



A Continuous Struggle for Transitional Justice through Truth and Reconciliation:

A case study of enforcedly disappeared in Nepal

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List of Acronyms

CPA: Comprehensive Peace Accord

CVC: Conflict Victims Committees

CVOS: Conflict Victims Orphan Society

DC: Disappearance Commission

ICCPR: International Covenant for Civil and Political Rights

ICRC: International Committee of the Red Cross

ICTJ: International Centre for Transitional Justice

INSEC: Informal Sector Service Centre

MOPR: Ministry of Peace and Reconstruction

NEFAD: National Network of the Families of Missing and Disappeared

NHRC: National Human Rights Commissions

NRCS: Nepal Red Cross Society

RADUT: Rina Arpan Dalit Uthhan Manch

TRC: Truth and Reconciliation Commission

Abstract

During the decade long conflict in Nepal (1996-2006), 1360 peoples were enforcedly disappeared by both parties to the conflict (International Committee of the Red Cross, 2013). But even after seven years of the signing of the Comprehensive Peace Accord, Truth and Reconciliation Commission has not been formed due to the disagreement among the political parties and the victims' families associations on issues like amnesty and forced reconciliation. Nepal in its current political context is in need of reconciliation, healing and truth telling for the nation to move forward without marginalizing the conflict victims and their families.

In this research paper I will explore the struggles / complexities and possibilities in achieving reconciliation in post conflict Nepal. I will examine the state responses for reconciliation and how do the victims' families associations perceive it. In this paper I will also study the broader demands of the victims' families individually and victims' families associations. For the purpose of the study reconciliation is analyzed through the micro level and macro level model given by Susan Dwyer. In Nepal the formation of the truth and reconciliation commission is in an impasse due to focus on prosecution versus amnesty debate. The findings suggest that the priority demands of victims' families are not in coherence with the victims' families associations. The victims' families' priority demand is *knowing the truth and delivery of socioeconomic demands as justice* where as the victims' families associations priority demand is *knowing the truth and prosecution as justice* .I argue that the prosecution of the perpetrators will not guarantee the long term healing and reconciliation of the victims' families if their socio-economic needs are not met. My conclusion in this paper is in the current context of Nepal, the state needs to reassess the focus on the social and economic justice to the victims and their family members which will pave a way for reconciliation.

Relevance to Development Studies

Countries which have come out of violent conflict must deal with it according to their country's environment for political stability. Reconciliation is an important and essential element in the broader concept of transitional justice. Thus this paper stresses that true reconciliation ensures a roadmap for positive peace in the country.

Keywords

Transitional Justice, Truth Telling, Reconciliation

Chapter 1

1.1 Statement of the research problem

Nepal witnessed a violent civil conflict from 1996 to 2006. Enforced disappearances were a hallmark of the conflict in Nepal and were carried out by both parties to it, the State and the Maoist combatants (UNOCHR, 2012). The decade long conflict in Nepal has left 1360 people disappeared from 69 districts (out of 75) of Nepal (ICRC, 2013). A human rights organisation Informal Sector Service Centre states that the disappearances occurred in two ways during the conflict. The first was that the persons were forced to disappear by the conflicting parties and the second is the disappearance that occurred when a person went missing while voluntarily participating in the struggle (INSEC, 2011). Article 5.2.3 of The CPA signed between the Maoists and the government of Nepal in 21st November, 2006 agreed on making public the information of the disappeared people within 60 days of the signing. But even after seven years both the parties involved in the war have failed to do so and the whereabouts of the disappeared people are still unknown leaving the families still in despair and suffering. Many national as well as international human rights organisations has done investigations and documentations regarding the enforcedly disappeared cases, but till date not a single person or alleged perpetrators has been brought inside the ambit of law.

The parties to the conflict who are accused of grave human rights violations have acknowledged the importance of truth and reconciliation through the CPA by committing to the formulation of the Truth and Reconciliation Commission (TRC). However in reality they are pursuing it with the dual “hidden” interest of safeguarding themselves from prosecution and appeasing the external agencies. The victims families associations recently challenged the amnesty clause and the provisions for forced reconciliation in the Ordinance creating a TRC in a written submission to the Supreme Court (Bhandari, 2013). On 1st April 2013, two weeks later after the ordinance was passed, a Justice on Nepal’s Supreme Court suspended the ordinance from taking effect pending a further review of the planned Commission (IJRC,

2013). Thus the process of formation of the TRC is suspended at the moment in Nepal. At the time of writing Nepal is focusing on the second constituent election which is slated to be held on 19th November 2013, the victims' families associations claims their voices has been marginalized and environment for reconciliation seems to be farfetched. This research paper originates from the problem statement that there is an impasse in the formation of the TRC because the political leaders are pursuing for amnesty and the victims associations are pursuing prosecution. This impasse has been delaying the formation of TRC which will have a negative impact in reconciliation and long term healing of the victims families.

1.2 Research Objectives and Questions:

The objective of this research is to explore the struggles and complexities of reconciliation in post conflict Nepal. This paper also aims to formulate recommendation to the government of Nepal for prioritizing its policies on truth and reconciliation to ensure its accountability to the families of victims of enforced disappearances that took place during the conflict.

The main research question is how has the proposed TRC introduced by the state affected the reconciliation and healing of families of enforcedly disappeared in Nepal?

The following sub-questions in the research will help to answer the main question:

- What are the mechanisms introduced by the state for TRC and how do the victims' families perceive it?
- What are the broader demands and arguments of victim's families associations? Are the demands in coherence or in tension with the demands of individual victims' families?

1.3 Research Methodology

The approach used in this research for data collection is qualitative method. In order to address this research objectives the data was collected both from primary as well as secondary sources.

Primary Data

Primary data for this research was collected using the tools like semi structured interview and informal discussions. For this paper semi-structured interviews were conducted with the key respondents i.e. Five victims' families associations and Six victims' families members. The victims' families associations that were interviewed were:

- i. National Network of the Families of Missing and Disappeared (NEFAD): Mr. Ram Bhandari
- ii. Conflict Victims Orphan Society (CVOS): Mr. Suman Adhikari
- iii. Rina Arpan Dalit Uthhan Manch (RADUT): Geeta Rasaili
- iv. Society for those disappeared by State: Ekraj Bhandari
- v. Conflict Victims National Society (CVNS): Mr.Gyanendra Raj Aran

The above mentioned victims' families associations were interviewed because of their status of being active in their advocacy. Among the five victims associations, four of them i.e. NEFAD, CVOS, RADUT and CVNS were part of the eight victims' families alliance that have submitted writ petitioned in the Supreme Court challenging the amnesty clause and the provisions for forced reconciliation in the proposed Ordinance creating a TRC.

For individual families six victims' families were selected. The disappearances took place in different part of Nepal but the interview was conducted in Kathmandu and Kavre districts of Nepal. The victims were selected on the basis of their time availability and their agreement on being part of this study through interview. Among the six families, one of the victim was disappeared by the Maoists whereas the remaining five were disappeared by the state.

Secondary Data

Secondary data is also used for this research paper. Secondary data was obtained through organizational reports, human rights journals, news reports and government documents. For additional secondary resources following organizations were visited:

- i. The International Committee of the Red Cross (ICRC): Head of Protection Program
- ii. Informal Sector Service Centre (INSEC): Chief, Documentation and Dissemination Program
- iii. Ministry of Peace and Reconstruction (MOPR): Assistant Secretary
- iv. National Human Rights Commissions (NHRC): Human Rights Officer
- v. Transitional Justice Resource Centre (TJRC): Legal Officer cum Librarian

The above mentioned organisations/actors has been identified and selected for secondary source because they are representing the key organisations that can provide relevant information in the issues and activities taking place in regard to transitional justice and more specifically enforced disappearances in Nepal. Organisation like INSEC (Informal sector service centre) is a very active organisation working for the protection and promotion of Human Rights in Nepal. ICRC has been working intensively in Nepal on missing persons. The National Human Rights Commission of Nepal is an independent and autonomous institution established on 5 June 2000, under the Human Rights Commission Act 1997, passed by the Nepalese Parliament with the objective of protection and promotion of human rights of the citizens of Nepal. Similarly all the other actors mentioned above will be key provider of secondary sources of data for this research.

1.4 Limitation and ethical consideration

The topic of enforced disappearances and transitional justice is a politically very sensitive issue. This research is particularly dealing with reconciliation element of transitional justice which involves deep personnel griefs and grievances. Bearing this in mind the research interviews was conducted in a very ethical and sensitive way. For the purpose of choosing the victims' families instead of random selection, families of Kathmandu and kavre district were introduced through the victims associations. Before conducting the interview the nature and background information of the study was explained to the respondents and approval was taken with them in carrying out the interview. For the security reasons as well as ethical concerns the names of the

victims and their families has been changed while quoting them in this paper. The victims' families' association's leaders were very vocal about their opinions as they were engaged in advocacy and justice issue since many years. During the interviews with the families it was observed that they were not fearful in naming names of the perpetrators involved in the disappearances of their family members. However among the interview with the six victims' families, two of the interviews had to be stopped before its completion because in one case during the interview the children of the victims arrived from school and their mother hesitated to continue the interview in front of them where as in another case, the interviewee broke down during the interview thus due to ethical consideration the interview was stopped. It also must be mentioned that considering the limited number of respondents especially among the victim's families in this research the conclusions drawn are tentative and generalizing should be resisted.

The initial plan of the research paper was to also include the representatives from the government and political leaders however it was impossible to have access to them to interview them in this issue. Some of the government bureaucrats were also approached via telephone to grant interview which initially they approved. But during the course of time they kept on postponing the appointment for next week. And finally they denied the permission for interview citing the cause of political sensitivity. Thus government bodies and representatives were limited in providing secondary data.

1.5 Structure of the Paper

This paper is divided into five chapters. The first chapter is the introduction chapter in which the identification of the problem statement, research objectives and questions and the methodology of the research are explained. The limitation and the ethical consideration of the research is also explained in chapter one.

The second chapter discusses the key concepts of this research paper i.e. enforced disappearances, transitional justice and the concepts of

reconciliation and truth telling within transitional justice. Chapter two also explains the analytical framework which will be used in the analysis of the findings of the research. Chapter three with its heading conceptualizing transitional justice in Nepal gives a background of the nature of the conflict in Nepal, The facts and figures of enforcedly disappeared in Nepal and the background on the ordinance of the proposed truth and reconciliation commission in Nepal.

Chapter four will present the findings and analysis of this research questions. The struggles and complexities for reconciliation in post conflict Nepal is explained using the Dwyer model of macro and micro level reconciliation and the broader demands and arguments of victim's families associations and victims' families members were presented. And in the final chapter the conclusion and recommendation will be drawn based on the findings.

Chapter 2: Key Concepts and the Analytical Framework

This chapter will focus and explore on the concepts of enforced disappearances and transitional justice. Under the broader framework of transitional justice, two of its sub concepts reconciliation and truth telling will also be discussed which will be applied in my analysis. Further in this chapter I will also discuss the analytical framework for the interpretation of the findings of the research to meet the research objective.

2.1 Enforced disappearances

The concept of “Enforced Disappearances” has been defined as a crime against humanity by numerous international instruments including the UN declaration on the Protection of All Persons from Forced Disappearance, Rome Statute of the International Criminal Court, Inter-American Convention on Forced Disappearance of People and the United Nation International Convention for the Protection of All Persons from Enforced Disappearance. When a person is enforcedly disappeared then it violates a range of his/her human rights including the right not to be subjected to torture or other cruel inhuman or degrading treatment or punishment, the right to security and dignity of person, the right to a legal personality, the right to humane conditions of detention, the right to a fair trial, the right to a family life and when the disappeared person is killed, the right to life is violated.

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance as “*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*” (ICPPED, 2006).

Similarly The U.N. Declaration on the Protection of all Persons from Enforced Disappearances defines disappeared persons as “*Those persons who are*

arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”(UNGA ,1992).

And further, Rome Statute defines enforced disappearance as 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 of the International Criminal Court ,1998).

The definitional difference between the international instruments mentioned above is that only the Rome Statute has included both the state party and the non-state party who commits the acts of enforced disappearances whereas the others instruments has acknowledged only state party or parties with the affiliation to the state in the act of enforced disappearances. In the context of Nepal Point 2(k) of the Ordinance on Investigation of Disappeared Persons, Truths and Reconciliation Commission published by the Government of Nepal, Nepal Gazette on 14 March 2013 defines The “Act of disappearing a person” as following acts .

(1)If any person arrested, detained, or taking control of by any other means by any person given the authority by law to arrest, investigate or implement a law or by a security personnel has not been brought to the authority that hears the case, is not allowed to meet concerned persons or concerned persons are not given information as to where how and in which state he/she is kept in after the time period as provided for in the law that such person needed to be presented before the authority that hears the case has elapsed.

(2) If any person is arrested or abducted, taken control of or deprived of from his/her personal liberty in any other ways by any organisation or organized or unorganized group(Ordinance ,2013).

Though Nepal has not ratified the Rome Statute the definition of enforced disappearances in the proposed ordinance has included the state actors as well as non state actors in the act of enforced disappearances. Thus this definition in the context of Nepal has included both the state as well as the Maoists party who were engaged in the act of enforced disappearances during the conflict. The state claims that it is preparing and planning to ratify the Rome Statute however it has yet not been done. This definition given in the proposed ordinance has been criticized for failing to distinguish between enforced disappearance and arbitrary detention or abduction. It does not include mention that the effect of refusing to acknowledge the deprivation of the disappeared person's liberty or concealing the fate and whereabouts of the individual has the effect of placing him or her outside the protection of the law (WGEID, 2010).

Under domestic criminal law Nepal has so far failed to criminalize the act of “enforced disappearances”. It is not yet identified as a specific crime. In May 2007 the then interim Legislature-Parliament proposed a Bill to amend the Civil Code to criminalize the practice of “enforced disappearances” and “abduction or hostage taking”. But it was criticized for not being in compliance with international standards and it was withdrawn (ICJ, 2009). Similarly in 2011 a draft criminal code was introduced in the parliament to criminalize acts of enforced disappearances and torture, but again they did not meet the international human rights standards. Before the draft was completed the parliament dissolved (TRIAL et al, 2013). Thus, the effort of criminalization of enforced disappearances has not yet been materialized in Nepal.

2.2 Transitional Justice

The concept of Transitional Justice holds a significant meaning especially for those countries that has come out of a violent conflict in the past. United Nation Secretary General defines transitional justice as “the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation . . . By striving to

address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objective of prevention of further conflict, peace building and reconciliation”(UNSG, 2004).

Huntington mentions that it was during the third wave of democratization in Latin America and Eastern Europe, the concept of transitional justice as a separate field of research and action first appeared. It particularly focused on transition from dictatorial or authoritarian regime (Huntington, 1993). The beginning phase of study of transitional justice was more inclined towards or was more influenced by the ideas of transitions from authoritarian rule to democracy. Hansen mentions that transitional justice can be understood from different scenarios not just from authoritarian to democracy which was an ideal concept in late 1980s to early 1990’s (Hansen, 2011). In his article he has written about four different types of scenario i.e. transitional justice in liberal transition, transitional justice in non-liberal transition, transitional justice in deeply conflicted societies and transitional justice in consolidated democracies (ibid). The critics argues that in the case of transitional justice within established democracies , these states are non transitional , thus there is nothing conceptually distinctive about transitional justice. It will thus be a concatenation of ordinary form of justice which need not attract a coherent and distinct theoretical apparatus (Posner et al, 2004).

Transitional justice is a home driven peace process and unique in many ways in Nepal. Nepal’s transitional justice process is led by the political parties who have been engaged in war crimes themselves. Post conflict the main actors /perpetrators who participated in the conflict are still represented in the state level. The then rebel group the Maoists is the largest political group in the country, the Nepali Congress who were in the government during the conflict is one of forefront political group, and the executive body i.e. the police and the army which is accused of carrying out grave human right abuses have not changed. Thus, Nepal is a unique example which does not relate to any of the four circumstances identified by Hansen above.

According to Russell Transitional justice is characterized by five key elements : (a) truth-seeking, (b) prosecuting perpetrators, (c) providing reparations or rehabilitation to victims, (d) shaping collective memory to facilitate reconciliation processes, and (e) reforming abusive or inequitable institutions (Russell, 2012). Transitional justice as a concept has been evolving from retributive justice to restorative justice. The focus was shifting from perpetrators to more on healing of victims and an effort to maintaining the social relationship of the offenders and the victims. Again over the passing time there has been increasing criticism of the concept of transitional justice for neglecting the socio-economic aspects. Many scholars are stressing and focusing in the broadening of the transitional justice scope by including social and economic justice and development. Arbor argues that transitional justice will not be able to achieve its objectives if it ignores economic and social rights. He argues that it is more “effective to attack the sources of legitimate grievances”. Further he elaborates that if those socioeconomic grievances which were the cause of the conflict are addressed then it may prevent the outbreak of next conflict (Arbour, 2006). This paper will focus on restorative justice in terms of truth telling and socio-economic justice which will pave a way for healing and reconciliation of families. The sub concepts under the broader framework of transitional justice, reconciliation and truth telling which will be applied in my analysis are discussed below.

2.2.1 Reconciliation

Reconciliation has been defined as a process of healing, mutual acknowledgement of past crimes on past circumstances and moving ahead to avoid future conflict. It is regarded as being necessary to prevent the desire for revenge (Fischer, 2011).

The concept has also been discussed in the context of mercy, forgiveness, acknowledgement and contrition. Dwyer suggests that the concept of reconciliation is specially common in scenarios when the judicial responses becomes unavailable due to corruption in the legal system, when the number of perpetrators is very high or whenever there is an anxiety about the political

consequence of trials and punishments(Dwyer, 1999). Critics have argued that reconciliation processes will not necessarily lead to forgiveness, as this is considered to be a power held only by those victimized and cannot be claimed by others (Minow, 1998).

Dwyer states that reconciliation and forgiveness are conceptually independent even if they often go together (Dwyer,1999). In this research paper I will acknowledge reconciliation without the concept of forgiveness. To explore the complexities in the struggle for reconciliation in this paper, the micro and macro level of reconciliation will be used which is given by Susan Dwyer .Dwyer usefully makes distinction between micro-level and macro-level reconciliation, where the former typically involves local, face-to-face interactions—for example between two friends—and the latter concerns more global interactions between groups of persons, nations, or institutions, which are often mediated by proxy (ibid). In the past the term reconciliation has been used to reconcile between actors of different types like between two friends, between a single victim and offender, and group reconciliation like racial reconciliation, religious reconciliation and ethnic reconciliation. Thus, to simplify it Dwyer suggests the micro and macro level reconciliation.

Mark (2007) opines that the concept of reconciliation should not be limited to acknowledgement and co-existence. He stresses the importance of meeting basic human needs like food, shelter and health care in post conflict situations. He further elaborates on the importance of dealing with impunity of perpetrators, reparations measures and inclusion of discriminated groups for reconciliation. This paper will use this concept of Reconciliation by Mark to study and analyze the state responses in Nepal for reconciliation. However this paper will take into account only the aspects of meeting the basic needs after the conflict as an important element for reconciliation.

2.2.2 Truth telling

Truth telling is considered as the primary step towards reconciliation. Mamdani (2000) points out that the truth is a prerequisite for justice which will facilitate

reconciliation and national healing. Similarly Hayner has argued that the individual and social healing and reconciliation can be achieved through the official and public exposure of truth. The truth will provide redress for victim (Hayner, 2001).

Fischer mentions four different types of truth recovery i.e. objective or forensic truth, narrative truth, social or dialogical truth and healing or restorative truth (Fischer, 2011). Freeman and Hayner (2003) acknowledged that truth-telling may be established through a truth commission mandated to lead a transition to a democratic and peaceful environment. Truth and reconciliation commissions are non-judicial mechanisms that have played an important part in addressing past human rights violations in post conflict societies. Villa-Vicencio(2007) expressed, *“a TRC, as the name suggests is concerned with the restoration of truth. Through TRCs, the commissions try to document and analyze structures and methods used in perpetuating out illegal repression, while taking into account the socio-political and economic conditions in which these violations have been held”*. This paper will analyze the concept of reconciliation through truth telling in the context of Nepal.

The concept of truth telling and reconciliation under the broader framework of transitional justice which has been discussed in this chapter is essential to understand and analyze the proposed TRC in Nepal. They will further help to understand the complexities and struggles in reconciliation in post conflict Nepal.

Chapter 3: Contextualizing Transitional Justice in Nepal

This chapter is divided into two sections. The first section provides the background on the history and causes of conflict followed by the brief discussion on the transitional justice mechanism introduced by the state. The second section provides the facts and figures of enforced disappearances in Nepal.

3.1 Conflict in Nepal

Nepal is a landlocked country situated between the two giants of Asia, India and China. The Shah Kings were the rulers of Nepal with Prithvi Narayan Shah as the first king of unified Nepal which he unified in 1769 which was before divided into twentytwo and twentyfour municipalities (Parajulee, 2000). Historically Nepal has never been colonized by any foreign regime or nation but the people of Nepal were ruled by the autocratic and feudal Rana rulers for 104 years, who enjoyed ultimate power and denied democracy to the people until 1950. During the Rana regime who ruled Nepal from 1846 to 1950, the Shah King were mere “puppets” in their control. The Rana regime was an autocratic rule with central power among handful of Rana family members. After the end of Rana regime a democratic norm of governance was seen in the country. In 1961 the country’s first democratic constitution was adopted, which was modelled largely on the British system of constitutional monarchy (Subedi, 2010). Then was the Panchayat system for almost three decades in which the absolute power was in the hand of the monarch. Discriminations in social, economic and political spheres of life in the name of caste, ethnicity, gender and geographic region existed in the deeper form. The so-called lower caste people of Nepal, the Dalits, who comprised of the twenty percent of the total population, also comprised of eighty percent of Nepal’s ‘ultra poor’ and possess roughly one percent of the country’s wealth (CHRGJ, 2005). The Madhesi group was another marginalized community in Nepal. The

Madhesi people are settled in the Terai region which is the most fertile part of Nepal. However majority of the Madhesi's do not own the land they cultivate (World Bank et al, 2006). They were also denied Nepalese citizenship and voting rights marginalizing them from all social benefits which led to Madhesi uprising in January-February 2007. Throughout the Nepalese history, the concentration of the land had been in the hands of a few elite classes and severe exploitation of the peasantry through excessive labor expropriation (SEEPOR, 2000). Reforms were made at policy level to reduce this exploitative practice of the landless peasants by the upper caste landlords. Karki explains that the legal measures that were introduced in order to address the inequality in landowning system failed in practicality (Karki, 2002).

Underlying causes of poverty of both the women and men is that of entrenched traditional social structures as castes and class hierarchies, ethnic or religious discrimination, and unequal distribution of land. Most ethnic minorities in Nepal have less direct access to resources and opportunities. It is equally applicable for women and ethnic communities (Shrestha, 2012). In 1990 the country adopted a new democratic constitution in which power was given to the elected bodies in the government and also ensured fundamental rights to the people of Nepal. However power was centralized in the elite group based in Kathmandu and other urban centers and states resources was unevenly distributed among the population. The economic stagnation, high rate of unemployment, poor education, impoverishment, continuing discrimination, and an increasing gap between the elite in Kathmandu and the rest of the country provided a fertile ground for dissatisfaction of the population of Nepal (Budhathoki, 2007).

These extreme gaps in citizen's access to the services of the nation, discrimination on the basis of caste, class, gender, ethnicity and region and deep rooted poverty led to the start of the armed conflict by the Maoists party of Nepal in 1996. In the first democratic elections in 1991, the Maoists had participated but they decided to follow a different path to their goal by 1994 (Iyer and Do, 2010). The Maoist's insurgency so called "People's War" began in 1996 which had grew out of centuries of accumulated resentment due to the

Nepal's exclusionary social, economic and political systems. In 1996, the Maoists formally resorted to armed struggle, when the 40-point demand which was made by the Maoists was rejected by the Nepalese government. The main objectives of the Maoists were to abolish the monarchy, establish a people's republic and elect a constituent assembly to draft a new constitution for the country (Ibid).The 40-point demands made by the Maoists were within the framework concerning Nationality, People's democracy and livelihood (Thapa, 2003). The prominent Maoist leader Bhattarai noted that "*The Nepalese society at the beginning of 21st century is passing through the greatest upheavals in its entire history in the form of revolutionary People's War (PW) of the oppressed classes, regions, nationalities, gender and communities against the outmoded semi-feudal and semi-colonial social order*"(Gurung, 2005;see Bhattarai 2003). The violent conflict began with the Maoists attacking three remotely stationed police outposts, a bank branch , a drinks bottling plant, a liquor factory, and a private house simultaneously(Nepal et al,2011).The civil conflict which started in 1996, went on for a decade. In 2001 and 2003 there were failed attempts of ceasefire. In 2005 then King Gyanendra declared a state of emergency, dismissed the government, put many of the political leaders under house arrest and took complete power. He also suspended civil liberties such as freedom of press. Then the people's movement of April 2006 took place which brought together Maoists and all other political parties together and finally the King Gyanendra stepped down as the last king of Shah Dynasty.The civil conflict ended after the signing of The Comprehensive Peace Accord (CPA) between then Government of Nepal and the Maoists on 21st November, 2006.Nepal was declared a federal democratic republic in 28 May 2008.Nepal is now in a post conflict peace process.

The conflict in Nepal witnessed acts of grave violations of human rights in the form of death, disappearances, torture and rape. Different human rights organizations and international organizations reported that during the conflict the act of enforced disappearances were done both by the government security forces as well as by the Maoists. INSEC reports the disappearances occurred in two circumstances in which one were those who were forcibly

disappeared by the conflicting parties and other were those who were voluntarily participating in the struggle (INSEC, 2011). During the conflict it was the normal civilians /villagers who were mostly vulnerable to the situation. The Maoists had gained a reputation for being forcibly gaining food and accommodation for their comrades. If the villagers denied providing them food and shelter then they had the risk of being executed in the name of being class enemies or traitors (Adams, 2005). And if they involuntarily provide such means to the Maoists then they became the target of the attacks from the state forces. Mostly rural poor, Dalits and indigenous communities were vulnerable to both Maoists and state security forces during the conflict (Ibid).

The Constitution of the Kingdom (then) of Nepal, 1990 was replaced by the Interim Constitution of Nepal, 2007. However, even after seven years of post conflict peace process the constitution has still not been drafted and the mechanisms for Transitional Justice has not been established which were the major themes of the CPA. The Constituent assembly which was formed after the 2008 election was dissolved in 2012. At the time of writing the new Constituent Assembly election is announced to be held on 19th November, 2013. Due to political turmoil the election which was supposed to take place on 22nd November 2012 has already been postponed twice. Amidst this havoc is an important issue to the victims families that has not been given a “priority” by the government and other political parties of Nepal i.e. transitional justice to the families of victims of enforcedly disappeared people during the conflict.

At the time of writing the victims group in a written submission to the Supreme Court had recently challenged the amnesty clause and the provisions for forced reconciliation in the Ordinance creating a Truth and Reconciliation Commission (TRC) (Ibid). The revised Ordinance was prepared without input from victims or human rights institutions. Both national and international organizations have identified numerous problems with the mandate and the structure of the Commission. On 1st April 2013, two weeks later after the ordinance was passed, a Justice on Nepal's Supreme Court suspended the ordinance from taking effect pending a further review of the planned Commission (IJRC, 2013). There is an impasse in the formation of TRC due to

the clashing demands from the victims associations with the state in terms of prosecution versus amnesty. TRC is an important mechanism for delivering transitional justice to the victims of past war crimes. Bhandari claims in Nepal there remains no clear understanding of the truth commission and its relationship with the criminal justice process and those of reparation and reconciliation (Bhandari, 2013).

Among the various possible transitional justice measures contemplated since the agreement, only an interim relief program (IRP) administered by the government's Ministry of Peace and Reconstruction (MoPR) has so far been implemented (Carranza, 2012). The Government of Nepal has distributed as monetary relief NPR 100,000 (942 US \$) in 2008 and an additional NPR 200,000 (1,884 US \$) in 2011/12 to the nearest family member of conflict victims (death and disappearances). Under the first relief guidelines, the government provided NPR 25,000 (235.50 US \$) to the family of a disappearance victim and NPR 100,000 (942 US \$) to the family of a deceased victim, thus creating a disparity between death and disappearance. As a result, relatives of the disappeared began to claim to be relatives of someone killed (ICTJ, 2011). The amount of economic assistance was increased from NPR 25,000 (235.50 US \$) to NPR 100,000 (942 US \$) by the third set of guidelines of the Interim Relief Program i.e. Guidelines for providing relief to the beneficiary of a disappeared person pursuant to cabinet decision, January 12, 2009. The program also provided NPR 25,000 (235.50 US \$) each to the widows of men who died due to the conflict (Ibid). The 2013 update by the Relief and Rehabilitation Unit of the Ministry Peace and Reconstruction states that among the 1530 people registered as disappeared in the Nepal government the first relief aid of 942 US \$ has been received by 1528 families whereas the second relief aid of 235.50 US \$ has been received by all families. Among the 1000 number of wives of the disappeared, 611 of them has received the additional 235.50 US \$ as widows. Whereas the remaining 389 has not received it yet. Apart from the monetary compensation the children of the families of the disappeared has also been given the provision of education scholarship for maximum three children who are below 18 years of age.

3.2 Enforced Disappearances in Nepal: Facts and Figures

The act of enforced disappearances was a common phenomenon during the civil conflict in Nepal which was carried out by the state (mostly) as well as nonstate actors. Historically also enforced disappearances has been carried out by the state agencies in Nepal. It can be traced back to 1951 with Ram Prasad Rai, who was actively involved in the protests against the Delhi agreement signed in 1951, is still missing. The trend of arbitrary arrest and disappearance of people increased in the authoritarian Panchayat era of 1961-1989 and also continued after the restoration of democracy in 1990(INSEC, 2011). But the decade long civil conflict has been the most brutal one in Nepalese history.

On 30th August 2013 different humanitarian organizations all over the world celebrated the Day of Disappeared. Marking the same, updated list of disappeared people has been published by different international as well as national humanitarian organizations in Nepal. The government of Nepal has registered disappeared number of people as 1506, The ICRC claims the number to be 1360(ICRC, 2013), INSEC claims the numbers to be 933 of people disappeared due to the civil conflict. For the purpose of analyzing the characteristics of the disappeared people in Nepal the list of ICRC in terms of international standard has been taken as a reference. During the visit to the ICRC only the missing persons list which consists of their basic background was obtained due to the due the confidentiality policy of the ICRC to protect the victims' families. Thus, in order to show the characteristics of the disappeared baseline list has been taken from ICRC whereas, the detail characteristic has been taken from the data of the INSEC on individual basis for the analysis.

Todate a total of families of 3,198 missing people has reported and registered to the ICRC and NRCS the disappearance of their relatives, often following their alleged arrest or capture by one of the parties to the conflict, or during armed encounters (ibid).But additional sources including missing reported by the family members totals to 3,926 disappeared cases during the period of 13th February 1996 to 21st November 2006(ibid).The ICRC then makes an intervention by contacting the concerned party of conflict in relation

to seeking the information about the missing person. The list is then updated on the basis of the answers given by the concerned party for example he/she was arrested and released on so and so date, he/she was killed on so and so date on so and so circumstances , he/she was not a conflict related disappearance case. When the families' acknowledges the answer provided by the authority that their family member is killed with detail information then the case is then closed from the disappearance list. The ICRC in its updated list has 1360 disappeared people (between 13th February, 1996 to 21st November, 2006). Among them 951 are the people whose fate has still not been clarified. To date, their families have not received information about the circumstances that lead to their disappearance and do not know whether their missing relatives are dead or alive. The remaining 409 missing persons are confirmed dead and whose families have been informed accordingly. However, their families are still waiting to know where they were buried. And some families also wish for the human remains of their loved ones to be exhumed (Ibid).

ICRC started its work in Nepal in 1998. During the conflict it was very dangerous and risky for the national staffs to travel to high tension districts in Nepal. It was mainly the foreign staffs and the expatriates who visited detention centers of both parties of conflicts in different areas of Nepal. Or the families used to come to register with the ICRC on their own. A RCM (Red Cross message) service was started in detention centres so that the families could keep in touch with their relatives. Later on if the families approach ICRC, they were also provided with the detention certificate which could help them in speeding up the process on getting interim relief and reparation schemes.

The registration for the missing person was a two way process. The ICRC went to villages for the registration whereas in some cases the families themselves approached them or the Nepal Red Cross. They also used the Nepal Red Cross Media which runs in 14 languages to disseminate information for the registration of the missing family members. The red cross message service also helped spread the role of ICRC in community level. In some cases they first interacted with village head that would then gather people from the

village and arrange for the meeting with them. The “word of mouth” in villages spread news which also was a factor for families approaching them.

In 2010 ICRC started an intensive program with the Nepal Red Cross called Restoring Family Links/Missing (RFL/ Missing). They visit each and every family in the missing list at least once a year. It is an initiative to let the victims’ families know that they have not been forgotten; to update them what answers did the ICRC got regarding their missing family member from the former parties to the conflict. When they visit the families the ICRC get additional new news, new rumors about the where about of the missing persons which helps them in updating the database of the individual missing files. It helps the ICRC to conduct interventions with the concerned party of the conflict. For example if they get the rumor/news about grave site of the missing then they check the locality and submit the case to the concerned party. The ICRC states that new cases of disappearances do come now but are very rare.

The difference in number of INSEC and ICRC list of disappearance persons could be definitional differences. Unlike ICRC which considers a person to be still disappeared until his/her body or grave site is identified, INSEC on the hand puts the name in death category when news about his death is confirmed through various sources even if the grave site is still unidentified. Also both the organization claims to have excluded the disappearances cases which are not political in nature. Thus the identification of cases accurately in terms of deaths and disappearances is necessary to address the cases accordingly in terms of providing transitional justice because a same person is listed as ‘missing’ in ICRC list and as ‘dead’ in INSEC. During the interview with the families they revealed that some cases of non-conflict related death like a person who died due to accident (falling from a cliff) was also registered as a conflict related death in the governments list.

Chapter 4: Findings and Analysis

This chapter will include the findings and analysis of the research. This chapter is divided into three sections in which first I will explore the struggles and complexities of reconciliation in Nepal using the Dwyer model of micro and macro level. The second section will interpret the broader demand and arguments of Victims families associations and the analysis of interview with the individual victims families members will be presented on the basis of which the complexity/divergent in demand of victims' families and victims' families association will be analyzed. In the third section the analysis of the weaknesses of the proposed TRC will be done.

4. 1 The Struggles and complexities for reconciliation in post conflict Nepal

Reconciliation is an important element of transitional justice. The approaches to transitional justice in Nepal are still in debate. The victims families associations are pursuing for prosecution of the perpetrators in the other hand the political leaders are pursuing amnesty. Nepal is a case of perpetrators leading the transitional justice process. The war leaders are now the peace leaders. But acknowledging the crimes and truth telling can lead to an environment for reconciliation which is very essential for the healing of victims' families and for the nation to move ahead. Thus this section will explore the struggles and complexities in reconciliation in Nepal.

It is essential to understand exactly who are the actors that are needed to be reconciled? Who versus Who? For the purpose of analyzing complexities in reconciliation in Nepal, the Dwyer model is used in this paper. Dwyer has explained this model basically to simplify the actors as reconciliation actors can vary to a great level from between friends, to between victims and offenders, to groups in conflict in terms of ethnicity, religion, class, caste and race. It could be between the government and the anti government groups or it could be between two states itself. This section of the paper will explore the struggles

and complexities for reconciliation at the micro and macro level in Nepal using the Dwyer model.

At macro level:

At the macro level reconciliation in Nepal is needed between the perpetrators leaders (political party/leaders) and the victims' families associations. In Nepal the perpetrators of the enforced disappearances were the Nepal Army /Nepal Police/ Unified Command and the Maoists. INSECs recent updated list of enforcedly disappeared which was provided by the INSEC to the researcher shows that 87.7 percent of the perpetrators were the state, 0.21 percent were unknown perpetrators and 12 percent of the perpetrators were Maoists. The state should initiate reconciliation at the macro level by acknowledgement of the wrong doings, creating an environment and mechanism for truth telling and publishing the whereabouts of the enforcedly disappeared.

Struggles in reconciliation at macro level

Article 5.2.3 of the CPA stated that *“both sides agree to make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed”* (CPA, 2006). But even after seven years both the parties involved in the war have failed to do so leaving the families still in despair and confusion and has stood as a major barrier for healing process. Out of the approximately 27 million populations 1360 victims' families are a minority which the political elite of Nepal are refusing to cater to.

The Maoists has released statements on few cases (one of the interviewee's husband's status was released by the Maoist) but in majority of the cases both the parties has not acknowledged the disappearances officially. The Nepali police and the army have denied most of the cases. They have denied the detention of the most of the abduction and arrest cases. Ram Bhandari a victims' families' leader in his article writes: there is active collusion between the Nepal Army and Maoists to keep the truth buried (Bhandari, 2013).

In one of the rare interview of the Army a Nepalese Colonel in his interview with the BBC in 2007 states that *"If we get some clues that we had done these violations we will punish the people and make these things public. But for those 800 cases there is no confirmed evidence we were involved. Unless some organisation or some individual comes to us with some evidence, with some proof, with some witness, we don't believe those cases"*. He further added that *"army investigates all allegations made against it, and has punished 162 soldiers for committing abuses during the war"* (BBC, 2007). However no public statements, no names or no details of the so-called punished soldiers has yet been released. Human Rights Watch claims that the army has held few trials of the alleged perpetrators in the military court due to external pressure. But the charges have borne little relationship to the gravity of the violations (HRW et al, 2008). In some of the cases the security forces have taken administrative action against perpetrators, such as suspension or demotion. In a few cases the army has conducted courts martial, but the convictions bear no relationship to the gravity of the crimes that has been committed (ibid).

In most of the cases the police has been avoiding investigation of disappearances cases by simply refusing to file a complaint .Some of the cases for investigation are initiated after it gains widespread media attention or pressure from human rights organisation and civil society. For example in the case of "Dhanusa five" the NHRC received a letter from the human rights cell of (then) Royal Nepal Army. The letter was received in 2006 January after more than three years of the initial inquiry. The information that the army provided in the letter was that those five students under inquiry had been killed in a police operation on October 2003.However they did not provide any information on the nature of the killing or the whereabouts of the remains of the body (Advocacy Forum, 2011). Thus the perpetrators of enforced disappearances in Nepal is yet not acknowledged their crimes nor taken responsibility for it. The political parties have shown interest in addressing the past human rights violation through the CPA but lacks in implementation with both the perpetrators parties trying to protect the accused personnel's. In a video documentary of Amnesty International, Krishna Bahadur Mahara

maoist leader has stated *“the people should be consider the displace of monarchy by republic as justice. that is justice enough”*. This “war is war” justification given by a top maoist political leader shows lack of accountability and responsibility towards the war crimes that occurred during the conflict and lack of political will to mend it. Ram Bhandari , the victim’s families association leader states *“whole notion of truth and reconciliation is a drama...how we can reconcile when they do not even accept the fact that they have disappeared people during the conflict....it is better to have no truth and reconciliation commission rather than a fake and a manipulated truth and reconciliation commission”*(Interview).

Geeta Rasaili , another victims’ families leader opined that *“at this stage we do not trust or have faith that the state has true intentions of bringing out truth and conduct sincere reconciliation. They have no respect towards us. Instead they have been promoting officials accused of war crimes and sending them offshore for peace missions. The alleged perpetrators Kuber Singh Rana of the “Dhanusa five” case and Raju Basnet of “Bhairabnath Battalion” has been promoted as Inspector General of Nepal Police and Brigadier General in the Nepal Army respectively. These acts by the state shows there is absolutely no sense of accountability on their part. Are they being rewarded for their bravery? The victims families and associations take it as tight slap on our faces from the state”* (Interview). Investigations by UN and NHRC implicate Raju Basnet in the cases of enforced disappearances and torture where as NHRC has hold Kuber Shingh Rana accountable in enforced disappearances and extrajudicial killings in the Dhanusa case(Amnesty International, 2013).

Thus the reconciliation at the macro level cannot be initiated unless there is a true political will to bring out the facts and events and whereabouts of the disappeared people during the conflict. The current emotions of the victims’ families is that of mistrust, betrayal, humiliation, frustration and anger towards the state.

At micro level:

Reconciliation in Nepal at micro level should take place after the reconciliation at macro level. It can occur between individuals (perpetrators

and victim's family member) and in cases in which more than two individuals are to be reconciled including chain of command.

In the revised ordinance the definition of perpetrator is given as “*a person involved in crime related to serious human rights violation during the armed conflict, and that term also include person giving order for committing such crime*”(Ordinance, 2013). It may also include informers from the same village who may be a neighbor who followed different political ideology or a family rival. Reconciliation in Nepal at a micro level is not a farfetched goal because here we are dealing with a minority of 1360 families of victims. The issue is not as complex as the Hutu-Tutsi division in Rwanda or Apartheid in South Africa which involved millions of families and deep rooted issues of race. In Nepal the grievance is not with a specific group or people but with the political system and the socio-economic marginalization. During the interview with the respondents it was shared that in initial days right after the conflict ended there was mistrust among two groups victims' families themselves. The Maoist victims and the state victims' families were not comfortable around each other. Geeta Rasaili from RADUT organization states- “*Most of the victims' families members, we had a different perspective towards the families of the victims of opposite party at the beginning. I used to get angry with the Maoist victim families. I used to think they are against us. We thought of them as our competitors so during the collection of first installment of the interim relief I helped only state victim families but not Maoist victim families*”(Interview). They shared as they continued to meet other families in different programs, trainings and gatherings they began to share their stories and began to realize that they had a common tragedy. Now they have moved on from their reservations and acknowledged their common struggle for truth and justice. Ram Bhandari further validates this saying “*Earlier the situation was so bad that the families of Maoist victims and the state victims were not in a situation to come together in a common platform but the ICRC supported 'Hateymalo project' has really helped families of victims of two parties to understand each other's pain. It has contributed in the long term healing process and the political parties of Nepal should learn from it*” (Interview). This was a strong evidence to support the fact that at local level

victims' families with different political ideologies did not hold extreme reservations/grudge against each other in the present context.

In the case of reconciliation among the victim's families and perpetrators opinions from family members varied. For example in the case of Sunita(name changed), *She told "I know the persons who gave the order for killing my husband. They were the husband-wife couple in the Maoist. Even if he had committed a mistake in the party they had no right to kill and disappear his body. I don't want their children to suffer like mine children did. I don't blame others but the two of them. I want to know my husbands gravesite and want the two of them to admit their crime in front of me and society"* (Interview).

In the case of Sapana (name changed),She opined *"I know that I am not the only one who suffered because of this conflict .There are many other family who lost their loved ones and suffered enormous trauma .I believe that my husband gave his life as a martyr .He fought to bring change in this country. I don't have personal qualm against those who arrested him because they were also doing their duty. But the least I am asking is to know the whereabouts of my husband and the culprits to acknowledge the mistake. I also want the state to make efforts to respect the individuals who lost their lives to bring change in the country by declaring them as martyrs and deliver economic reliefs and compensation to the families because the remaining family is suffering economic hardship"*(Interview).

Whereas another respondent Parbati (name changed) cited how difficult was it for her and her family to meet the informer who caused so much pain to her family. She said *"We are very aware of the man who came from next village to ours, showed my house to the army, he then went to a nearby house and asked for curd with an old lady. She identified him. We still coincide with each other from time to time. Though he has not admitted to it, we are confirmed it was him who showed the house and then my brother was arrested. He has now shifted to another neighboring village and left his land barren because he is unable to confront the villagers. Everytime my father sees him he becomes faintly and says he cannot find peace until that man is dead. But what can we do? We can't kill him. We want him to acknowledge his crime. .We want the state to start with the inquiry and we want him to confess that he was the informer and he was responsible was the misfortune that happened in my family"*. These reservations may exist among

many members of victim's families which may take a wrong direction if not addressed in a sensitive manner.

Concluding remarks

This section portrayed the struggle and complexities for reconciliation at the micro level and macro level in Nepal. This section concludes that the reconciliation effort cannot and will not be initiated unless the parties to the crime acknowledge the crime publicly and take accountability for their crimes. Since the current emotions of the victims a family are of hatred, betrayal, humiliation, mistrust, frustration and anger towards the political leaders the current environment for reconciliation, is very negative. Thus it is essential for the state to take into account the demands of the victims' families for true reconciliation and lasting peace.

4.2 Truth and Reconciliation Commission (TRC)

Truth and reconciliation commission is one of the transitional justice mechanisms introduced by the state for transitional justice. This section will analyze the proposed TRC by the state.

Historically looking at the commissions that had been formed in Nepal to investigate the human rights abuses; they have not been very effective. They were formed just in namesake to avoid the public pressure and outburst. In 1990 the commission for the investigation of people disappeared during the Panchayat era as well as the commission of 2006, another high-level inquiry commission formed to investigate human rights violations that occurred during the second People's Movement in April 2006 were formed (Pasipanodya, 2008). The report of the commission of 1990 was never made public and the report of 2006 were made public after high pressure from the civil society bodies. The recommendations of the both the commissions were never implemented (ibid).

The establishment of the truth and reconciliation commission was one of the key components of the CPA of 2006 in Nepal. Article 5.2.5 of the CPA states that *“Both sides agree to constitute a High-Level Truth and Reconciliation Commission through the mutual agreement in order to investigate truth about those who have*

seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliations in the society” (CPA, 2006). Likewise Article 33(s) of the Interim Constitution of Nepal has stated that post conflict the formation of the TRC is the responsibility of the state. It states that the responsibility of the state is *“To constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society”* (Interim Constitution, 2007).

Both the key players of the conflict are engaged and accused of human rights violations in the context of Nepal, and for this reason there is a fear that truth-seeking mechanisms may have destabilizing effects. Russell claims that political leaders may purposely limit the scope of powers of the truth commission to avoid upsetting the country’s tenuous stability (Russell, 2012). On the basis of provisions contained in the CPA and Interim Constitution and following the Supreme Court’s June 2007 directive order, draft bills for the establishment of a TRC and a Disappearances Commission were made public in July 2007 and November 2008 respectively by the newly established Ministry of Peace and Reconstruction (MoPR). The draft bills were created without any consultation with the victims’ groups, civil society organizations or the human right bodies. It was widely condemned for failing to meet international human rights standards. More specifically, the draft TRC bill was criticized for its lack of independence from political influence, inadequate witness protection mechanisms, and a proposal to grant it the power to recommend amnesty for perpetrators of serious human rights violations. The draft Disappearances Commission bill was similarly criticized for seemingly lack of political independence of the commission, for failing to acknowledge enforced disappearances as a crime against humanity and for failing to define enforced disappearance in compliance with the international law (International Commission of Jurists, 2009). Again dismissing the both commissions the notice published in Nepal Gazette Part 62 on 14 March 2013, the President approved and certified the new merged ordinance of investigation of Disappeared Person, Truth and Reconciliation Commission. The text of the

ordinance was not made public but the unofficial circulation reached the hands of human rights organizations and civil society bodies.

This merged version of proposed TRC ordinance was widely criticized by the national as well as international human rights actors. The TRC which was introduced on the basis of political consensus did not consult the stakeholders like the victims associations neither bodies from civil society, human rights organizations and the NHRC. It states *“The Government of Nepal shall form a high level Commission on Investigation of Disappeared Person, Truth and Reconciliation by publishing a notice on gazette, inter alia, to bring actual facts to the public by including investigation about persons disappeared during armed conflict truth investigation and inquiry of serious human rights violation and crime against humanity related other incidents and about the persons involved in those incidents, to conduct reconciliation between the perpetrator and victim, submitting a report with recommendation on reparations for victims, and to end state of impunity by bringing perpetrators involved in serious crimes in relation to those incidents under the ambit of law”* (Ordinance, 2013).

The ordinance failed to define and categorize serious violation of human rights. It included the controversial mandates of enforcing amnesty in an indirect way granting power to the commissioner and forced reconciliation. The Article 23(1) of the ordinance states *“While carrying out investigation pursuant to the ordinance, the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof”*(Ordinance, 2013). The Article 23(2) states *“notwithstanding anything contained in Sub Section (1), serious crimes, including rape, which lack sufficient reasons and grounds for granting amnesty following the investigation of the Commission, shall not be recommended for amnesty by the Commission”*(ibid).Hence only in case of rape amnesty of perpetrators is prohibited whereas the remaining serious crimes has not been defined.

Article 22(1) states that *“If a perpetrator or a victim files an application to the Commission for reconciliation, the Commission may reconcile between victim and perpetrator”* (Ibid).This provision of reconciliation which can be initiated without consent from both the parties has been viewed as forced reconciliation.Thus because of its many problematic mandates this ordinance was challenged by the victims

associations in writ petition to the Supreme Court. On 1st April 2013, two weeks later after the ordinance was passed, a Justice on Nepal's Supreme Court suspended the ordinance from taking effect pending a further review of the planned Commission (IJRC, 2013).

The victims' families associations are demanding prosecution for the perpetrators of the war crimes that occurred during the conflict, but the political leaders who were leading the conflict are proposing amnesty. Thus, when the president approved the ordinance for formation of the Commission on Investigation of Disappeared Person, Truth and Reconciliation in March 2013, it gained wide criticism from victim groups, human rights organizations as well as international community for a) not consulting the civil society, b) for failing to define enforced disappearances as a crime against humanity, c) its lack of independence from political influence, d) inadequate witness protection mechanisms e) proposal to grant it the power to recommend amnesty for perpetrators of serious human rights violations f) for failing to employ a definition of enforced disappearance consistent with international law and g) enforced reconciliation. A Justice on Nepal's Supreme Court suspended the ordinance from taking effect after it was challenged by the victims associations in writ petition to the Supreme Court. Thus, the formation of the truth and reconciliation commission is at an impasse as the victim groups are advocating prosecution and political leaders pushing the agenda of amnesty and the hesitant political parties' unwillingness to cater to the minority of victims' families

Concluding remarks

Thus i would like to conclude that this impasse has suspended the formation of the TRC. As the delay in TRC continues it is likely that the possibilities of finding the grave sites and bodies for identification and exhumation becomes slimmer with passing time. Thus, the delay in formation of TRC has led to delay in knowing the truth about their disappeared family member and delay in justice.

4.3 The broader demand and arguments of victims' families associations and individual victims' families.

This section is the findings of the broader demands and arguments of victims' families associations and individual victims families. The findings suggests that the priority demands of victims' families and families associations divert with the victims' families priority demand as *knowing the truth, and delivery of socioeconomic demands as justice* where as the families associations priority demand as *knowing the truth and prosecution as justice*. Thus based on the findings I would like to argue that in the current context of Nepal the truth telling and delivery of socio economic needs by the government is more practical and realistic way forward than the prosecution of the perpetrators for creating an environment for reconciliation. The findings are elaborated below.

During the conflict the situation was not safe for the formation of victim's families or any other forms of associations. After the signing of Comprehensive Peace Accord (CPA) in 2006, discussions were being held at district level for the victims' families of both sides to come together. In Bardiya district, Conflict victims committee (CVC) was the first independent family association to be established in 2006 after the CPA, which included families that were victimised from both parties to the conflict. In the later years formation of different families association followed among which some included families from both parties where as some only incorporated one side victims.

Most of these families associations are not funded by any donors. In the past the victims associations lacked funds, at later stage when some of them worked with few donors, it was realized that there was no match of interest. They also felt unwanted interventions in their activities, manipulation and they shared that it actually brought division in some families associations in the earlier days when they worked with donors. Only on event basis they sometimes work together with organizations like ICTJ and ICRC. All the activities done by the associations are self motivated and voluntary in nature and all the expenses are borne by the members themselves. They share that

they want to bring out their activities as a campaign as families movement to educate, aware and mobilize victims families on voluntary basis. They do not see it as a “project”. One of the victims families leader stated “*the Perpetrators are organized, institutionalized and strong but victims group are weak, unorganized and divided*”(Interview). Though they lack technical support, financial support and political support. They have taken the ownership because it is a very personal/emotionally attached issue for them. The initial activities they became engaged in were assisting the families in collecting the interim relief as most of the families were unaware about the entire process of collecting it and also which required many supporting documents. Currently their main activity is advocacy for justice.

The demands put forward by the victims’ families association and their objections to the current Truth and Reconciliation Commission:

Based on the interview with the leaders of victims’ families associations, their demands and arguments are stated below:

- The victims’ families associations have questioned marked the process of formation of this truth and reconciliation commission. Their demand is for a separate Disappearance commission as per the points 5.2.3 and 5.2.5 of the CPA. The decision against the provisions of the bills that were discussed and approved in the then legislature parliament for establishment of two separate commissions were dissolved and instead a decision was made by the top level political agreement to merge two commissions is not acceptable to the victims’ families associations as this new proposed merged ordinance for TRC is not victim centred. They opined that this decision was made without taking any input from victims’ families association, human rights organisations and civil society. They opined that even if this commission comes into its functioning it has been given the discretionary power which can neither address the pain and suffering of individual families principally. They claimed that the finalising the ordinance in this “secretive” manner was just a strategy adopted by the political leaders to save face and appease the international community.

- They opined that the proposed TRC introduced by the state are top down approach in practice .It should be bottom up and stressed the need to include victims’ families associations through their participation and consultation, they should have a sense of ownership in the TJ process. They claim that victims’ families’ representation should be there in the recommendation committee for the appointment of the Chairperson and Members of the Commission.
- They demand to know the truth of what happened with their family member during the conflict. They want the state to release the situation, status and whereabouts of their family members. If the victim was killed during the conflict, the family members demand to know the whereabouts of the victim’s body for exhumation and conduct the last rites and ritual as cultural practices. They opined that even 7 years after the CPA, the state and the political parties who were main perpetrators of the war crimes has not officially acknowledge which proves their lack of accountability to the war crimes occurred during the conflict.
- They argued that the amnesty clause in the new ordinance of the Commission on investigation of Disappeared Person, Truth and Reconciliation Commission will not lead to fair trail and justice. They opined that cases should differ on the basis of extent of crime committed. They want the clear mentions of crimes like unlawful killings and enforced disappearances to be defined as crimes against humanity in which no amnesty should be granted. They also argued that without prosecution there can be no environment for reconciliation.
- They demands for the acknowledgement of the state to remember and respect the conflict victims through symbolic gestures measures by naming schools, roads and buildings etc of villages/towns after the victim’s name of that village/town, erecting statues of the victims in their home towns , set up museums and memorials remembering the conflict and conflict victims.
- Section 13 (b) of the ordinance states the duties, function and power of the commission is “to conduct reconciliation between perpetrator and the

victims”. The victims’ families association claims that the reconciliation is forced according to this commission without creating any environment to reconcile. In cases like enforced disappearances and illegal killings the provision of amnesty will be a main hurdle for reconciliation. They also stated that currently the perception of the victims’ families is very negative towards state and are very skeptic about the states willingness to provide justice to the victims’ families. In the writ petition they have mentioned that it is not possible to reconcile by the Commission because reconciliation is the result of the continuous efforts which cannot be achieved from a single program. Assurance of truth seeking, availability of reparation and criminal responsibility can help for reconciliation.

- Section 22 of the ordinance mentions about the individual reconciliation concept in which it is assumed that there is one perpetrator in each crime by neglecting the involvement of more than one person in a single incident including command responsibility. In the writ petition the victims’ families association has mentioned this provision is against the first annual report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of non-repetition submitted in the Human Rights Council which has mentioned that the “reconciliation should not be conceived either as an *alternative* to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice reparation and guarantees of non recurrence)”.

- The victims’ families associations also criticized the Local Peace Committee in Nepal to be highly politicized. They claimed that the LPC’s were creating a false reconciliation by showing to “outsiders” that people are reconciling but in reality that is not the case.

These were the broader demands and arguments of the victims’ families’ associations. However I would like to draw a thin line among the individual victim’s families and victims’ families associations. The families associations, whose leaders are literate, socially and politically conscious actors are fighting for justice in terms of prosecution. But when we look at the other majority of

the victims' families who are from poor socioeconomic background has a different agenda in terms of justice.

Interviews were conducted with the individual victims' families for the purpose of this research in which they stressed very much on their socio-economic hardships in the current context. Among the disappeared people in Nepal 90percent of them was male i.e.1219 whereas the remaining 10percent was female i.e. 141(ICRC, 2013). In most part of the patriarchal society of Nepal husbands are the sole earning member of the family. Thus when a man of the house dies then the family is faced with social and economic hardship. In Nepal women also faces a greater economic insecurity because they do not have direct access to the primary means of economic production. They have always been dependent on their relation to land owning male family members as daughters, wife or mother. The land is conventionally passed from a father to a son (World Bank et al, 2006). Because of these aspects the economic impact was seen on the wife of the disappeared man whose property could not be transferred in her name.

Sunita (name changed) one of the victims wife stated *“Economically my family has to face a huge crisis as my husband was the sole earning member in the family. Now we sustain on the house rent which we get from tenants of NRs 2500 per month (24.30 USD) and i weave sweater but irregularly from which I earn about 1500 per month (14.58 USD).Its very difficult for me to run my house on this meager income. I am so worried that I am not able to do anything with the house. The house is in the name of my husband. I cannot repair the house neither sell it. According to the Nepali law it takes atleast 12 years for a disappeared person to be pronounced dead. According to the law in Nepal, the property of the disappeared people cannot be transferred in another family member's name”*. She further adds that the scholarship provided for her children education is not adequate.”*They give a sum of NRs.14000-15000 per year (142.38 USD) for education the whole money goes just in one time admission. I have been managing the monthly tuition fee myself by weaving sweaters. If the state was really serious then they would have increased the financial assistance for education. They don't have to give us money just to buy pen and pencils”* she opined sarcastically and angrily. Now her son has completed 18 years and higher secondary education .She wants him to go to

college for further education but the state stops the education grant after 18 years of age. She says *“Now my son cannot go for further education nor employment. I don’t know in which direction will his life move ahead now”*. Similar is the story of Mayadevi (name changed) who has one son and one daughter. Her daughter still goes to school because she is under 18 and she has been managing with the state scholarship by adding her own income. But her son after completion of secondary higher level could not study further because of lack of finance. *She said “I was compelled to send my son to Malaysia for employment. His salary there is very low because he is neither skilled nor highly educated. The entire one year salary will be spent on paying the loan I took for his tickets and other costs. I wish my son could continue his further education. I am worried the same cycle will continue for my daughter as well. I want the government to support the families to send their children to college”*.

In another interview Anita (name changed) said she was thrown out of her house by her mother in law after her husband disappeared. Before she was thrown out she used to be mentally tortured saying – *“You ate my son, return to me my son”*. After much struggle she met people from RADUT and with their help she got this current job as a cleaner/helper. She says- *“This job has helped me survive been more stable for me now at least. When I started with this job I did not even have enough money to buy the mattress. I slept on the mat for 2 months, and then later on with my salary I bought a mattress and gas stove. Life has been really hard for me and my two children after the disappearance of my husband. I want the state to take care of my economic needs”*. She further adds *“Because of the social discrimination against women without husbands I know there are many other sisters like me who has been homeless and are struggling to meet their daily needs. My request to the state is to provide women like us with permanent employment opportunity , maybe in government organizations where we can do work like cleaning or making tea so that we can be financially independent and make a living “*:The disappearance of male member of a family has direct social impact on their spouse. Nepal being a patriarchal society, single women and widows are vulnerable group who can come under social attack not just by men but women too. Like in the case of Anita who was mentally tortured by her own mother in law and was thrown out of the house with her children after her husband was disappeared. All the female respondents (wives of victims) that

were interviewed for this research paper were observed to be wearing the clothes and accessories that symbolized married women when the case in Nepal is that women whose husbands are dead are supposedly to be dressed in a certain way like wearing only white or pale color garments. Sunita states *“Living in a patriarchy society I am looked down by my own relatives because I am a single woman now without any male support. I am confused about my own identity. I refuse to identify myself as a widow because I have not seen my husband’s body and I cannot call myself a normal married woman because of the circulated news that my husband is dead. In Nepalese society a widow is not supposed to wear red color clothes, bangles, vermilion powder because it means dishonoring the dead husband and the family. But I wear them because deep inside in my heart even now I hope that my husband will come home alive one day. Many of my relatives voice their disappointment in me because i refuse to wear a widow’s garment. Due to this reason I am boycotted from many family gatherings, rituals and other important events. I feel, me and my children are being marginalized from my society. I want them to have a normal life not a life like this”* (Interview).

A similar form of grievances was told by Mina (name changed).Mina is also raising her two children on her own in Kathmandu. She shares everyday is a battle for her and her children. Three of them sharing a rented room in Kathmandu, she says *“I don’t know how long will it go on?”*She helps around in the neighbouring houses whenever there is work. She says *“I don’t have a fix job, I go and help neighbours in their house, in the field whenever they call me .Sometimes they give me food, sometimes money and sometimes clothes. Things would have been better if my husband was here.I want to take some loan so that I can send my son somewhere abroad to work.When he will send money then it can be easier for me and my small son to survive. The state is doing nothing to help us.I don’t have any answer to give to my small son when he asks for his father.I request the state and political leaders to tell us the whereabouts of our disappeared family member and to help us in our livelihood so that we can have some source of income to live on ”*(Interview).

Thus based on the findings of the interview it can be concluded that the demands of individual victims’ families is stressed on knowing the truth and fulfillment of socioeconomic needs. Even though the limitation of this research is the comparative less number of individual victim’s families, the

findings can be validated by the further evidence. Simon Robins after his study of the victims' families need mentioned that whilst families of the disappeared would welcome justice it is not their priority (Robins, 2011). The everyday burden and struggle with basic needs like food, housing, education, health facilities are their priority. He conducted a study in which when the victims or victims' families were asked about their immediate needs majority of them i.e. 24percent of them demanded compensation, followed by education (17percent), basic needs (housing and clothing)(12percent), employment (8percent), and publicizing the whereabouts of the disappeared(7percent). Where as the remaining 3percent prioritized the punishing of perpetrators(Robins ,2009). This study included various types of victims not just enforced disappearances cases. This study shows that punishing the perpetrators were of least priority to the individual victims' families whereas the victims' families associations have been demanding for prosecution as the only way for justice and reconciliation. Similarly another study by Robins specifically focusing on the disappeared people's families has brought forward three types of needs i.e. 64percent of the respondents said the immediate need as an answer-the truth-about the fate of the disappeared: Is he/she dead or alive?", 62percent of them said the economic support in the form of "compensation" or assistance regarding education, medical treatment and jobs for family members and 29percent of them said justice in the form of punishment of those responsible (Robins, 2011). Thus it can be concluded that there is a divergent in the needs of the individual victims' families and individual families associations and the state needs to reassess the focus on truth telling and delivering the socioeconomic justice to the victims' families as an immediate measure for long term healing and reconciliation.

Many recent peace agreements include specific commitments to human rights but they rarely address the economic and social rights (Arbour, 2006). In this regard Nepal's Comprehensive Peace Agreement (CPA) is thus quite an exemplary peace agreement which has explicitly focused on the economic and social justice. Point 7.5(1) to point 7.1(6) of the CPA specially focusing on socio-economic rights has provided the provisions to ensure the

socioeconomic rights through the right to livelihood by chosen employment, no interference will be made in access to food, not hindering the supply of medicines and health facilities, by maintaining appropriate academic environment in educational institutions and by protecting the private property of the people(CPA, 2006). Nepal is in a transition phase which has shown its commitment for equality, justice and prosperity through addressing the socio-economic needs in the CPA. Hence it is necessary for Nepal to further validate its commitment by incorporating these elements through the transitional justice mechanism and not by marginalizing socioeconomic needs as a separate development agenda. The violations of socioeconomic rights has been taking place in Nepal before the conflict as explained in chapter 3. The violation of socioeconomic rights took place during the conflict in the extreme forms. Due to the violent nature of the conflict many physical infrastructures like roads, bridges, communication systems and health posts were destroyed specially in rural areas which greatly affected the livelihood of the rural population and their access to public goods and services. The impact of conflict in education was also higher in the rural areas than in urban centres. The Maoists abducted teachers as well as students from schools. Similarly in rural areas the common civilians had to suffer in terms of their daily existence and livelihood. In some cases, Dalit families would 'starve for several days' in order to compensate for food consumed by ten or more maoist cadres in a single night (CHRGJ,2005). And post conflict the violation of socioeconomic rights is taking place as a result of conflict.

Concluding remarks

Thus from the above analysis it can be concluded that the priority demands of victims' families and families associations divert with the victims' families priority demand as *knowing the truth, and delivery of socioeconomic demands as justice* where as the families associations priority demand as *knowing the truth and prosecution as justice*. I would like to argue that in the current context of Nepal the truth telling and delivery of socio economic needs by the government is more practical and realistic way forward than the prosecution of the

perpetrators for creating an environment for reconciliation, considering the facts that the deeply rooted socioeconomic disparity was the root cause of the conflict.

CHAPTER 5: Conclusion and Recommendation

5.1 Conclusion

The objective of this research paper was to explore the struggles and complexities for reconciliation in post conflict Nepal. Using the Dwyer model of macro and micro reconciliation the analysis of struggles and complexities of reconciliation in Nepal was done. In the present context the current emotions of the victims' families and associations are of hatred, betrayal, humiliation, mistrust, frustration and anger towards the political leaders which needs to be addressed for the country to move ahead without marginalizing the victims needs and demands.

Based on the findings and analysis it can be concluded that the priority demands of individual victims' families and victims' families associations divert with the victims' families priority demand as *knowing the truth, and delivery of socioeconomic demands as justice* where as the families associations priority demand as *knowing the truth and prosecution as justice*. The debate on prosecution versus amnesty and forced reconciliation among the victims' families association and the state has created an impasse which has led to suspension and delay in the formation of the TRC. This delay in the formation of TRC will further delay the process of investigation, identification and exhumation of the bodies that were enforcedly disappeared. With the passing of time these matters may become even more complicated. Admist this debate even if the TRC is established with the current mandates then, institutionally there is a serious concern and doubt that it can play a catalyst role for reconciliation because it has failed to define enforced disappearances as a crime against humanity thus maynot address the issues of enforced disappearances. It may not be able to fulfill its mandate. Thus I would argue that the prosecution of the perpetrators will not guarantee the long term healing of the victims' families if their socioeconomic needs are not met, considering the facts that the deeply rooted socioeconomic disparity was the root cause of the conflict. In the current context delivery of socioeconomic needs is a more realistic and practical way

forward for the state to move ahead. Thus the delivery of socioeconomic needs is seen more essential than the prosecution of the perpetrators as a transitional justice mechanism in Nepal for long term healing and reconciliation of the families at micro and macro level.

5.2 Recommendation: A way forward

The issue about prosecution versus amnesty has become the centre of the debate of the political leaders and the victims' families associations in Nepal. During the interview most of the victims' families' associations leaders opined that in reality they cannot foresee a fair truth and reconciliation commission because of the anxiety of the political leaders. They also opined that the political leaders are purposely delaying the whole process of formation of TRC as a strategy of buying or killing time. However they stated that they will fight for justice in terms of truth and prosecution till the end. This deadlock has hindered the initiation and delivery of transitional justice process of Nepal. The recommendation of this paper is that in the current context for the nation to move forward the need is to reassess the focus from prosecution to delivery of socio-economic justice to the victims and their family members which will which will sow a seed for reconciliation.

The core of the debate has been focused on the civil and political rights but the main recommendation of this paper is that Nepal needs to focus on the social and economic rights as it was the root cause of conflict thus providing a means that would lead to economic security and social equality which can play a key role in societal reconciliation. The following specific recommendations are made:

- The immediate and urgent need of the moment is to release the whereabouts of the disappeared people during the conflict. The uncertainty of the situation of their family member has left the victims' families in despair economically as well as socially. The families opined that even if they could do the exhumation and conduct the last rite it would give them a peace of mind. Thus this is the primary step towards reconciliation which the state should act on without delay.

- The recommendation to the state and victims' families associations in Nepal who are in the deadlock debate of prosecution versus amnesty for the perpetrators is to reassess their focus in social and economic justice. Long term healing and reconciliation at micro level is seen possible if their socioeconomic needs are met.
- On the basis of the urgency and "immediate need" factor, it is recommended that the state should conduct an in-depth survey/investigation of the households of the victims' families to identify their immediate socio economic needs and their difficulties in having access to basic services. Based on the recommendation of the report of the study the delivery of those needs identified should be implemented in all victims households.
- In order to secure the future of the children's of victims it is recommended to increase the economic support provided for education as per the real need. Among the respondents interviewed three of them claimed that they could not continue the further education of their children even though they wanted to due to economic problems. They took loan and send their children for foreign employment in unskilled low paying job because with secondary education it was very difficult to find a job in Nepal. Thus the state should consider providing financial assistance for the victim's children even after 18 years of age.
- The state should have the mechanism to give special priority to the victims' families i.e. spouse or children for employment opportunity in the government sector as a means to support them for livelihood.
- Finally it is recommended that the state should plan and include the mechanism to provide health care facilities to the victims' families as per their need.

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Appendices

Appendix A: List of individual victims family members interviewed (Name is changed), their address and their relation to the disappeared member.

S.N	Name(changed)	Address	Relation of disappeared person
1	Sunita	Kavre	Wife
2	Sapana	Lalitpur	Wife
3	Ram bahadur	Kathmandu (temporary)	Brother
4	Anita	Kavre	Wife
5	Parbati	Kavre	Sister
6	Mina	Kathmandu (temporary)	Wife

Appendix B: Interview Guideline

For victims families associations

- When and how was the association established?
- How many victims' family members are a member of this association and which region does it covers?
- Are all the families of a particular region member of this association? If no give reasons.
- How were member families registered?
- In total how many families associations are there?
- Does the organisation register victims of both party or only one? If only one which one?
- Who are their donors? If none how do they operate?
- What are their networks outside Nepal and how they help inform and resource their positions?
- What are the activities carried out by families associations in the past and plans of near future?
- How are families mobilised?
- So far what is the compensation the state has provided for the families? Interm of money? In terms of education and health? Interim relief? Were some families missed out ?
- How is the collaboration with other victim's families? Collaborative working mechanism?
- What are the broader demands and arguments of families association in terms of this TRC? What are your priority needs?
- Why are they dissatisfied with the current process of formation of TRC? What is their main concern over the amnesty clause?
- What is their opinion on the contradictory aspect of prosecution and truth telling?
- How has the state responded to their demands? What role has the state played to give/or not give a sense of ownership to the victims families association? Explain
- Any examples of local level reconciliation?

- Can there be any space for compromise from the victims' families association in order to move ahead with the process of formation of TRC and break this deadlock?

For ICRC

- What is the mechanism used by ICRC to identify missing people?
- Which mechanism/tools were used to call victims' families to register? /How was information disseminated? /which languages were used(ethnic languages usage)?
- The list of missing ? Is it only involuntary disappearances? Or do they also represent Maoists Combatants and Army/Security personnel's?
- Is there any possibility of gap in numbers of missing? Missing list of ICRC INSEC and government data vary?
- What are the activities/projects the ICRC is engaged in for supporting the victim's family?
- Among the missing list some people are confirmed dead but the family is waiting for the information on the burial site. How does the ICRC validate the death of the person?

For victim's family's members:

- Background information on the event of the disappearance of the family member.
- What are the facilities/benefits their family has got from the state?
- Their point of view in issues of prosecution and reconciliation
- What are the needs and demands of the family members?