

# 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; Leman-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-Tel 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. (Pouliny, 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.