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The rights of people with intellectual disabilities in the post-conflict context: Constructing a
framework for inclusion.

Heather Galbraith

Thesis Supervisor: Belinda Cooper
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Abstract

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This thesis considers the current inclusion of people with intellectual disabilities (PWIDs) in post-conflict processes. The author uses a disability rights framework to demonstrate that transitional justice mechanisms do not go far enough in addressing the rights of PWIDs in post-conflict contexts. In order to uphold state obligations towards PWIDs, post-conflict states must use a wider transformative process and address the structural violence suffered by PWIDs and the violations of their economic, social and cultural rights. Only by incorporating a disability rights framework into post-conflict processes and mainstreaming disability issues nationally, can a state adequately redress the human rights violations suffered by PWIDs and give effective guarantees of non-recurrence.

Keywords: Transitional justice; transformative justice; economic, social and cultural rights; structural violence; people with intellectual disabilities; UNCRPD

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I. Introduction

People with intellectual disabilities (PWIDs) often experience conflict in a different way to the rest of the population. Due to structural inequalities and discrimination that exist before the conflict, they are often directly targeted or suffer disproportionately from the closure of government services. A lack of understanding or appreciation for danger and problems with communication can leave them particularly vulnerable in a conflict situation. Thus, in a post-conflict context, these experiences must be taken into account to ensure the full inclusion of PWIDs in post-conflict processes.

Using a disability rights framework in a post-conflict context is necessary to ensure that PWIDs are not only fully included in any transitional justice mechanisms that are being used but also that the full range of their experiences are considered and remedied. This thesis will demonstrate that a disability rights framework requires a state to go further than simply including them in transitional justice mechanisms to address their direct human rights violations. Rather, it requires states to address the structural inequalities PWIDs face in society and examine the different forms of discrimination in order to guarantee non-recurrence of human rights violations and a fair and equitable society.

The World Health Organisation has defined intellectual disability as:

“ A significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.”¹

The decision was taken to focus on intellectual disability because it has been suggested that even within the disability community, PWIDs are often marginalized.² This may be due to problems

¹ “Definition: Intellectual disability”, WHO Regional Office for Europe, available at:

with understanding and communication that can lead to PWIDs being unable to assert their rights.³ Furthermore, international humanitarian law and previous transitional justice processes have focused on the medical model of disability,⁴ which prioritizes treatment of physical disabilities and this again leaves PWIDs marginalized as they may not require any specific medical treatment. Thus, it is important to consider the position of PWIDs because of their unique experience in conflict and their marginalization within not only a post-conflict context but also within the disability community itself.

While this thesis has a central focus on PWIDs, it will also give some attention to people with disabilities (PWDs) generally due to a lack of data and information specifically on PWIDs. The situation of PWIDs in post-conflict contexts has been largely neglected in the academic field and so it is often necessary to consider them as a part of the wider group of PWDs as this is the only information accessible. This can, however, be problematic because PWDs should not generally be considered as one homogenous group.

The aim of this thesis is to collate information on the experiences of PWIDs during conflict and examine how this might shape their needs in a post-conflict context. It also aims to identify the obligations on states to identify the duties owed to PWIDs to redress their rights in a post-conflict context and the most appropriate framework for doing this.

This research will show that PWIDs are affected in a unique way during conflict and that these experiences need to be addressed directly in a post-conflict process. In order to do so, the state must ensure PWIDs have full access to any transitional justice mechanisms but also ensure that the process goes further than this and addresses structural violence experienced by PWIDs by employing mechanisms contained within the framework of transformative justice. This is absolutely necessary for PWIDs who often suffer extreme discrimination and marginalization that can be a

² Rohwerder, B., "Intellectual Disabilities, Violent Conflict and Humanitarian Assistance: Advocacy of the Forgotten." *Disability & Society* 28(6) (2013) at 772.

³ *Ibid* at 772-773.

⁴ Hart, N., et al, "Making Every Life Count: Ensuring Equality and Protection For Persons With Disabilities in Armed Conflicts," *Monash University Law Review* 40(1) (2014) at 152.

cause or consequence of a human rights violation. In order to guarantee non-recurrence and for a state to meet the obligations it owes to PWIDs, there must be a real concerted effort to address these forms of discrimination in the post-conflict context.

II. Literature Review

The literature concerning PWIDs in the conflict and post-conflict context is sparse. Therefore, it is essential to consider the wider literature concerning people with disabilities (PWDs) in order to show there is a deficit of information on the situation of people with intellectual disabilities. This section will begin by examining the literature on the situation of PWDs in conflict zones before moving to post-conflict contexts and then examining the potential merits of transformative justice.

Grove, Grove and Myerscough have written an article focusing solely on PWIDs in conflict.⁵ The article discusses a range of violations PWIDs face during conflict and by focusing solely on PWIDs, the article demonstrates a first step in filling this information deficit. The authors draw on several examples provided by people who have witnessed the violations in order to give a good understanding of why PWIDs are so vulnerable in conflict contexts. Furthermore, it examines the idea of a hierarchy of disability that prioritizes the needs of people disabled by the war at the expense of those with pre-existing disabilities.⁶ Although it does not specifically address transitional justice and the post-conflict context, the information contained in the article is useful in identifying the issues that might need to be addressed in the transitional justice phase.

Another article that engages with the issues faced by PWIDs is by Rohwerder.⁷ This article identifies that PWIDs are marginalized even within the disability rights discourse.⁸ The author discusses various problems PWIDs face in conflict such as the disproportionate risk of death or injury caused by a lack of understanding of danger and issues with communication⁹; a disruption in essential services¹⁰; and difficulties in fleeing or living in refugee and internally displaced persons camps.¹¹ The author also points out that different PWIDs have very different needs, making this a challenging issue to address.¹²

⁵ Grove, S., Grove, N., and Myerscough, T., "Intellectual Disability and War: Issues for Consideration." *Journal on Developmental Disabilities* 16(1) (2010).

⁶ Ibid at 87.

⁷ Op. Cit. Rohwerder.

⁸ Ibid at 772.

⁹ Ibid at 774.

¹⁰ Ibid.

¹¹ Ibid at 775.

¹² Ibid at 779.

Kerr also highlights the unique position of PWIDs.¹³ She examines the structural violence experienced in Northern Ireland and advocates for use of the social model of disability in post-conflict countries in order to view PWDs generally as rights-bearing agents. She also briefly discusses the UK personal injury compensation payments made to victims of the conflict in Northern Ireland.¹⁴ This is particularly interesting because she points out that these ad hoc payments failed to address the wider societal issues. Therefore, although she does not specifically refer to transformative justice, she touches on the very problem highlighted by advocates of transformative justice in the discourse of transitional justice. The literature on this debate will be examined below.

Miles addresses the problems faced by people with pre-existing disabilities before the conflict and highlights the problem with the hierarchy of disability that often exists.¹⁵ In assessing the situation in Afghanistan, he points out that men disabled in jihad were typically prioritised in terms of services, and that people with pre-existing disabilities suffer real harm due to a disruption in services that leaves them neglected.¹⁶ Furthermore, he advocates for the inclusion of PWDs in development planning,¹⁷ although he does not address the situation of PWIDs specifically or take into account that often PWD have very varied needs, depending on their disability.

A substantial amount of the existing literature focuses on physical disabilities and the problems these can create for people fleeing or living in refugee and IDP camps. Dos Santos-Zingale and McColl wrote an insightful article on the marginalization of PWDs when fleeing and living in camps.¹⁸ Although it largely focuses on people with physical disabilities, it makes perceptive points that apply to PWIDs. It again highlights the idea of a hierarchy of disability, examining how people who are directly disabled by a conflict are prioritised in terms of services and resources over those

¹³ Kerr, S., "Disability and Conflict: Exploring How the Peace Process in Northern Ireland Assesses and Addresses the Needs of Persons with Disabilities." *Disability & Society* 28(6) (2013).

¹⁴ *Ibid* at 831.

¹⁵ Miles, M., "Disability and Afghan Reconstruction: Some Policy Issues," *Disability, Handicap & Society* 5(3) (1990).

¹⁶ *Ibid* at 260.

¹⁷ *Ibid*.

¹⁸ Dos Santos-Zingale, M. and Mccoll, M., "Disability and Participation in Post-conflict Situations: The Case of Sierra Leone," *Disability & Society* 21(3) (2006).

with pre-existing disabilities.¹⁹ The article also suggests that the exclusion of PWDs from community decision-making leads to further marginalization,²⁰ a useful point, as it can clearly relate to people with all types of disability.

Hart et al also write about the fact that people with disabilities are often left behind during evacuations or live in refugee and IDP camps that are ill equipped for their needs.²¹ While this is important information, the experience of PWIDs is likely slightly different because of the nature of their disability, and the article does not acknowledge this nuance. It does, however, point out the positive progressive steps taken by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in using the social model of disability, which conceptualizes PWDs as agents, rather than passive recipients of services.²²

This limited literature shows a real deficit in articles assessing the experience of PWIDs in conflict. Some useful articles are available, but clearly more research needs to be undertaken on this issue. Recently, increased focus has been put on PWDs in conflict zones, and recent reporting by leading non-governmental organisations has taken a more wide-reaching view of disability and included a range of disabilities.

Human Rights Watch has produced one such report, entitled “Leave No One Behind.”²³ This report covers people with a range of disabilities and the unique challenges each of them face when fleeing and as refugees. It is a very useful resource for exploring the challenges faced by people with a range of disabilities, but it primarily focuses on people who have fled and had to resettle in other countries. Therefore, it does not assess the situation of people with disabilities who choose not to, or are unable to, leave the conflict zone.

¹⁹ Ibid at 252.

²⁰ Ibid at 254.

²¹ Op. Cit. Hart et al.

²² Ibid at 152-153.

²³ Human Rights Watch, “Leave No One Behind.” May 19 2016, available at <https://www.hrw.org/news/2016/05/19/leave-no-one-behind>, accessed 09/15/2016.

Another useful report is that of the World Institute on Disability.²⁴ It highlights ways in which PWDs are disproportionately affected by the conflict.²⁵ It also addresses the situation of people with a variety of disabilities and advocates for their inclusion in peace processes in order to ensure long lasting and sustainable peace.²⁶ Helpfully, it gives concrete recommendations on the most effective ways to ensure they are properly represented and highlights the problems likely to arise surrounding the varying needs of people with different types of disability.²⁷ It then suggests there is a real need for case studies on peace building processes to assess how people with different disabilities are included, as well as for creation of a blueprint for future processes.²⁸

While many of the aforementioned articles have some discussion of the need for inclusion of PWDs in post-conflict planning, none of them specifically address the need for their inclusion in transitional mechanisms and process. These articles tend to focus heavily on the violations in conflict, which can be useful to help determine needs post-conflict. However, there is a need to examine the literature on PWDs generally in post-conflict and transitional justice processes to determine how PWIDs could be better included in these processes.

The literature on the position of PWDs in post-conflict and transitional justice contexts is also limited. Kerr's article calls for the social empowerment of PWDs in order to properly address their needs in a post-conflict context.²⁹ All of the literature on PWDs post-conflict highlights the need to include them in peace building and decision making processes in order to properly address their needs.

²⁴ World Institute on Disability, "The Involvement of Persons with Disabilities in Conflict Resolution and Peace building Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post- Conflict Arena." 22 August 2014, Revised August 2015, available at <http://www.usip.org/publications/world-institute-disability-wid-working-paper-the-involvement-of-persons-disabilities-in>, accessed 09/15/2016.

²⁵ Ibid at 6.

²⁶ Ibid.

²⁷ Ibid at 7.

²⁸ Ibid.

²⁹ Op. Cit. Kerr at 836-837

Ortoleva expands on this by highlighting the importance of informing courts and other tribunals of the need for accessibility measures in order to fully include PWDs.³⁰ Practical accessibility of traditional transitional justice mechanisms is certainly something that must be addressed, and a range of measures could be introduced to make such institutions more accessible. For the purposes of this paper, “traditional transitional justice mechanisms” will refer to any courts prosecuting crimes and human rights violations committed during the conflict; truth commissions investigating conflict related violations; any bodies established for the purpose of recommending or implementing reparations frameworks; and any bodies tasked with recommending or implementing policies for institutional reform. The Office of the High Commissioner for Human Rights deems these mechanisms as ones to achieve the aims of transitional justice.³¹

It must be taken into account, however, that making these mechanisms accessible must go beyond simply making them physically accessible for PWDs. In order to ensure successful inclusion of all PWDs, measures must be considered that take into account the typical difficulties experienced by PWIDs with communication and understanding.

Hollander and Gill support this call for accessibility as they highlight that often PWDs are included theoretically in transitional documents, but that no solid provisions are made for their access.³² They also emphasize the need to look beyond just medical needs in a post-conflict environment.³³ This article is a case study on people physically disabled in the conflict in Uganda, or “marked bodies.” Throughout the study, the victims interviewed expressed the need for social mechanisms to address their violations, such as vocational training in order to gain employment and

³⁰ Ortoleva, S., “Women with disabilities – the forgotten peace builders”, *Loyola of Los Angeles International and Comparative Law Review*, 33(1) (2010) at 83.

³¹ Office of the High Commissioner for Human Rights, “Transitional Justice and Economic, Social and Cultural Rights”, HR/Pub/13/5, available at www.ohchr.org/documents/publications/HR-Pub-13-05.pdf, last accessed 7 September 2016 at 5.

³² Hollander, T. and Gill, B., “Everyday the War Continues in My Body: Examining the Marked Body in Post conflict Northern Uganda,” *The International Journal of Transitional Justice* 8(2) (2014) at 16.

³³ *Ibid* at 18.

a freedom from stigma.³⁴ Therefore, it is clear that, for victims, traditional transitional justice mechanisms are not enough to address their needs post-conflict.

The lack of academic attention focused on PWIDs in conflict and post-conflict contexts means it is essential to consider how other marginalized groups are progressively asserting their rights in this field. For example, women's rights have gained more momentum recently, and the need to address the wider societal problem of discrimination against them has led to greater awareness of economic, social and cultural rights. It is possible that PWDs could take inspiration from the campaign mounted by women and force the relevant authorities to pay attention to their rights and needs, as women did by relentlessly campaigning for their own inclusion in the transition period. Discrimination in peacetime, marginalization and a dependency on state services make PWDs, like women, disproportionately vulnerable to structural violence and inequalities.

Aguirre and Pietropaoli consider in depth the issue of the inclusion of economic, social and cultural rights in the transitional process.³⁵ Through a case study on women in Nepal, they argue that even though states have moved towards restorative justice over purely retributive justice, the measures taken have not gone far enough to address the violations of economic, social and cultural rights that women typically experience in conflict.³⁶ They highlight the fact that the goal of transitional justice is not restored dependence and subordination, as is often the position of women before conflict, but improved social structure that accords full citizenship and social justice.³⁷ Furthermore, they argue that transitional justice mechanisms should be tools for advancing women's rights and challenging structural inequalities.³⁸ Parallels can be drawn here with the rights of PWDs as they also face disproportionate structural violence due to their role in society pre-conflict.

³⁴ Ibid at 17-18.

³⁵ Aguirre, D, and Pietropaoli, I. "Gender Equality, Development and Transitional Justice: The Case of Nepal," *The International Journal of Transitional Justice* 2(3) (2008)

³⁶ Ibid at 363.

³⁷ Ibid.

³⁸ Ibid at 364.

Cornelson's article expands on this idea, covering the situation of women with disabilities.³⁹ She makes the argument that women with disabilities experience double discrimination, and explores the effects of discrimination on women in conflict.⁴⁰ She also argues that transitional justice mechanisms are often inaccessible to women with disabilities because the stigma of disability means they may be hidden at home.⁴¹ This shows a real need to go beyond the transitional justice mechanisms to institute real societal change so that people, and particularly women with disabilities, can develop in society and have access to the same mechanisms and facilities as the rest of the population.

It is clearly necessary to better incorporate the experience of marginalized groups in transitional justice in order to ensure their needs are met post-conflict. Other authors, however, have taken this idea further and have developed the discourse of "transformative justice".

Evans examines the issue of structural violence in South Africa.⁴² He points out that South Africa employed a number of traditional transitional justice mechanisms but still has serious issues with structural violence.⁴³ This suggests a need to go further than the traditional transitional justice mechanisms in order to institute real societal transition. Evans suggests that the traditional mechanisms are not equipped to properly institute this social change, as they are not prepared to properly redress economic, social and cultural rights.⁴⁴ He suggests focusing on socio-economic structures and considering how inequalities produce structural violence.⁴⁵ This article defines the difference between transitional justice and transformative justice to explain why it is necessary to use transformative justice alongside transitional justice.

³⁹ Cornelson, K., "Doubly Protected and Doubly Discriminated: The Paradox of Women with Disabilities After Conflict," *William and Mary Journal of Women and the Law* 19(1) (2013-2012).

⁴⁰ *Ibid* at 109.

⁴¹ *Ibid* at 110, 114.

⁴² Evans, M., "Structural Violence, Socioeconomic Rights, and Transformative Justice", *Journal of Human Rights*, 15(1) (2015).

⁴³ *Ibid* at 2.

⁴⁴ *Ibid* at 6.

⁴⁵ *Ibid*.

Evans uses a clear diagram that shows the two discourses as distinct but overlapping.⁴⁶ Transitional justice includes truth commission, trials, amnesties, institutional reform and a general focus on civil and political rights, which creates change at the top levels of society and only addresses the direct consequences of the conflict.⁴⁷ Transformative justice includes addressing structural violence, a focus on socioeconomic rights and inequality and longer-term radical change that reverberates throughout the whole of society.⁴⁸ The diagram shows an area of overlap between the two, which it labels ‘transformative aspects of transitional justice’. Evans expands on this to suggest this area includes measures such as reparations that may address socio-economic rights, although the benefits of such mechanisms are often limited to certain groups who may be prioritised because of their particularly difficult experience of the conflict.⁴⁹

Gready and Robins agree there is a need for ‘transformative justice’. They suggest that transitional justice addresses the consequences, not the causes of conflict.⁵⁰ Therefore, while it is an essential part of a post-conflict process, a new agenda is clearly needed that addresses the causes in order to prevent a return to conflict. They define transformative justice as:

“Transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived out-comes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.”⁵¹

Within the current framework, Gready and Robins cite reparations as the closest thing to transformative change, but they highlight the problems with reparations.⁵² There is a real danger that governments will use reparations programs as a substitute for long-term development

⁴⁶ Ibid at 8-9.

⁴⁷ Ibid at 6, 8-9.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Gready P. and Robins, S., “From Transitional to Transformative Justice: a New Agenda for Practice”, *The International Journal of Transitional Justice* 8(3) (2014) at 340.

⁵¹ Ibid.

⁵² Ibid at 347.

programs, which marginalizes some of the most vulnerable people in society.⁵³ A reparations program prioritizes groups most directly affected by the conflict and dedicates resources to these groups. Thus, groups that were already vulnerable before the conflict, and so possibly not the most directly affected, tend to be left out in the allocation of resources. It is therefore, essential that the government also construct an adequate development framework to include such marginalized groups.

As Gready and Simon point out in relation to women in conflict zones, there is a real need to address the attitudes to marginalized groups and their role in society in order to bring about real societal change and ensure non-recurrence.⁵⁴

To conclude, the literature on PWIDs in conflict and post-conflict contexts is very limited. Therefore, it is necessary to consider literature on PWDs more generally; but this often fails to acknowledge the unique and distinct needs of people with different types of disability. By treating people with disabilities as a homogenous category, the literature and research does them a disservice, as it assumes they all have the same needs when this is clearly not the case.

Furthermore, the literature that does consider PWIDs tends to focus solely on the problems they face during the conflict without considering how these can be addressed post-conflict. It is therefore essential to consider the literature on transformative justice to determine whether PWIDs could fit into this framework.

III. Methodology

In order to explore the situation of PWIDs in conflict and post-conflict states, the author

⁵³ Ibid.

⁵⁴ Ibid at 354.

conducted limited field research in Northern Ireland. Northern Ireland was chosen for its accessibility and stable and legitimate institutions. It was determined that if any country had the capacity and resources to address the needs of PWIDs post-conflict it would be Northern Ireland.

The author sent recruitment emails to eleven organisations that provide services for PWIDs in Northern Ireland. These were compiled using internet searches and with the assistance of the International Disability Alliance. Responses were received from three organisations. Two organisations agreed to the interview process and showed interest in the project, but one decided at short notice not to participate. The third organisation expressed interest in the project but was unable to contribute.

A list of questions was prepared by the author to explore the situation of PWIDs throughout the conflict and in the post-conflict setting. The participating organisation was a rural based one that provides social and respite services for PWIDs and their families. Staff members, board members and family members whose relatives used the services were interviewed over a two-day period. The conscious decision not to interview PWIDs themselves was taken because of issues surrounding consent, communication, understanding and the possibility of resurfacing trauma.

The information taken from this field research is supplemented by several other sources. The first chapter that focuses on the experience of PWIDs during conflict, draws on studies conducted by reputable non-governmental organisations and other studies that are reported in the literature.

The second chapter that focuses on the obligations of states to PWIDs within the current transitional justice framework uses a range of data. It draws on various UN documents, including treaties and general comments, to clarify the obligations owed to victims in transitional justice. It also examines, in detail, the reports of specific truth commissions to determine the visibility of PWIDs in the truth seeking and reparations process.

The final chapter also draws on various UN documents such as treaties and general comments to determine the obligations imposed on post-conflict states by the disability rights framework. This

data is used to determine how states can expand a transitional process to adequately incorporate the rights of PWIDs.

IV. People With Intellectual Disabilities in Conflict

It is important to consider how conflict might affect those with intellectual disabilities

differently from others in order to determine the need for inclusion in transitional and transformative justice processes. The evidence of previous conflicts has shown a number of ways in which those with disabilities may be directly or indirectly affected by the war.

During WWII, the Nazis euthanized at least 200,000 people with disabilities as they were seen as useless, a waste of food and medicines, and taking up space in hospitals that could have been used for soldiers.⁵⁵ Targeting continues to be an issue in more contemporary conflicts. For example, in Sierra Leone, anecdotal evidence has suggested that PWIDs were deliberately shot by soldiers.⁵⁶ Furthermore, their right to life is not considered equal to other citizens, and therefore there may be mercy killings.⁵⁷ In a Human Rights Watch Report, women who were unable to flee said rebels inflicted violence on them, which they perceived as punishment for their disabilities.⁵⁸ While these women did not necessarily have intellectual disabilities, the attitudes of the rebels are informative as they show the extreme stigmatization faced by PWDs. These anecdotes demonstrate that the targeting of people with intellectual disabilities is still a real issue in contemporary conflict. However, more research is needed in order to better understand these issues.

Often these individuals are targeted because of the stigma attached to their disability or because of their vulnerability, which is a result of their weakened support systems, a direct consequence of the war. This can result in increased instances of abuse, whether physical, emotional or sexual. This was seen in Nepal, Sudan and the Democratic Republic of Congo⁵⁹ and it is difficult to identify this abuse due to the communication problems people with intellectual disabilities often experience,

⁵⁵ Op. Cit. Grove, Grove and Myerscough at 86.; See discussion of Law for the Protection of Hereditary Health of the German Volk October 1935 in Gretchen Schafft, *From Racism To Genocide: Anthropology in the Third Reich* (Chicago: University of Illinois Press, 2007) at 158; See discussion on Aktion T4 in Adam Blackler “Destruction of “Life Unworthy of Life:” Rassenhygiene, Aktion T4, and the Transfer of the Final Solution to Occupied Poland, 1939-1943“, Dissertation unpublished, University of Wyoming, 2009.

⁵⁶ Op.Cit Rohwerder at 773.

⁵⁷ Ibid 774.

⁵⁸ Human Rights Watch, “As If We Weren’t Human,” August 26, 2010, available at <https://www.hrw.org/report/2010/08/26/if-we-werent-human/discrimination-and-violence-against-women-disabilities-northern>, accessed 09/15/2016.

⁵⁹ Op.cit. Grove, Grove and Myerscough at 88.

especially when their support systems are fractured by conflict.⁶⁰ Amnesty International found that in Somalia, PWDs were at an increased risk of forced marriage, rape and violence due to a lack of protection and a lack of respect.⁶¹ Human Rights Watch reports that women with disabilities are often seen as weak, stupid or asexual and are targeted by both sides.⁶²

Often this lack of protection comes from the death or injury of close family members who may be caretakers for the affected people. In one case in Kosovo, workers at a care home left the service-users behind when fleeing violence, which effectively left them with no protection.⁶³ This vulnerability can also be exploited in other ways.

Grove et al report an increased use of PWIDs as suicide bombers. Terrorist groups exploit vulnerability and increased isolation by grooming people into becoming suicide bombers.⁶⁴ This was also seen in Northern Ireland, where the director of a service provider for people with intellectual disabilities described the position of a young man with an intellectual disability in the conflict.

“I think [he] was kind of used as a scapegoat for his community in that when there was rioting going on against police, he was asked to throw petrol bombs and things like that because he was more amenable or more vulnerable as an individual. He would have undertaken things that other people would have put him up to.”⁶⁵

The stigma attached to people with intellectual disabilities can often lead to the entire family’s exclusion from the community.⁶⁶ Thus, even if the person with the disability survives an attack but

⁶⁰ Ibid.

⁶¹ Amnesty International, “Somalia: Prioritise Protection for People with Disabilities,” March 11 2015, available at <http://www.amnestyusa.org/research/reports/somalia-prioritise-protection-for-people-with-disabilities>, accessed 09/15/2016.

⁶² Op. Cit. Human Rights Watch, “As If We Weren’t Human”.

⁶³ Op. Cit. Rohwerder at 774.

⁶⁴ Op. Cit. Grove, Grove, and Myerscough at 89.

⁶⁵ Organisation Director, Author Interview, In-person, Belfast, Northern Ireland, June 1 2016.

⁶⁶ Op. Cit. Rohwerder at 773.

the family does not, the person will be completely isolated with no support. Furthermore, when families flee violence, people with disabilities are sometimes left behind.⁶⁷ This exposes them to increased violence due to their vulnerability. Even when they do flee with their families, they often leave behind assistive aids,⁶⁸ which can affect their independence and might leave them unable to communicate.

Human Rights Watch has released an informative report on this very issue. It highlights the dilemma families face when choosing whether to flee with their relative who has a disability.⁶⁹ It also discusses the problem of leaving behind physical aids such as wheelchairs and crutches. However, the report does not consider aids beyond physical. For example, there is no mention of communicative devices, which are often used by PWIDs, and leaving this behind can leave PWIDs struggling to express their needs.

A lack of understanding, which is often present in those with intellectual disabilities, can be fatal in conflict situations. People with IDs may not understand orders given to them.

“The soldiers started to chase him, while another of the farmers told the soldiers that ‘Abdu was mentally disabled, and that was the reason he did not obey them. Despite this, the soldiers continued to chase ‘Abdu. They shot him, hitting him in the chest. He died a short time later.”⁷⁰

Grove highlights incidents described by B’Tselem in Israel, where a number of PWIDs have been shot for not obeying orders that they did not understand.⁷¹ Rohwerder describes situations in which parents in Kenya had to keep children with intellectual disabilities locked inside because they would run towards gun shots.⁷² They are therefore much more vulnerable when they come into

⁶⁷ Op.Cit. Hart et al at 149.

⁶⁸ Op. Cit. Rohwerder at 775.

⁶⁹ Op. Cit. Human Rights Watch “Leave No One Behind.” at 11

⁷⁰ Op. Cit. Grove, Grove and Myerscough at 89.

⁷¹ Ibid.

⁷² Op. Cit. Rohwerder at 774.

direct contact with the violence; they may not understand what is happening or the potential consequences of their actions, so they may act more recklessly than someone who has a full understanding of the gravity of the situation.

Where fleeing is concerned, the Human Rights Watch Report details instances of people who were unable to understand the dangers and the need to flee.⁷³ The report outlines that there may be barriers to receiving this information, for example, marginalization from community networks and they may therefore be unaware of the danger.⁷⁴

One of the most problematic issues faced by PWIDs in wartime is the disruption of services. Grove et al outline that services are often seen as expendable when the economy is focused on war.⁷⁵ Focus is diverted to the war effort⁷⁶ and this can last into the post-conflict era when reconstruction is prioritised over services for the disabled. For example, in Yemen, three hundred organisations that provided assistance to PWDs closed⁷⁷ and this left many families with no access to essential resources.

This cessation in services can lead to increased vulnerability and isolation. It can also result in a deterioration of their condition.⁷⁸ Furthermore, it can affect education and have a lasting effect on the economic capacity of PWIDs. For example in Iraq, before 1990 disabled children were well provided for in education but in 1991 all the specialized training institutions were closed.⁷⁹ Iraq also fell behind on global debates about inclusion because of their isolation from the international community and so many PWIDs missed out on an education because of the war. Currently, children with intellectual disabilities continue to be deprived of education because of ongoing issues in Iraq.⁸⁰

⁷³ Op. Cit. Human Rights Watch, "Leave No One Behind" at 11.

⁷⁴ Ibid.

⁷⁵ Op. Cit. Grove, Grove, and Myerscough at 87.

⁷⁶ Ibid.

⁷⁷ Op. Cit. Human Rights Watch, "Leave No One Behind" at 15.

⁷⁸ Op. Cit. Rohwerder at 774.

⁷⁹ Mitchell, S. K., "Death, Disability, Displaced Persons and Development: The Case of Landmines in Bosnia and Herzegovina," *World Development* 32 (12) (2004) at 805.

⁸⁰ Ibid., 806.

The Human Rights Watch report focused heavily on education for displaced children with disabilities and cited, for example, the case of the Central African Republic. At the M'Poko camp children with disabilities cannot attend school because the schools are not equipped for them and teachers are not trained to teach them.⁸¹ This was also a problem for Syrian children in Jordan who were denied access to schools because of their disabilities.⁸²

The report also outlines that humanitarian efforts in Lebanon to ensure children with disabilities are able to go to school have largely focused on children with physical disabilities.⁸³ The focus has been on ramps and accessible transport without consideration of the problems faced by children with intellectual disabilities. This would require training teachers to teach them and possibly changing attitudes to ensure stigma does not prevent them from attending school.

Non-essential services may be affected too. A Committee member of a Northern Irish service that provides social opportunities for PWIDs suggested that during a conflict people are too divided and do not trust organisations to look after the well being of PWIDs. He suggested that there is no space for social opportunities for PWIDs during a conflict because of the concern that they will be engaging with people of different backgrounds that they do not know.⁸⁴ This significantly restricts their social opportunities.

Therefore, the issues caused by the cessation of services during war have long lasting and disproportionate effects on those with disabilities who rely on public services the most. Furthermore, when people are forced to flee their homes, camps for internally displaced persons and refugees are often not equipped to deal with the complex needs of PWIDs.⁸⁵ Thus, they continue to suffer disproportionately because they need different assistance from the majority of the population. A Syrian refugee family describes the effects of this on their son who has autism. He had been attending weekly therapy but the Syrian war meant the roads were closed and so the

⁸¹ Op. Cit. Human Rights Watch, "Leave No One Behind" at 20.

⁸² Op. Cit. Human Rights Watch, "Leave No One Behind" at 21.

⁸³ Op. Cit. Human Rights Watch, "Leave No One Behind" at 24.

⁸⁴ Committee Member, Author Interview, In-person, Belfast, Northern Ireland, June 1 2016

⁸⁵ Op. Cit. Hart et al. at 149.

family fled to Turkey where they did not have access to therapy. They assert that all the progress he made in years of therapy with communication and willingness to learn has been undone. He no longer wants to learn, cannot sit still and is badly affected by the noise of bombing.⁸⁶ This will likely have long-term implications for him in education and economic capacity with more severe consequences than other members of the community.

Research undertaken by the author has shown the diverse experiences of PWIDs and their families during conflict. The research was undertaken in Northern Ireland, where the conflict was clearly not as destructive as those of countries such as the ones examined in the aforementioned Human Rights Watch report. The families, however, described a variety of experiences of the conflict. Some families described the need to hide the conflict from their relatives with intellectual disabilities altogether. For example, one father who was a member of the security services described his son as being “without reason or discretion.” This meant the family was unable to discuss any matters relating to the Troubles around the house and their son had to be completely shielded from discussions about the Troubles and the father’s job.⁸⁷

Another mother described her son’s obsession with death and his inability to cope with it. Therefore, he had to be completely shielded from any news of the Troubles to ensure he did not become emotionally distressed.⁸⁸ This was possible because of the nature of the conflict in Northern Ireland. In other contexts, shielding PWIDs from the conflict altogether would have been impossible, and so the emotional effects could be significant.

This anecdotal evidence suggests that PWIDs are affected more severely than the majority of the population. They are often targeted because of their increased vulnerability and the stigma attached to having a disability and they also suffer disproportionately because of the indirect consequences of the war. Cessation of services has a grave impact on them and this has long-term

⁸⁶ “Humans of New York,” December 4, 2015, available at <http://www.humansofnewyork.com>, accessed 09/15/2016.

⁸⁷ Parent, Author Interview, In-person, June 1 2016.

⁸⁸ Parent, Author Interview, In-person, June 1 2016.

effects relating to their health, education and economic capacity. However, it is clear that much more research is necessary specifically on the situation of PWIDs, during and post-conflict.

V. People with Disabilities in Transitional Justice

Current transitional justice processes use a range of mechanisms to address human rights violations committed during conflict. Transitional justice has been defined as:

“The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁸⁹

A report by the Office of the High Commissioner for Human Rights outlines the conceptual framework of transitional justice in four clear aims: there is an obligation on the state to investigate and prosecute perpetrators of gross violations of human rights and international humanitarian law; there is a right to truth for victims and families about abuses suffered and disappearances; there is a right to reparations for violations of international humanitarian law and international human rights law; and there is a state obligation to prevent recurrence.⁹⁰

Various mechanisms are used to fulfill these obligations, and the report highlights the importance of trials, truth commissions, reparations programs and institutional reform.⁹¹ This chapter will similarly address access to justice, the right to truth and the inclusion of PWIDs in reparations frameworks. Institutional reform has been deliberately excluded from this chapter because it is a vast area that cannot be sufficiently condensed for the purposes of this paper. In order to address it properly, a significant amount of field research must also be done on ways in which institutional reform policies have affected PWIDs, and this research is not yet available.

With regard to the right to truth, access to justice and the right to reparations, it is important to consider the legal basis of the obligations and what they mean, in order to determine what duties the state owes to PWIDs. This chapter will analyze various UN documents in order to establish the

⁸⁹ United Nations, Report of the Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”, 23 Aug 2004, S/2004/616.

⁹⁰ Op. Cit. OHCHR “Transitional Justice and Economic, Social and Cultural Rights” at 5.

⁹¹ Ibid.

scope of these obligations and will use examples to suggest that these obligations are not being truly fulfilled. It will also suggest that states must go further to adequately address the experiences of PWDs by including them in current processes but also by addressing the full range of rights violations.

Access to justice

Most transitional justice processes traditionally centre on legal trials of perpetrators at various levels, whether international, national or local. The duty on the state to prosecute comes from various sources. Primarily, the International Covenant on Civil and Political Rights carries the obligation to prevent, investigate and punish any violations of the rights.⁹² This obligation is also contained in several other treaties⁹³ and there is a duty to prosecute ‘grave breaches’ of the Geneva Conventions.⁹⁴

Furthermore, Principle 1 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity⁹⁵ outlines that those suspected of criminal responsibility should be prosecuted, tried and punished and that there be effective remedies. The Commission on Human Rights released these principles as guidelines to assist states in combating impunity,⁹⁶ thus they may be useful tool for transitioning states when constructing a transitional justice framework but are of no legal significance.

⁹² United Nations, Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights”, General Comment Number 31, 29 March 2004, CCPR/C/21/Rev.1/Add.13

⁹³ See for example, United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Article 4; United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, 2010, Article 7.

⁹⁴ See Article 49 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, Article 50 Geneva Convention II For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, Article 129 Geneva Convention III relative to the Treatment of Prisoners of War 1949 and Article 146 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949.

⁹⁵ Orentlicher, D., Economic and Social Council, “Promotion and Protection of Human Rights, Report of the Independent Expert to Update the Set of Principles to Combat Impunity”, 8 February 2005, E/CN.4/2005/102/Add.1.

⁹⁶ Ibid at Preamble.

Clearly, states have a duty to investigate and prosecute crimes in post-conflict societies, and many states do uphold this obligation. The critical issue for PWIDs however, is their access to these legal processes once they have been established in the transition period.

Several human rights provisions theoretically guarantee equal access to justice for victims with disabilities. For example, Article 14 of the ICCPR guarantees that all persons shall be equal before courts and tribunals.⁹⁷ The Human Rights Committee, which monitors implementation of the ICCPR by state parties, has interpreted this provision to guarantee a right of access to courts so that no individual should be deprived of access to justice, thus including PWDs.⁹⁸ Furthermore; Article 26 ICCPR guarantees that all persons are entitled to protection of the law without discrimination. Thus, there is a clear obligation under the ICCPR to ensure effective access for PWIDs to legal mechanisms.

Obligations under the UN Convention on the Rights of Persons with Disabilities also guarantee a right to justice for PWIDs. Article 12(1) affirms that PWDs have the right to recognition everywhere as persons before the law.⁹⁹ Article 12(2) requires that PWDs enjoy legal capacity on an equal basis with others in society¹⁰⁰ and Article 12(3) guarantees that state parties will take appropriate measures to provide access to support for PWDs in exercising their legal capacity.¹⁰¹ It is acknowledged that this treaty has not been as widely signed and ratified as other human rights treaties, but it is a relatively recent treaty and it is hoped that more states will accede to it in the near future.

The Committee on the Rights of Persons with Disabilities monitors compliance with the UNCRPD and can give recommendations on implementation. It highlighted the importance of moving away from substituted decision-making, which is the process of having a legal guardian

⁹⁷ United Nations, International Covenant on Civil and Political Rights, 1976 at Article 14.

⁹⁸ United Nations, Human Rights Committee, “Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial”, General Comment Number 32, August 23, 2007, CCPR/C/GC/32.

⁹⁹ United Nations, Convention on the Rights of Persons with Disabilities, May 3 2008, Article 12(1).

¹⁰⁰ Ibid at 12(2).

¹⁰¹ Ibid at 12(3).

make decisions on behalf of a person with a disability, towards supported decision making, when the person with a disability is supported to make the decision themselves.¹⁰² This fosters respect for the human rights of PWDs and follows the shift from using the medical model of disability, which characterizes PWDs as passive and in need of treatment to the human rights model which views PWDs as rights bearing agents.¹⁰³ Thus, PWDs must have direct access to judicial mechanisms rather than having others make decisions for them.

The Committee also suggests the various kinds of support mechanisms that should be offered in order to allow PWDs access to judicial mechanisms. These can be formal or informal mechanisms such as support with communication, making information understandable for various types of disabilities and allowing a trusted person to be present in all situations.¹⁰⁴ There is extensive information in General Comment 12 on how state parties can ensure they are offering support mechanisms that comply with Article 12 and do not constitute substituted decision-making.¹⁰⁵ The Committee also highlights the importance of consulting and involving PWDs in any policies concerning methods of support they might need in order to access the judicial sphere.¹⁰⁶

This General Comment provides detailed guidance on methods of ensuring the inclusion of PWDs in the judicial sphere. Although it is not specific to post-conflict environments, it provides clear guidelines for supporting PWD's access to justice and could be very useful in a post-conflict context.

The International Disability Alliance's (IDA) submission to the Committee for the Elimination of Discrimination Against Women's general discussion on Access to Justice outlined the process by which, historically, PWDs have always struggled to access justice due to inaccessible mechanisms and procedures, a lack of awareness of disability issues on the part of actors in the justice sector,

¹⁰² United Nations, Committee on the Rights of Persons with Disabilities, "Article 12: Equal Recognition Before the Law", General Comment Number 1, 19 May 2014, CRPD/C/GC/1 at paragraph 3.

¹⁰³ These models of disability will be examined in more depth in the following chapters.

¹⁰⁴ Op. Cit. CRPD General Comment Number 1 at 17.

¹⁰⁵ Ibid at 29.

¹⁰⁶ Ibid at 50.

and discrimination.¹⁰⁷ According to IDA, without remedies for violations, the human rights of disabled people are rendered meaningless and PWDs continue to be marginalized.¹⁰⁸

One main problem highlighted by IDA is the denial of legal personhood of PWDs, which can often mean they have to rely on their guardians to seek justice on their behalf.¹⁰⁹ In a post-conflict context this could be problematic because conflict can fracture family structure through death and displacement. Therefore, it may be unclear who the guardian is or there might be no one who is willing or able to take on this role, effectively leaving a person with a disability with no legal personhood and no one to exercise rights on their behalf if the state chooses to use this system. As discussed above the Committee on the Rights of Persons with Disabilities condemns substituted decision-making; however, having a close trusted person may be necessary for supported decision-making. After a conflict it may be difficult to locate a trusted person to act in this capacity for a PWID.

Furthermore, the submission paper points out that particularly women with disabilities (WWD) may not be taken seriously when it comes to sexual and gender-based violence, because they are not considered reliable or competent witnesses.¹¹⁰ This is a real issue for PWIDs and can lead to their exclusion from the judicial sphere, a violation of their human rights. They are also stereotyped as either non-sexual beings or hypersexual beings that lack self-control, which can lead to their testimony or complaints being discounted.¹¹¹ This could be a serious issue in post-conflict countries because of the high incidences of sexual and gender based violence against PWDs in conflict zones, as examined above.

¹⁰⁷ International Disability Alliance, “IDA Submission to the CEDAW Committee General Discussion on Access to Justice”, February 18 2013 available at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/AccessToJusticeWrittenContributions2013.aspx>, accessed 09/16/2016 at paragraph 1.

¹⁰⁸ Ibid at 2.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

The submission paper also examines issues with communication that PWIDs may experience.¹¹² It reports that there is a lack of support and special measures to facilitate for PWIDs specifically within judicial mechanisms.¹¹³ The procedures used and the information disseminated are also not accessible for PWIDs.¹¹⁴

IDA argues that all these barriers faced by PWDs result in violations against them being unexposed and not remedied, which leads to a real lack of data on violations against PWDs. The submission paper highlights the obligation on state parties to take all appropriate steps to ensure reasonable accommodations are provided to PWDs in the legal sphere.

Although this submission by IDA concerns access to justice for PWDs generally, it is useful in helping to suggest the situation of PWDs in post-conflict countries. It could be assumed that if PWDs face such barriers in accessing justice in developed countries in peacetime, these problems are likely to be exacerbated in developing and post-conflict countries. These countries often have scarce resources and a government distracted by other problems, and therefore disability issues are a low priority.

Based on patterns of exclusion experienced in peacetime it is likely that state parties are not upholding their obligation to provide access to justice for PWDs. It is imperative that PWIDs are afforded the support measures necessary to allow them equal access to ensure that any direct violations of human rights they have suffered are adequately addressed.

Right to truth

Following a conflict, or even during a conflict, truth commissions are used to fulfill a number of goals following widespread violations. As the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence, Pablo de Grieff, highlights, truth commissions have recently

¹¹² Ibid at 3.

¹¹³ Ibid at 3.

¹¹⁴ Ibid.

moved towards fact finding with the purpose of understanding root causes, circumstances, factors, context and motives behind the conflict and human rights violations that occurred.¹¹⁵

The right to truth is contained in various resolutions by UN bodies. For example, Human Rights Council Resolutions 9/11,¹¹⁶ 12/12¹¹⁷ and 21/7¹¹⁸ all concern the right to truth with Resolution 21/7 recognising the importance of ensuring the right to truth to end impunity¹¹⁹ and encouraging states to use truth commissions¹²⁰ with comprehensive witness protection programs.¹²¹

Human Rights Council Resolution 21/15 entitled “Human Rights and Transitional Justice” highlights that truth processes must be based on broad consultations that consider the victims’ voices.¹²² Paragraph 15 underlines the importance of giving vulnerable groups a voice and ensuring discrimination is addressed¹²³ and paragraph 21 underlines the need for particular attention to be paid to vulnerable groups including PWDs.¹²⁴

Furthermore, Principle 2 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity¹²⁵ reinforces the inalienable right to truth and states that every person has this right. Principle 4 then states that irrespective of legal proceedings,¹²⁶ victims and their families have the right to truth about the circumstances in which violations took place.

Thus, embedded in the transitional justice framework there is a clear right to the truth owed to every person and their family that suffers a direct violation. This right must be extended to PWDs to

¹¹⁵ Grieff, P. de, Human Rights Council, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence”, August 28 2013, A/HRC/24/42.

¹¹⁶ United Nations, Human Rights Council Resolution 9/11, “Right to Truth”, A/HRC/RES/9/11, September 18 2008.

¹¹⁷ United Nations, Human Rights Council Resolution 12/12, “Right To Truth”, A/HRC/RES/12/12, October 1 2009.

¹¹⁸ United Nations, Human Rights Council Resolution 21/7, “Right To Truth”, A/HRC/RES/21/7, 27 September 2012.

¹¹⁹ Ibid at para 1.

¹²⁰ Ibid at paragraph 4.

¹²¹ Ibid at paragraph 9.

¹²² United Nations, Human Rights Council Resolution 21/15, “Human Rights and Transitional Justice”, A/HRC/RES/21/15, October 11 2012, at paragraph 3.

¹²³ Ibid at paragraph 15.

¹²⁴ Ibid at paragraph 12.

¹²⁵ Op. Cit. Orentlicher at Principle 2.

¹²⁶ Ibid at Principle 4.

ensure that state obligations are fulfilled and in order to do this it is likely that similar support measures to those that must be adopted by courts will be necessary.

One clear step to be taken is the deliberate inclusion of people with a range of disabilities in the consultation process. The needs of people with different disabilities vary significantly so wide inclusion in the process is necessary to ensure all needs are considered. The obligation to consult PWDs is contained in Article 4(3) of the UNCRPD:

“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”

Thus, there is a clear obligation on state parties to consult with PWDs in order to ensure adequate provision is made for their inclusion in truth mechanisms. This should be considered as useful guidance when constructing a truth commission, even for those who have not ratified the Convention. PWDs are often marginalized from any community decision-making processes due to the stigma attached to disability¹²⁷ and frequently left out of consultation processes and so it is necessary that their opinions are actively sought out and they are deliberately targeted for the consultation process.

The Kenyan Truth, Justice and Reconciliation Commission made a significant effort to include PWDs in their work, as reflected in the Report produced by the Commission. The Report frequently references the situation of PWDs and clearly acknowledges that structural violence has a disproportionate effect on marginalized groups, including PWDs.¹²⁸

¹²⁷ Op. Cit. Dos Santos-Zingale and McColl at 254.

¹²⁸ Truth, Justice and Reconciliation Commission, “The Final Report of the Truth, Justice and Reconciliation Commission of Kenya”, 2013, Volume 1 at xvi and Chapter 3, page 99 at paragraph 67.

The Commission had a Special Support Department that was tasked with ensuring the situation and experiences of vulnerable groups were consistently and adequately addressed in all the processes of the Commission.¹²⁹ The Commission also had the authority to put in place special mechanisms and procedures to ensure vulnerable groups were adequately included in the process¹³⁰ and when selecting venues it considered accessibility issues for PWDs.¹³¹

Throughout the Report of the Kenyan TJRC, frequent reference is made to the situation of PWDs¹³² and examples are given of their targeting.¹³³ It is also recognized by the Commission that Kenya is a state party to the UNCRPD and that this is relevant when analyzing their obligations to PWDs.¹³⁴ The steps taken by the Kenyan Commission show, in theory, a significant step towards the inclusion of PWDs in truth seeking mechanisms.

There is an obligation on states to include PWIDs stemming from the UNCRPD and the various provisions on truth and non-discrimination, but more research is necessary to determine whether states are upholding these provisions in practice. The Kenyan Commission is an excellent example of a process that is aware of PWD's rights and further research could help provide a blue print for future mechanisms that would ensure transitional bodies are aware of disability issues.

Reparations

Some scholars have described reparations as a transformative element in transitional justice that makes a limited attempt to address socioeconomic inequalities and structural violence.¹³⁵ It is important to consider the extent to which PWIDs are considered in reparations frameworks and whether these address the structural violence experienced by PWIDs.

¹²⁹ Ibid page 29 at paragraph 80.

¹³⁰ Ibid.

¹³¹ Ibid page 102 at paragraph 82.

¹³² Ibid Volume IIA page 215 at paragraph 313 (tells of blind man burnt alive in hour); page 721 at paragraph 46 (inability to flee makes them a target); Volume IIB page 358 at paragraph 58 (corruption has a disproportionate effect on PWDs); Volume IIC page 2 at paragraph 4 (recognizes WWD as a vulnerable group within gender chapter); page 44 at paragraph 117 (highlights increased problems for WWD).

¹³³ Ibid Volume IIA page 215 at paragraph 313; page 719 at paragraph 39.

¹³⁴ Ibid Volume IIC, page 3 at paragraph 9.

¹³⁵ See for example Op. Cit. Evans at 4.

The UN Reparations Guidelines define victims:

“Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”¹³⁶

Thus gross violations of IHL and IHRL resulting in harm, will give rise to reparation, a right to access justice and a right to further information concerning the violations for PWIDs on an equal basis with the rest of the population.¹³⁷ Furthermore, the Guidelines suggest that reparations are due for harm suffered by any acts or omissions that can be attributed to the state. In the case of PWIDs the inclusion of ‘omissions’ is crucial. They are likely to be disproportionately affected by the omissions of the state to provide services during conflict, protect them or to provide for them appropriately if they are forced to flee their homes. A truth commission must, therefore, seek out the details of other violations against PWIDs in order to determine whether these amount to gross violations of their human rights and if so, award appropriate reparations.

The forms of reparation outlined in the Guidelines are restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.¹³⁸ Arguably, restitution is the least appropriate because the situation of PWIDs can often be dire pre-conflict and so to restore them back to this is not an ideal solution. It could, however, be appropriate relating to the restoration of services that could help PWIDs learn and communicate more effectively. They would likely also be due compensation for any physical and mental harm and also moral damage suffered. Furthermore, rehabilitation may be appropriate in some cases for any conditions that have worsened as a result of the conflict and satisfaction in the form of truth can be useful if it is formulated in a manner that is

¹³⁶ United Nations, General Assembly Resolution 60/147, "UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", March 21 2006, A/RES/60/147 at paragraph 8.

¹³⁷ Ibid at paragraph 11.

¹³⁸ Ibid at paragraphs 19–23.

accessible for PWIDs. In order to make truth accessible and meaningful for PWIDs, it may have to be communicated in certain formats or in a way that is comprehensible for a person who understands things differently to others.

This section will consider the Reports of three truth commissions that have laid out extensive reparations frameworks in order to examine the presence of PWDs within these frameworks and whether these meet the obligations expected of states in a post-conflict environment. This section will consider whether PWDs and particularly PWIDs have been included theoretically in the reparation process as considering this will give some insight into the treatment of PWDs, regardless of whether the frameworks have been implemented or not.

The three case studies in this section – Timor Leste, Sierra Leone and Kenya – have been chosen for their relatively recently published reports detailing extensive reparations frameworks and their wide mandates to consider a range of human rights violations. As the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence pointed out in his 2013 Report, recent truth commissions have much wider mandates to address a range of violations¹³⁹ and therefore, if any reparations frameworks are likely to include PWDs, it is likely to be more recent ones. Furthermore, the UN General Assembly did not adopt the UNCRPD until 13 December 2006.¹⁴⁰ This suggests an increased awareness of disability issues at this time and so it is also interesting to compare the visibility of PWDs in reparations frameworks before and after the adoption of this convention.

The Report of the Sierra Leone Truth and Reconciliation Commission was released in 2004. It benefited from a wide mandate that allowed it to “deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.”¹⁴¹ This same provision also gave the

¹³⁹ Grieff, P. de, Human Rights Council, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence”, August 28 2013, A/HRC/24/42.

¹⁴⁰ United Nations, General Assembly Resolution 61/106, “Convention on the Rights of Persons with Disabilities”, December 13 2006. A/RES/61/106.

¹⁴¹ Lomé Peace Agreement, July 7 1999, Article XXVI, as cited by Sierra Leone Truth and Reconciliation Commission, “Witness to Truth: Final Report of the TRC”, Volume I, Chapter 1, page 1 at paragraph 3

Commission the mandate to recommend measures for the rehabilitation of victims of human rights violations.¹⁴²

Similarly, the Timor-Leste Commission for Reception, Truth and Reconciliation released its report in 2005, entitled “Chega!” It was tasked with inquiring into and establishing the truth regarding human rights violations from 25 April 1974 to 25 October 1999.¹⁴³ The wide mandate allowed the Commission to examine different types of human rights violations and recommend a reparations framework best suited to address these.

The Kenyan Truth Justice and Reconciliation Commission released its report in 2013. This Commission had a similarly wide mandate that tasked the Commission with “promoting peace, justice, national unity, healing and reconciliation by establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February 2008.”¹⁴⁴

Therefore, each Commission had the mandate to examine a range of violations and make recommendations to counter these in their reparations frameworks. It is interesting to assess, therefore, which violations and groups of victims each Commission prioritised.

Sierra Leone

The Truth and Reconciliation Commission of Sierra Leone makes no reference to PWIDs throughout the Report and instead focuses heavily on people disabled directly by the conflict. Throughout the conflict the RUF, its allies and opponents used physical mutilation indiscriminately against the civilian population.¹⁴⁵ As a result of this, amputees are heavily featured throughout the

¹⁴² Ibid.

¹⁴³ Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Section 2.2, as cited by Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR), “Chega!” Report, Part 2, page 2 at paragraph 2(1).

¹⁴⁴ Truth, Justice and Reconciliation Commission Act (Kenya), Article 5(a), March 9 2009.

¹⁴⁵ Op. Cit. Sierra Leone TRC Report, Volume II, Chapter 1, page 3 at paragraph 2.

Commission Report. The Commission recommends four groups for reparation measures: amputees and war wounded; victims of sexual violence; children; and war widows.¹⁴⁶ The reasoning given for choosing these groups:

“In determining the categories for the reparations programs, the Commission first considered those victims who have become vulnerable as a result of having suffered human rights violations.”¹⁴⁷

Therefore, the Commission clearly prioritised people with physical disabilities caused directly by the conflict over people with other disabilities. Although it justifies this decision based on its findings, throughout the report there is no mention or consideration of PWIDs or people who already had disabilities before the conflict. This would suggest that the Commission examined very little or no testimony from PWIDs or people with pre-existing disabilities and thus were not aware of the different ways in which they were affected by the conflict. The Commission chose to prioritise the war wounded over PWIDs and pre-existing disabilities without an adequate understanding of their experience of the conflict.

The reparations given to the war wounded and amputees include free physical healthcare for life for the victim and their wife;¹⁴⁸ free rehabilitation;¹⁴⁹ free prosthetics;¹⁵⁰ and preference for scholarships for children disabled by the conflict.¹⁵¹ This would require significant resources and only contributes to the hierarchy of disability theory. This theory suggests that by including people with some types of disability in the post-conflict transition process, for example those disabled directly the conflict, they are allocated an unequal amount of resources at the expense of people

¹⁴⁶ Ibid at Volume I, Chapter 1, page 20 at paragraph 84.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid Volume II, Chapter 3, page 192 at 486.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid Volume II, Chapter 3, page 194 at paragraph 494.

with other types of disability.¹⁵² This intensifies stigma towards people with certain types of disability who are seen as not worth spending resources on. Thus, people with some types of disability are supported and able to flourish in a post-conflict society while others fall even further behind.

It is clear that PWIDs must be consulted in reparation processes in order to determine whether they require any specific reparations. It is possible that they may not require any specific reparations, but without adequate consultation the Truth Commissions risk marginalizing them even further by prioritizing scarce resources for people disabled by the conflict.

The Report outlines in its guiding principles the importance of consultation for reparations and reconciliation.¹⁵³ It also highlights the importance of consulting certain groups, including “victims with visible physical disabilities such as amputees and war wounded”.¹⁵⁴ This again, reinforces the hierarchy of disability by including some groups to give their opinions and marginalizes the experiences of other groups with different disabilities.

The Report acknowledges that many people suffered in the conflict but that resources are scarce and not everyone can be helped.¹⁵⁵ The Commission therefore determined categories based on those victims who were particularly vulnerable.¹⁵⁶ Particularly interesting was the Commission’s justification for including amputees and war wounded. The Commission said this group have “enduring physical handicaps” as a result of which they suffer physical and mental harm as they are unable to reintegrate, cannot sustain themselves or their families and cannot get medical help because of the cost.¹⁵⁷ This description could also fit the position of people with pre-existing disabilities but because they were never consulted, these experiences were never brought to the attention of the Commission.

¹⁵² Op. Cit. Rohwerder at 776; Op. Cit. Miles at 802.

¹⁵³ Op. Cit. Sierra Leone TRC Report, Volume 2, Chapter 3, page 197 at paragraph 517.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid Volume II, Chapter 4, page 242 at paragraph 56.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid Volume II, Chapter 4, page 243 at paragraph 59.

Although it is true that resources are scarce, prioritizing one group of PWDs over another only leads to creating a hierarchy of disability, when the entire community is in desperate need of vital services after conflict. In order to determine the best way to address PWDs and PWIDs in post-conflict reparations framework, more research must be done to determine what they need and how this can be incorporated in the wider process of transition. It is also essential that they be consulted in the truth-seeking process to guarantee the Commission understands their experience of conflict.

Timor-Leste

The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste takes a similar view of disability as the Sierra Leone Truth and Reconciliation Commission. Throughout the Report it is clear that people physically disabled by the conflict are prioritised in the giving of evidence and the reparations framework. The Commission highlights that people have been left disabled by various violations, such as bombings¹⁵⁸ and sexual and gender based violence.¹⁵⁹ The Commission aims to provide reparations for these direct violations that caused disability¹⁶⁰ with no mention of how other types of violations can impact people already living with disabilities in a disproportionate manner. The Report is more progressive than that of the Sierra Leone TRC because it dedicates a lot of space to economic, social and cultural rights. It details the different ways in which these rights have been violated¹⁶¹ but fails to assess their impact on the most vulnerable groups.

When outlining the reparations framework, it requires beneficiaries to be direct survivors of human rights violations¹⁶² and gives examples of what these violations might be--for example, abduction, killing and rape¹⁶³--but does not list violations of economic, social and cultural rights.

¹⁵⁸ Op. Cit. CAVR Report, Chapter 7.3, page 13 at paragraph 44.

¹⁵⁹ Ibid Chapter 7.7, page 26 at paragraph 96.

¹⁶⁰ Ibid Chapter 10, page 7 at paragraph 18.

¹⁶¹ See Ibid Chapter 7.9.

¹⁶² Ibid Chapter 10, page 40 at paragraph 175.

¹⁶³ Ibid.

PWIDs and PWDs generally, are disproportionately affected by violations of economic, social and cultural rights due to their increased reliance on the state.

For example, PWDs suffer disproportionately from the cessation of services during conflict. They often rely heavily on the government or third party organisations for health care and various types of therapy, which can be very damaging if it suddenly is no longer available.¹⁶⁴ Furthermore, PWDs often rely on third party services for social opportunity and if this is not available during conflict, they can become very isolated which may affect the manifestation of their disability.¹⁶⁵

Provision for PWDs in IDP and refugee camps is often limited and so access to education, healthcare and food can be very difficult for PWDs.¹⁶⁶ These experiences can be very difficult for PWDs and may affect their abilities and capacities post-conflict. Thus, failing to address these economic, social and cultural rights violations disproportionately impacts the disability community.

In the Recommendations section, some broad suggestions are made that would impact the disability community. For example, the Commission recommended that the Government develop and implement policies that ensure the fruits of development are enjoyed equally including isolated communities and disabled people.¹⁶⁷ The Commission also recommended that universal education be extended in practice, particularly to disabled people.¹⁶⁸ It is possible that the plight of the war disabled brought these structural inequalities to light and this has allowed all PWDs to benefit from the report through the broad recommendations. It would, however, have been desirable for the Commission to pay more attention to the entire disability community in order to address the unique experience of PWIDs.

The Commission also emphasizes that the reparations program must benefit the most vulnerable and lists people with mental and physical disabilities caused by the conflict.¹⁶⁹ It is

¹⁶⁴ Op. Cit. Humans of New York.

¹⁶⁵ Organisation Staff Member, Author Interview, In-person, June 1 2016.

¹⁶⁶ Op. Cit. Human Rights Watch “Leave No One Behind” at 20.

¹⁶⁷ Op. Cit. Timor-Leste CAVR Report, Part 11, page 7 at Recommendation 3.2.6.

¹⁶⁸ Ibid Part 11, page 14 at Recommendation 4.2.6.

¹⁶⁹ Ibid, Part 11, page 40, paragraph 12.9

difficult to determine why in a post-conflict environment, people disabled by the conflict would be categorically more vulnerable than those who already had disabilities. The experience of PWIDs during conflict may leave them extremely vulnerable in a post-conflict environment and truth commissions must prioritise their voices in order to address this.

Kenya

The final case study is that of Kenya, where the Truth, Justice and Reconciliation Commission outlined a reparations framework in their final report. The Kenyan commission made significant efforts to include PWDs in the fact-finding process and detail violations they suffered. Thus, the Commission took into account the experiences of PWDs when recommending the reparations framework.

Reparations were determined to be only for gross violations of human rights¹⁷⁰ and were categorized according to how serious the violation was with appropriate reparations recommended for each category according to victim group. The victim groups are listed as Priority A, B and C, with priority A being for the most vulnerable,¹⁷¹ priority B being for victims that suffered violations as a group¹⁷² and priority C being for people who have suffered the most serious violations but are not considered particularly vulnerable and therefore are only entitled to a symbolic payment.¹⁷³

Category 1 and 2 violations, which include violations of the right to life and violations of personal integrity, can be remedied with compensation and rehabilitation if the victim is considered vulnerable under Priority A or otherwise will be in the form of group reparations.¹⁷⁴ Category 3 violations, which require forcible transfer of the population, can include individual reparations under limited circumstances or will also be group reparations.¹⁷⁵ Category 4 and 5 violations, which

¹⁷⁰ Op. Cit. Kenya TJRC Report, Volume IV, Chapter 3, page 102 at paragraph 14.

¹⁷¹ Ibid Volume IV, Chapter 3, page 105 at paragraph 18.

¹⁷² Ibid Volume IV, Chapter 3, page 107 at paragraph 24.

¹⁷³ Ibid Volume IV, Chapter 3, page 120 at paragraph 60.

¹⁷⁴ Ibid Volume IV, Chapter 3, page 105 at paragraph 17.

¹⁷⁵ Ibid.

include historical and contemporary land injustices and systematic marginalization, can only be remedied with group reparations.¹⁷⁶

This extensive reparations framework outlines a range of reparations to address a range of issues expressed by various factions of Kenyan society. It shows an understanding by the Commission of the range of violations committed against the Kenyan people and its acknowledgement of economic, social and cultural rights demonstrates a welcome step towards the realization of wide scale inclusion in reparations frameworks.

This is particularly promising for PWDs as it is essential that they are not only given equal provision to the rest of the population when it comes to direct violations of their rights but also that their differing experience of the conflict is addressed. In order to do this, it is essential that truth commissions assess and recommend reparations that combat violations of economic, social and cultural rights as PWDs are disproportionately affected by these types of violations.

One interesting factor that could account for this inclusion of PWIDs in Kenya is the ratification of the UNCRPD and the greater awareness of disability issues this created. The Sierra Leone and Timor-Leste reports both came before the adoption of the UNCRPD at the General Assembly and clearly this adoption would have raised the profile of disability rights to some extent and clarified state obligations. Regardless of the number of signatories, having an international treaty on the rights of PWDs significantly increased the visibility of these rights internationally and creating a committee for monitoring the Convention increased discussion on what these rights mean. Thus, it is interesting to note that the Kenyan Commission references the obligations under the UNCRPD in the TJRC Report.¹⁷⁷ The Report considers the situation of PWDs of all natures throughout, and as discussed below, puts several mechanisms in place to ensure their access to the Commission and inclusion in the process.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid Volume IIC, Chapter 1, page 9 at paragraph 3; Chapter 2, page 168 at paragraph 17.

There may have been other influencing factors that resulted in the Kenyan Commission paying great attention to disability rights; however, its references to the UNCRPD show that the Commission was aware of and attempting to uphold the obligations of the state to PWDs.

The Kenyan Commission is, in theory, an excellent example of a Commission and reparations framework that ensures the inclusion of people with all types of disability. Progress has most certainly been made on the inclusion of PWDs in transitional mechanisms and this could provide an excellent blueprint for other countries wishing to uphold obligations under the UNCRPD. An issue still remains, however with the implementation of these recommendations and whether they go far enough to have a tangible effect on the situation of PWDs.

In its 2014 submission to the Committee on the Rights of Persons with Disabilities, the Kenyan Government outlined several legislative and policy measures it had taken to ensure the inclusion of PWDs in all aspects of Kenyan society and provide for their economic, social and cultural rights.¹⁷⁸ The Committee however, expressed concern in several areas. For example, the Committee was concerned about the lack of ongoing training for teachers in fulfilling obligations under Article 24.¹⁷⁹ It was also concerned about the low employment rate among PWDs, which in 2015 stood at 1%¹⁸⁰ and the lack of specificity of the Kenyan Government when referring to measures for access and reasonable accommodations, among other issues.¹⁸¹ Therefore, while the Commission may have outlined several suggestions and a reparations framework to improve the situation of PWDs in a post-conflict environment, it is clear that this has not gone far enough to ameliorate the situation of PWD and address the barriers they still face in society.

¹⁷⁸ United Nations, Committee on the Rights of Persons with Disabilities, “Consideration of Reports Submitted by State Parties under Article 35 of the Convention, Kenya”. July 28 2014, CRPD/C/KEN/1.

¹⁷⁹ United Nations, Committee on the Rights of Persons with Disabilities, “Concluding Observations on the Initial Report of Kenya”, September 30 2015, CRPD/C/KEN/CO/1 at paragraph 43.

¹⁸⁰ Ibid at paragraph 47.

¹⁸¹ Ibid at paragraph 9.

Conclusion

This chapter has examined the inclusion of PWDs in existing transitional justice mechanisms that fall within the current transitional justice framework. Clearly, PWDs in general have problems in accessing such mechanisms.

Typically PWDs and PWIDs particularly, struggle to access justice and there is no reason to believe this would be any different in a post-conflict context. Furthermore, close examination of earlier truth commission reports suggest a lack of inclusion of PWDs, which leads to a lack of understanding of their experience of conflict and their complete absence from the reparations framework.

The Kenyan Commission suggests a clear shift towards ensuring the inclusion of PWDs in truth commissions in order to better understand and address their experiences of conflict. This is reflected in the inclusion of reparations for economic, social and cultural rights in the framework, which would help to address the issues faced by all PWDs in a post-conflict environment. This shift may suggest that future transitional processes will better account for violations of economic, social and cultural rights and this will result in more inclusive frameworks for reparations and better understanding of the diversity of needs post-conflict.

VI. Transformative Justice as a Framework for Inclusion

From the previous chapter it is clear that transitional justice processes have moved towards addressing wider violations of human rights, including economic, social and cultural rights. As the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Grieff, has suggested, however, truth commissions are not capable of providing actual transformation.¹⁸² He accepts that recently truth commissions have been given wider mandates to address a range of violations but suggests that they can only conduct deep analysis and not transform society.¹⁸³

The Kenyan Truth, Justice and Reconciliation Commission was a good example of this. Although the Commission had a mandate to address a wide range of violations and recommend a reparations framework based on its findings, it did not provide adequate recommendations to be considered transformative. For example, it investigated land rights but recommended very technical measures and ignored the issue of land redistribution, which could have been transformative if adequately addressed.¹⁸⁴

Another example of the failure of transitional justice mechanisms to create transformation was seen in the case of South Africa. South Africa illustrates that transitional justice mechanisms alone are not enough to address the underlying causes and consequences of the conflict. Structural inequalities still remain in South Africa even after a comprehensive transitional process.¹⁸⁵

Although post-conflict countries have started to take a wider view of the definition of human rights violations, as seen in the Kenyan process, using current transitional justice mechanisms to address violations of economic, social and cultural rights does not go far enough. Wider mechanisms and processes are necessary to address the root of structural violence and economic, social and cultural rights violations.

¹⁸² Op. Cit. Grieff, 2013 at page 25.

¹⁸³ Ibid at 40.

¹⁸⁴ Op. Cit. Gready and Robins at 346.

¹⁸⁵ Op. Cit. Evans at 2.

This wider process is necessary to address violations experienced by the entire population but as has been shown, structural violence and violations of economic, social and cultural rights affect marginalized groups disproportionately to the rest of the population. Thus, PWDs and PWIDs especially should be afforded equal access to the transitional justice mechanisms and these mechanisms should consider their experiences when outlining recommendations and reparations frameworks. However, a wider transformative process is also necessary in order to address their experience of structural violence and the discrimination they face.

This wider process that goes beyond transitional justice is called ‘transformative justice’. This process is defined as:

“Transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived out- comes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.”¹⁸⁶

It includes addressing structural violence with a focus on socioeconomic rights, which institutes a longer-term radical change that permeates the whole of society.¹⁸⁷

Furthermore, as outlined above, it is essential that states use the social model of disability when constructing a framework for this transformation. This is the same model used by the UNCRPD and ensures that PWDs are given the opportunity to speak for themselves.

The social model of disability

The reason people with disabilities are vulnerable is because of social disadvantage, poverty and structural exclusion rather than any natural vulnerability.¹⁸⁸ Thus, it is important that a post-conflict society takes this into account. International Humanitarian Law tends to use the medical

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Op. Cit. Rohwerder at 771.

model of disability,¹⁸⁹ and this can continue into the post-conflict context as some states try to address disability by solely focusing on the medical needs of the war wounded as has been seen in Sierra Leone¹⁹⁰ and other post-conflict countries.

The medical model views impairment as the cause of disability and views PWDs as passive and in need of medical treatment rather than looking at the physical and social barriers created by society.¹⁹¹ The UNCRPD uses the social model, which conceptualizes people with disabilities as rights-bearing agents ensuring their ability to exercise these rights.¹⁹² Northern Ireland is a good example of why the medical model is not appropriate after conflict. The approach in Northern Ireland was to try and fix those with disabilities, and so the British Government paid millions of pounds in individual reparations, which did nothing to address the wider issues people with disabilities face.¹⁹³ This approach also prioritizes those whose disabilities can be seen and are a direct consequence of the war,¹⁹⁴ which sidelines people who were already disabled. This is the precise problem with many transitional justice processes that prioritise people disabled by the conflict without addressing the wider societal barriers holding back PWDs. It effectively ensures that people with other types of disability are marginalized in a post-conflict context and again, reinforces the hierarchy of disability. This is why it is essential that post-conflict frameworks use the social model of disability and take wider account of human rights violations.

The social model views disability as socially constructed and addresses the barriers that exist as a result of what society deems as ‘normal.’¹⁹⁵ This shifts the focus from the medical sphere and puts it in the political by locating the problem in society rather than the individual.¹⁹⁶ It also creates more

¹⁸⁹ Op. Cit. Hart et al at 152.

¹⁹⁰ Op. Cit. Sierra Leone TRC Report, Volume I, Chapter I, page 20 at paragraph 84; Sierra Leone focused on needs of amputees and war wounded and made them a priority group.

¹⁹¹ Op. Cit. Kerr at 830.

¹⁹² Op. Cit. Hart et al. at 153.

¹⁹³ Op. Cit. Kerr at 831.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid at 833.

¹⁹⁶ Ibid.

space for the voice of those who have the disability rather than medical experts,¹⁹⁷ allowing them to advocate for their own needs.

The use of this model could transform the way post-conflict governments view disability and how they address violations. This model provides an alternative framework for the inclusion of PWDs that would ensure their diverse needs are properly addressed. It would also help to remove the stigma on PWDs as society would begin to see them as capable individuals exercising their rights and this understanding could help dismantle the vulnerability of PWDs that is a result of societal attitudes.

Thus, using a social model of disability is crucial in a post-conflict context because it highlights the need to include PWIDs in the traditional transitional justice processes, rather than marginalizing them in favour of people disabled directly by the conflict. It also, however, demonstrates the need for a much wider process that addresses structural inequalities experienced by PWIDs and ensures their rights are considered in the wider transition process.

State obligations

It is clear that while reparations frameworks may address economic, social and cultural rights, the state must go further than monetary reparations and use a broader framework to address violations of economic, social and cultural rights. The process of rebuilding state mechanisms after a conflict can present an excellent opportunity for a state to assess the obligations it owes its population and improve on the services it offers pursuant to fulfilling economic, social and cultural rights. Addressing these voids in services and ensuring all rights are upheld without discrimination can help to address the structural violence that PWIDs often experience.

Under the International Covenant on Economic, Social and Cultural Rights, states must respect, protect and fulfill the rights contained in the Covenant.¹⁹⁸ To respect the rights means states must

¹⁹⁷ Ibid at 834.

not directly violate them. To protect the rights means states must protect them from potential third party violations. Finally, to fulfill the rights means states must facilitate the right to greatest extent possible taking into account their current resources.¹⁹⁹

Upholding the rights in the ICESCR would be of benefit to the whole of society after a conflict but particularly to PWDs because they suffer disproportionately from violations of economic, social and cultural rights. In order to address the causes of these violations, the state must focus on eliminating structural violence and ensuring PWDs have full access not only to transitional justice mechanisms that may provide redress for these violations but also to create a more fair and equitable society in order to guarantee non-recurrence of such violations.

Central to the transitional justice framework is a state obligation to guarantee non-recurrence.²⁰⁰ As Special Rapporteur Pablo de Grieff points out, truth cannot be a substitute for non-recurrence.²⁰¹ It is difficult to perceive how a state can give a guarantee of non-recurrence without first addressing the societal attitudes or policy decisions and programs that led to the violation in the first place. Thus, in order to guarantee non-recurrence states must adopt a wider transformative program to elevate the status of PWDs in society and ensure they are no longer marginalized and targeted, directly or indirectly, because of their disability.

Article 2(2) ICESCR provides that states must ensure there is no discrimination in upholding the rights contained in the Covenant. These rights include the right to work;²⁰² the right to an adequate standard of living;²⁰³ the right to the highest attainable standard of physical and mental health;²⁰⁴ and the right to education,²⁰⁵ among others.

¹⁹⁸ United Nations, International Covenant on Economic, Social and Cultural Rights, January 3 1976, Preamble.

¹⁹⁹ United Nations, Committee on Economic, Social and Cultural Rights, “The Nature of States Parties Obligations (Article 2, paragraph 1)”, General Comment Number 3, December 14 1990, E/1991/23.

²⁰⁰ Op. Cit. OHCHR “Transitional Justice and Economic, Social and Cultural Rights” at 5.

²⁰¹ Op. Cit. Grieff, 2013 at 26.

²⁰² Op. Cit. ICESCR at Article 6.

²⁰³ Ibid at Article 11.

²⁰⁴ Ibid Article 12.

²⁰⁵ Ibid Article 13.

The Economic and Social Council (ECOSOC) clarifies some of the obligations that stem from the ICESCR in published General Comments. For example, General Comment 18 outlines that the right to employment includes ensuring there is no discrimination in accessing employment²⁰⁶ and that states take measures to enable PWDs to have access to appropriate work that allows for them to progress in their occupational field.²⁰⁷ Article 13 also emphasizes the obligation to ensure there is no discrimination in accessing education for PWDs.²⁰⁸

The basic obligations owed to PWDs were clarified in General Comment 5 by ECOSOC. The Committee highlighted the problems faced by PWDs:

“Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities.”²⁰⁹

ECOSOC suggested that even in countries with a high standard of living, PWDs are often denied the opportunity to enjoy the full range of economic, social and cultural rights.²¹⁰ The General Comment clarified that states were obligated to take appropriate measures to the maximum extent of their resources to enable PWDs to overcome any disadvantages in terms of the enjoyment of their rights contained in the Covenant:²¹¹

“The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with

²⁰⁶ United Nations, Committee on Economic, Social and Cultural Rights, “Article 6 of the International Covenant on Economic, Social and Cultural Rights”, General Comment Number 18, February 6 2006, E/C.12/GC/18 at paragraph 12(b).

²⁰⁷ Ibid at paragraph 17.

²⁰⁸ United Nations, Committee on Economic, Social and Cultural Rights, “The Right To Education (Article 13)”, General Comment Number 13, December 8 1999, E/C.12/1999/10 at paragraph 36.

²⁰⁹ United Nations, Committee on Economic, Social and Cultural Rights, “Persons with Disabilities”, General Comment Number 5, January 5 1995 at paragraph 15.

²¹⁰ Ibid at paragraph 1.

²¹¹ Ibid at paragraph 5.

disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.²¹²

Furthermore, it states that additional resources may need to be made available²¹³ and that there is a duty on state parties to protect vulnerable members of their societies and that this assumes greater, rather than less, importance in times of severe resource constraint.²¹⁴ The period following a conflict is often a time of scarce resources, which again affects PWDs disproportionately. This General Comment suggests that during this time there is an important obligation on states to fulfill the rights of PWDs even with the lack of resources.

The Committee further suggests that states should monitor the situation of vulnerable groups, in this case PWIDs in order to determine the nature and scope of the problems they face.²¹⁵ This will allow them to adopt tailored policies, legislate for what is necessary and seek international cooperation²¹⁶ to assist in upholding the rights of PWIDs. Furthermore, comprehensive anti-discrimination legislation is indispensable in all states to ensure PWDs have access to remedies for violations of their economic, social and cultural rights but also to provide social programs to help states meet their obligations in the future.²¹⁷

Thus although the Covenant does not cover the situation of post-conflict states specifically, it gives clear guidance as to the obligations of states in a post-conflict context. Not only are PWDs entitled to remedies for any past violations of their economic, social and cultural rights but they are also entitled to state action that allows them to enjoy these rights equally with the rest of the population.

²¹² Ibid at paragraph 9.

²¹³ Ibid at paragraph 9.

²¹⁴ Ibid at paragraph 10.

²¹⁵ Ibid at paragraph 13.

²¹⁶ Ibid.

²¹⁷ Ibid at paragraph 14.

There is a clear obligation on states to put measures in place to ensure that PWDs have equal access to and enjoyment of their economic, social and cultural rights. Ensuring PWDs enjoy these rights is not the role of a truth commission or reparations program as the transitional justice framework is tasked with redressing the consequences of conflict and helping society move towards reconciliation and so does not have the power or resources to institute real transformative change. Therefore, significant governmental effort is required to institute legislation and policies that can create this change.

Another key treaty, which puts important obligations on state parties, is the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Although this has significantly fewer signatories than the ICESCR, it has more specific obligations for the situation of PWDs. It should be considered the primary authority on ensuring PWDs are included in society. It could also be utilized by all states when emerging from conflict as a set of guidelines for inclusion, even if they are not signatories. This would help states to build more fair and equal societies with stronger guarantees of non-recurrence of human rights violations.

There are several provisions in the UNCRPD that require state parties to eliminate discrimination. Article 4 requires states to ensure and promote full realization of all human rights for PWDs without discrimination.²¹⁸ Furthermore, Article 5(3) requires states to make reasonable accommodations to ensure non-discrimination²¹⁹ and Article 8 requires states to take measures to foster respect for the rights and dignity of PWDs.²²⁰ The same Article also requires states to combat stereotype and prejudices²²¹ and promote awareness of the capabilities and contributions of PWDs to society.²²²

This treaty clearly goes a step further than the ICESCR in relation to the rights of PWDs. It requires the state to go beyond simply addressing discrimination by requiring it to take positive

²¹⁸ Op. Cit. UNCRPD, 2008, Article 4.

²¹⁹ Ibid at Article 5(3).

²²⁰ Ibid at Article 8(1).

²²¹ Ibid at Article 8(2).

²²² Ibid at Article 8(3).

measures to promote the inclusion of PWDs and raise awareness of the barriers they face and the important contribution PWDs make to society. National sensitizing campaigns, such as those conducted in Kenya, could help raise awareness of the rights of PWDs,²²³ and publicly celebrating their contributions to society. Furthermore, ensuring PWDs are more visible in the community can also help to address stigma and break social barriers.

Article 9 requires states to ensure accessibility to the physical environment for PWDs. This includes access to buildings, roads and transport²²⁴ but also includes the requirement to ensure communications and information are accessible for PWDs.²²⁵ This is particularly relevant in relation to PWDs who may struggle with communication and accessing information when it is only available in certain formats. Such information should be available in language that is easy to understand and various other formats such as in picture format.

General Comment 2 by the Committee on the Rights of People with Disabilities clarifies the meaning of this obligation. It highlights that PWDs face technical and environmental barriers to accessing services that are often human constructed.²²⁶ The Committee suggests that these barriers are often not deliberate and are rather, a consequence of a lack of awareness of disability issues.²²⁷ This demonstrates a real need to raise awareness of disability issues to a range of stakeholders to ensure that these barriers to access can be removed and this can help combat the stigma experienced by PWDs and change attitudes. Anti-discrimination legislation could help address this and is essential in every state to meet their basic obligations under ICESCR and the UNCRPD. Kenya also created the National Council for Persons with Disabilities, which has the function of promoting the rights of people with disabilities and also mainstreaming disability rights in all aspects of national

²²³ Op. Cit. UNCRPD Kenya Report, page 27, paragraph 135.

²²⁴ Op. Cit. UNCRPD at Article 9(1)(a).

²²⁵ Ibid at Article 9(1)(b).

²²⁶ United Nations Committee on the Rights of Persons with Disabilities, “Article 9: Accessibility”, General Comment Number 2, May 22 2014, CRPD/C/GC/2 at paragraph 3.

²²⁷ Ibid.

development and advising the minister in charge of disability issues.²²⁸ Other states could follow this example to ensure the voice of PWDs is represented in every policy and piece of legislation. Such a body can also help raise awareness of issues PWDs face in the community.

The Committee highlights that the first step must be an analysis of the situation in order to determine exactly what the barriers to access are so that they can then be removed.²²⁹ The period following a conflict would present an excellent opportunity to assess these barriers. When the state is reconstructing buildings and services anyway, it would make sense to do so in a way that they become accessible to PWDs. The state, however, must ensure that any assessment process is carried out statewide. Only addressing these barriers in areas where reconstruction is required anyway, could lead to large parts of a state falling behind in terms of development.

The war can sometimes leave a clean slate for the complete transformation of society and states should capitalize on this opportunity by including the voices of PWDs in the reconstruction process. After WWII in Germany, an entire new infrastructure was necessary and this gave Germany the opportunity to modernize.²³⁰ When post-conflict states have to construct new buildings or transport systems, these should be made accessible for PWDs. When they have to overhaul government services and inform the population of any changes, they should take the opportunity to publicize this in a way accessible for PWDs. By using this opportunity to transform society it could also help address attitudes towards PWDs by making them more visible and included in the community.

The Committee also outlines that a state is required to undertake a comprehensive review of the laws on accessibility and address any gaps.²³¹ Again, the post-conflict period would present an excellent opportunity to rebuild a state's legislative framework on the inclusion of PWDs in society. It must be remembered that accessibility goes beyond accessibility to the built environment.²³² This

²²⁸ Ibid at paragraph 27.

²²⁹ Ibid.

²³⁰ See for example, Berlin City Guide, "Rebuilding Postwar Germany", available at <http://berlin-germany.eu/post-war-germany/rebuilding-post-war-germany>, accessed 09/16/2016.

²³¹ Op. Cit. UNCRPD General Comment 2 at paragraph 28.

²³² Ibid at paragraph 35.

is particularly important for PWIDs who may have no issues accessing the built environment but instead have issues with information and communication and this must be considered by states in the review process.

It is acknowledged that after a conflict there are several groups competing for limited resources and to have their input on new legislative frameworks. To ensure PWDs have a powerful voice during this time, the state needs to take concrete action for their inclusion. Kenya has a National Council for Persons with Disabilities that is composed of members who represent disability organisations and government ministries.²³³ This Council ensures the mainstreaming of disability issues into legislative frameworks and policy decisions. Although this was not established in a post-conflict environment, such a Council would be most useful in a post-conflict context as an authoritative body to represent PWDs in all legislative and policy decisions and ensure the voices of PWDs is heard.

Furthermore Article 11 of the UNCRPD obligates the state to protect PWDs in times of armed conflict. If this obligation has not been upheld during conflict then PWDs are entitled to redress if it amounts to a ‘gross violation of human rights’.²³⁴ It is just as important, however, that the state can ensure non-recurrence of this and other violations and to do so it must address any direct violations PWDs experienced during the conflict but also any structural inequalities that led to these violations. Some suggestions have been given as to how to address structural inequalities. For example, improving accessibility to education and the work place; using awareness campaigns to combat stigma; and ensuring PWDs are adequately represented in any consultation processes regarding legislation and post-conflict mechanisms.

It would, however, be useful for the Committee on the Rights of Persons with Disabilities to clarify the obligations under Article 11. This would ensure states are better equipped to uphold this right.

²³³ Op. Cit. UNCRPD Kenya Report, page 18, paragraph 76.

²³⁴ Op. Cit. UN Reparations Guidelines at paragraph 8.

Conclusion

As detailed throughout this and the previous chapter, there is a need for a more transformative process to take place alongside the traditional transitional justice process. This would allow for the experiences of PWIDs to be addressed. By putting certain measures in place, states could also work towards ending marginalisation and strengthening their guarantees of non-recurrence of the violations of the rights of PWIDs during conflict.

It is imperative that states use the social model of disability when constructing and post-conflict framework, as it takes a much wider view of the needs of and challenges faced by PWDs generally. This is essential in constructing a more inclusive process that addresses societal barriers for PWIDs.

The obligations to end discrimination and structural violence are derived from the ICESCR and UNCRPD, which obligate the state to go further than just ending discrimination and to actively promote the inclusion of PWDs as contributing citizens in society. Although it is acknowledged that not every state is bound by the obligations discussed above, the treaties provide, at least, clear guidelines for a transitioning state to consult when considering how to address inequalities within society.

Furthermore, the transitional period provides an excellent opportunity to examine existing policies and legislation and institute new ones in order to ensure transformation within society and strengthen guarantees of non-recurrence.

VII. Conclusion

In conclusion, the limited evidence available suggests that PWIDs experience conflict in a different manner from the majority of the population. They are often the targets of direct violence and this targeting can stem from social attitudes towards PWDs in general. Furthermore, they suffer disproportionately from violations of economic, social and cultural rights and from structural violence such as the cessation of government services in times of conflict.

The experiences of PWIDs must be considered when constructing a transitional framework. Current transitional justice processes must be made accessible to them and their rights violations must be considered in order to ensure they are adequately addressed. The state, must also address the structural inequalities experienced by PWIDs and the widespread discrimination in order to strengthen guarantees of non-recurrence and ensure they can become respected members of society.

When constructing the transition process, states must uphold their obligations under the disability rights framework. Only by upholding these obligations can states ensure the full inclusion of PWIDs in the transition and elevate their status within society to foster respect for their dignity and rights. States must also guarantee the use of the social model of disability, as the medical model ensures the exclusion of people with disabilities that do not require medical treatment. PWIDs often fall into this category and thus it is imperative that states view them as rights bearing agents who should have some say in a new society built on respect and equality.

The UNCRPD has provided a new resource for states to understand their duties towards PWDs. It is possible that with increased awareness of the rights of PWDs, states will meet these obligations with increased vigor and commitment. It would however, be useful for the Committee on the Rights of People with Disabilities to highlight and clarify state obligations to PWDs in a post-conflict context to make states more aware of what must be done.

Ultimately, PWIDs must be included in post-conflict processes and these processes must take account of their individual experiences of the conflict. Using a disability rights framework is

essential to ensure transitional justice mechanisms are fully inclusive; but also that states undertake a transformative process and address structural violence and violations of economic, social and cultural rights. Only by doing this can post-conflict processes be considered fully inclusive for people with intellectual disabilities.

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