origin,

traditionally close to the colonial elite.

Newar (Newa)	(Nepali) An indigenous people who traditionally occupied the Kathmandu valley.
PLA	(Nepali) People's Liberation Army; armed wing of the CPN-M.
PTSD	Post-traumatic stress disorder
puja	(Nepali / Sanskrit) Hindu expressions of honour, worship, devotional attention; prayer.
RNA	(Nepal) Royal Nepal Army
sindhur (sindoor)	(Nepali / Hindi) A traditional red or orange-red coloured cosmetic powder worn by married women along the parting of their hair.
Sofad	(Nepal) Society for the families of those disappeared by the state (CPN-M aligned association of families of the Missing).
suku (suco)	(Timor-Leste) Sub-district, administrative unit.
Tamang	(Nepali) An indigenous ethnic group from the north central hill region of Nepal, who practise Buddhism.
TBO	(Indonesian) <i>Lit.</i> 'staff assisting operations': Young men and boys taken, often forcibly, to assist the Indonesian military in Timor-Leste.
Terai	(Nepali) A geographic for districts in the plains bordering India, constituting a strip the length of the country.
Tharu	(Nepali) An indigenous traditionally non-Hindu. community living in the Terai.
tika	(Nepali) Traditional mark worn on the forehead by Hindus; married women wear red tika
TRC	Truth and Reconciliation Commission (most often referencing the South African TRC).
UDT	(Timor-Leste: Portuguese) União Democrática Timorese.
uma	(Tetun) <i>Lit.</i> 'house'
uma lulik	(Tetun) <i>Lit.</i> 'sacred house': A sacred building that constitutes the centre of the sacred life of a community.
UNTAET	UN Transitional Administration in East Timor
VDC	(Nepal) Village Development Committee (Administrative unit)
Xefe suku (Chefe suco)	(Timor-Leste) Suku chief.



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