

Call for input: thematic priorities of the Special Rapporteur on the human rights of internally displaced persons

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(2500 words + bibliography)

I. Introduction

§ 1. Reparations and accountability for internal displacement, and the question of their relationship, are issues that have been addressed in previous reports where Special Rapporteurs have sought to establish links with the field of transitional justice (A/73/173). However, they are likely to remain important issues for the new mandate holder, as they lie at the intersection of two of the themes on which the Special Rapporteur has requested input, namely **Internal displacement due to generalised violence** and **Internally displaced persons in peacebuilding to achieve sustainable peace**.

§ 2. The issue of reparations has been present throughout the main instruments that have been developed at the UN level to address internal displacement, from the Deng *Principles* to Kālin's *Framework on Durable Solutions*. The growing recognition of the importance of reparations and of its links with accountability is partly the result of the growth of adjacent fields such as International Criminal Law (ICL) and Transitional Justice (TJ) (*see* paras. 4-5 below), as well as the development of soft law instruments such as *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law* [hereinafter *Basic Principles and Guidelines on the Right to Reparation*]. While previous mandate holders have discussed the impact of organised crime on internal displacement from a general perspective (A/76/169) and in the context of El Salvador (A/HRC/38/39/Add. 1) and Honduras (A/HRC/32/35/Add.4), they have not addressed the interaction between accountability and reparations in these settings, nor its impact on the Economic, Social and Cultural Rights (ESCRs) of IDPs.

§ 3. The present submission argues that an accountability-based approach to reparations in contexts of organised crime requires further **attention** and **reporting** by the current Special Rapporteur, as it may create **access barriers** and **unjustified differential treatment** to the

detriment of certain segments of IDPs with regard to the guarantee of their ESCRs and the progressive achievement of durable solutions. This situation also implies that, in certain contexts, groups of IDPs **are excluded from the peacebuilding agenda**. This is the case because, as will be argued below (*see* paras. 9-15), reparations tend to be the means by which IDPs directly and indirectly fulfil some of their ESCRs. This being the case, attempts to link reparations to accountability, including through transitional justice mechanisms, risk affecting IDPs' access to reparation-related resources in circumstances that do not trigger responsibility under international law.

II. *Towards an accountability-based approach to reparations*

§ 4. Some form of reparation for internal displacement was already enshrined in the 1998 *Guiding Principles on Internal Displacement*, in particular Principle 29(2) on restitution of property and possessions and the obligation of authorities to compensate or provide another form of "just reparation" where restitution is not possible. The 2005 *Pinheiro Principles* elaborated on the right to housing and property restitution in the context of the return of refugees and IDPs, including the right to compensation in lieu of restitution in very specific circumstances (Articles 69-72). The 2009 *Framework on Durable Solutions for Internally Displaced Persons* expands the meaning of reparation in two ways. First, reparation is intended to address not only property-related issues but the situation of "IDPs who have been victims of violations of international human rights or humanitarian law, including arbitrary displacement" (para. 94). Second, reparation is understood to go beyond restitution/compensation of property and possessions to include the full range of mechanisms recognised in the *Basic Principles and Guidelines on the Right to Reparation*, namely restitution, compensation, rehabilitation and satisfaction (para. 98). In sum, the *Framework on Durable Solutions* states that IDPs should have access to transitional justice mechanisms, where appropriate, and that state authorities should address past violations by holding perpetrators accountable (paras. 94-97). The latter would be "particularly important in cases where IDPs became victims of war crimes or crimes against humanity, where they remain at risk from the perpetrators of violations or abuse, or where they themselves feel that formal justice is needed to enable them to overcome their displacement experience". (para 97)

§ 5. From the above, it is clear that reparations have gained prominence in tandem with a growing demand for accountability, moving beyond the humanitarian focus and consequentialist approach that inspired the first instruments on internal displacement. While the 1998 *Guiding Principles* barely mention accountability mechanisms (Principle 16 on truth-seeking), and the 2005 *Pinheiro Principles* limited themselves to interpreting the right to property restitution using the framework provided by the *Basic Principles and the Guideline on the Right to Reparation*, the 2009 *Framework on Durable Solutions* introduced for the first time the right of IDPs to "full reparation" and the consequent obligation of state authorities to hold perpetrators of serious violations accountable. This shift is significant as humanitarian actors have traditionally been wary of accountability efforts as they consider that these efforts can impede humanitarian action, endanger humanitarian actors and civilians, and divert resources that could be used to address basic needs (Torres, 2019: 37). According to La Rosa "The purpose of humanitarian action is, above all else, to save lives, not to establish [...] responsibility" (2006:183).

III. Accountability-based reparations as a means of delivering ESCRs and achieve durable solutions

§ 6. In her A/73/173 report on internal displacement and transitional justice, former Special Rapporteur Jimenez-Damary emphasised the importance of a robust understanding of reparations (in line with Kälín's *Framework on Durable Solutions*) in achieving durable solutions. From a general perspective, reparations not only contribute to overcoming "the material obstacles that internally displaced persons typically face as a result of their displacement" by "facilitat[ing] reintegration through economic recovery, access to land, re-establishing livelihoods and providing educational assistance" (A/73/173: paras. 42 and 64), but also, together with truth-seeking, criminal accountability and guarantees of non-recurrence, reparations contribute to the recognition of wrongdoing and restore, to some extent, the dignity of victims of arbitrary displacement (para. 42). More specifically, individual reparations should include, in addition to restitution of housing, land and property (as per the *Pinheiro Principles*), "access to higher education, livelihood support and cash grants" (para. 42). In turn, collective reparations should encompass "building the relevant infrastructure; collective educational programmes; and health and psychological services" (para. 42). Underlying this position is the

view that IDPs must have access to these reparation measures in their capacity as "transitional justice actors" (para. 29).

§ 7. It is important to emphasise that the measures included under individual and collective reparation are not really different from the services and goods that state authorities are already obliged to provide for the satisfaction of the ESCRs of IDPs, as enshrined in the ICESCR (*see, i.e.*, Article 11 on the right to an adequate standard of living) and interpreted by the Committee on Economic, Social and Cultural Rights (ESCRs Committee) in post-conflict situation (*see, i.e.*, ESCRs Committee, Concluding Observation on Suriname, 1995: para. 21, on the state's duty to "laying an infrastructure and providing basic facilities in the interior [of the country], particularly houses for persons displaced during the recent internal armed conflict"). Following the tripartite structure of obligations *to respect, protect* and *fulfil* human rights adopted by the ESCRs Committee (*see, i.e.*, ESCRs Committee General Comment No. 14, 2000: para. 33), state authorities have a primary obligation to provide the services and goods framed above by Special Rapporteurs as reparations. This is done as an expression of the authorities' positive obligations to *fulfil* ESCRs, not as a response to their failure to *respect* and *protect* rights in the past (*see, i.e.*, ESCRs Committee General Comment No. 7, 1997: paras 5-7, on the right to housing and not to be forcibly evicted) — failure which triggers the obligation to make reparation under international human rights law (IHRL).

§ 8. Therefore, following a line of reasoning similar to that which has led humanitarian actors to keep the provision of humanitarian assistance separate from accountability for past wrongdoing, it is argued here that the provision of socio-economic goods and services, presented in the A/73/173 report under the guise of reparations, in principle should also be decoupled from accountability measures. The remainder of this contribution seeks to highlight some of the challenges and risks that can arise when access to socio-economic goods and services is linked to accountability-based reparations and to the consideration of IDPs as "transitional justice actors". This is an issue that has been neglected by previous stakeholders and poses particularly complex challenges. Not only does it reflect a tension that affects some of the key fields dealing with forced displacement, but it may also entail shortcomings in the protection of ESCRs and unjustified differential treatment that merit attention and reporting by the current Special Rapporteur.

IV. Gaps, access barriers and differential treatment of IDPs with regard to the guarantee of their ESCRs following accountability-based reparations

§ 9. The first and most obvious challenge to the use of accountability-based reparations and the consideration of IDPs as TJ actors to fulfil ESCRs is that TJ has only gained traction in conflict and (post)conflict settings, often in conjunction with the adjacent fields of peacemaking and peacebuilding. To date, there is no experience of applying TJ to serious abuses committed in the context of organised crime. In addition, state authorities in countries affected by these practices (e.g. Mexico, El Salvador) are reluctant to adopt a TJ framework (Eskauriatza, 2021: 504, 506). While the merits of using TJ to tackle organised crime have yet to be fully researched and assessed, previous Special Rapporteurs (A/76/169, A/HRC/38/39/Add. 1, A/HRC/32/35/Add.4) and scholars (Cantor 2016; 2014) have already noted that some of these countries are facing a critical situation of internal displacement, which at times amounts to a situation of armed conflict.

§ 10. Therefore, in contexts of organised crime, the much-needed access to socio-economic goods, which previous Rapporteurs have framed in terms of individual and collective reparations, lacks foundation. This is exemplified by the lack of elaboration on the right to reparation, and its accompanying socio-economic provisions, in the A/76/169 report on the prevention and response to arbitrary displacement in situations of generalised violence (the only loose reference to the obligation to provide reparation is in para.19). Whether this is a simple omission or whether contexts of organised crime present challenges that may undermine the prevailing approach to accountability-based reparations, will be discussed next. For now, suffice it to say that certain displacements caused by organised crime, such as when gangs engage in “turf wars” that do *not* reach a particular level of intensity and organisation (Kalmanovitz, 2022: 12, 17), do not always amount to an internationally wrongful act that triggers the international obligation to make reparation. Mindful of these limitations, previous Special Rapporteurs have stressed the importance of state authorities carrying out proper investigations into abuses and ensuring that victims of non-state actors have access to a remedy (Kälin, 2009: para. 100). However, the eventual lack of investigations, especially in contexts with overall high levels of impunity and weak judicial systems, seems a strange place to dig to establish state responsibility with the objective of granting reparations with a direct impact in the satisfaction of ESCRs. This is particularly unconvincing given that state authorities are

already obliged to provide IDPs with relevant socioeconomic goods and services under the ICESCR (*see supra*, para. 7).

§ 11. In the context of organised crime, the suitability of introducing notions of International Criminal Law (ICL) and International Humanitarian Law (IHL) has been questioned (Eskauriatza, 2021: 498-505; Kalmanovitz, 2023: 14-17), raising doubts about the benefits of mobilising categories such as war crimes and crimes against humanity to underpin access to reparations and the socioeconomic benefits attached to them. While from a doctrinal perspective it is clear that certain forms of displacement amount to war crimes or crimes against humanity, such as mass transfers or deportations (Torres, 2019: 31-32), the label of crimes against humanity has not been used by domestic courts in contexts of organised crime, such as in Mexico, where charges tend to revolve around drug trafficking, money laundering, and bribery/corruption (Eskauriatza, 2021: 475). With regard to war crimes, it is not always the case that organised crime reaches the level of violence and collective organisation that triggers the application of IHL and ICL (Kalmanovitz, 2023: 4). From a general perspective, the applicability of IHL in the context of organised crime has been the subject of heated debate, partly because organised crime is often “outsourced” and perpetrated by actors who are not a party to an armed conflict, and because framing these actors as a party to an armed conflict runs the risk of escalating violence (Kalmanovitz, 2023: 12, 15)

§ 12. From the perspective of state responsibility for human rights violations on its territory, it is already clear that the prevailing approach of regional human rights courts to establishing responsibility for the conduct of non-state actors is often insufficient to address abuses committed by organised criminal groups. Where such abuses are not the result of state collusion or acquiescence, the current framework, which requires state authorities to be aware of a risk and to take reasonable measures to prevent it, often does not allow for the establishment of state responsibility in contexts of widespread violence where civilians are structurally at risk (Torres, 2022: 27-28; Guercke, 2021; Ebert and Sijniensky, 2015). For this reason, the author has advocated for the direct guarantee of ESCRs, over an accountability-based approach to reparations, in contexts where the conduct of non-state actors has a significant impact on the population, not only in the inter-American human rights system (Torres, 2022), but also in the European (Torres, 2021a) and African systems (Torres, 2021b).

§13. The bottom line of the foregoing considerations is that internal displacement is not necessarily the result of past wrongdoing that activates international responsibility to make reparation, be it a violation of IHRL by the state on its territory, a violation of IHL by a party to an armed conflict, or individual criminal conduct in violation of ICL. However, this conclusion should not obscure the fact that internal displacement in itself tends to entail a critical human rights situation that the state must address in accordance with its positive obligations to fulfil ESCRs. This is equally true of displacement due to natural disasters, climate change, criminal violence or armed conflict, with or without the application of TJ.

§14. From this perspective, it may be difficult to justify differential treatment whereby only certain IDPs have access to reparations and related socioeconomic goods, for example where the state is colluding with criminal gangs, evidence of war crimes has been found, or TJ mechanisms are applied. This is the case for the following reason: when addressing the phenomenon of displacement *in itself* (i.e., without considering other human rights violations that often, but not always, trigger displacement, such as killings or disappearances), it should make no difference to the satisfaction of the ESCRs of those affected whether there was a systematic plan underlying the removal of the population or whether there are indications of state collusion with non-state actors. While these considerations are crucial for accountability purposes (e.g., truth seeking, trials), they should not distort the allocation of resources to ensure the ESCRs of those affected by violence.

§15. Examples of this skewed allocation can be found in Colombia, where access to key resources for the fulfilment of ESCRs is made dependent not on the socioeconomic deficiencies of IDPs, but on the nature of the armed groups responsible for violations. In a situation where a TJ framework coexists but does not directly address the conduct of organised criminal groups, those forcibly displaced by the conduct of criminal groups unrelated to the armed conflict have for years lacked access to housing allowances, income-generation programmes and other socioeconomic benefits, which were limited to those officially recognised as “victims” according to Article 3 of the 2011 *Victims Law*. Although this situation has already been resolved, some of these IDPs continue to lack access to monetary compensation, which in practice puts them at a disadvantage in guaranteeing their ESCRs, as IDPs tend to use these monetary resources to fulfil rights such as housing or education.

Bibliography

UN documents/special procedures

- Cecilia Jimenez-Damary, *Report of the Special Rapporteur on the human rights of internally displaced persons*, 16 July 2021 (A/76/169).
- Cecilia Jimenez-Damary, *Report of the Special Rapporteur on the human rights of internally displaced persons*, 17 July 2018 (A/73/173)
- Cecilia Jimenez-Damary, *Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador*, 23 April 2018 (A/HRC/38/39/Add.1)
- Chaloka Beyani, *Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Honduras*, 05 April 2016 (A/HRC/32/35/Add.4)
- Francis Deng, *Report of the Representative of the Secretary-General: Guiding Principles on Internal Displacement*, 11 February 1998 (E/CN.4/1998/53/Add.2)
- Sergio Pinheiro, *Housing and property restitution in the context of the return of refugees and internally displaced persons*, 11 July 2005 (E/CN.4/Sub.2/2005/17/Add.1)
- UN Committee on ESCRs, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 20 May 1997 (E/C.12/GC/20).
- UN Committee on ESCRs, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 11 August 2000 (E/C.12/2000/4).
- UN Committee on ESCRs, *Concluding Observation on Suriname*, 7 June 1995 (E/C.12/1995/6).
- Walter Kälin, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons: Framework on Durable Solutions for Internally Displaced Persons*, 29 December 2009 (A/HRC/13/21/Add.4)

Secondary literature

- Cantor, David. 2016. "As deadly as armed conflict? Gang violence and forced displacement in the Northern Triangle of Central America". *Agenda Internacional* (23)34: 77-97.
- Cantor, David. 2014. "The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico". *Refugee Survey Quarterly* 33(3): 34-68.
- Ebert, Franz Christian and Sijniensky, Romina I. 2015. "Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?". *Human Rights Law Review* 15: 343.
- Guercke, Lene. 2021. "State Responsibility for a Failure to Prevent Violations of the Right to Life by Organised Criminal Groups: Disappearances in Mexico". *Human Rights Law Review* 21: 329-357.
- Kalmanovitz, Pablo. 2022. "Can criminal organizations be non-State parties to armed conflict?". *International Review of the Red Cross* 105(923): 618-636.
- La Rosa, Anne-Marie. 2006. "Humanitarian Organizations and International Criminal Tribunals, or Trying to Square the Circle". *International Review of the Red Cross* 88 (861): 169-186.
- Torres, Felix E. 2022. "The State, the assailant? Guaranteeing economic and social rights after widespread violence through the Inter-American Court of Human Rights". *Netherlands Quarterly of Human Rights* 40(1): 12-34.
- Torres, Felix E. 2021a. "Reparations, to What End? Developing the State's Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights". *European Journal of International Law*, 32(3): 807-834

- Torres, Felix E. 2021b. “Economic and Social Rights, Reparations and the Aftermath of Widespread Violence: The African Human Rights System and Beyond”. *Human Rights Law Review* 21(4): 935–961.
- Torres, Felix E. 2019. “El desplazamiento forzado en los intersticios de la justicia transicional: oportunidades y riesgos”. *Revista de Estudios Sociales* 69: 28-40.