

# INTERGENERATIONAL AND TRANSGENERATIONAL HARM



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## 1. Introduction

On November 7th, 2019, Bosco Ntaganda, a high commander of the Patriotic Forces for the Liberation of Congo (FPLC), was convicted by Trial Chamber VI (TC VI) for five crimes against humanity and thirteen war crimes<sup>2</sup> committed in the Ituri district of the Democratic Republic of the Congo (DRC) between August 6, 2002 and December 31, 2003.<sup>3</sup>

On March 8, 2021, TC VI ordered collective reparations with individualized components for direct and indirect victims of the crimes for which Mr. Ntaganda was convicted. In the Reparations Order, TC VI considered “[...] that given the short and long-term consequences of certain crimes, as discussed above, children of the direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they can show that their harm is a result of the crimes for which Mr. Ntaganda was found guilty.”<sup>4</sup> In addition, TC VI quantified the damages and imposed a thirty million USD reparation.<sup>5</sup>

In the appeals brief, the defense contended for the existence of specific evidentiary errors related to the way in which requests for reparations for this type of harm should be evaluated.<sup>6</sup> The Appeals Chamber (AC) decided to partially reverse the “Reparations Order” to the extent that TC VI failed to:

“(i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr. Ntaganda; (iii) assess and rule upon victims’ applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the

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<sup>2</sup>Bosco Ntaganda was convicted for: “As set out above, the Chamber determines the following sentences in respect of the crimes for which Mr Ntaganda has been convicted, in the order the crimes were charged: murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2): 30 years of imprisonment; intentionally directing attacks against civilians as a war crime (Count 3): 14 years of imprisonment; rape of civilians as a crime against humanity and as a war crime (Counts 4 and 5): 28 years of imprisonment; rape of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 6): 17 years of imprisonment; sexual slavery of civilians as a crime against humanity and as a war crime (Counts 7 and 8): 12 years of imprisonment; sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 9): 14 years of imprisonment; persecution as a crime against humanity (Count 10): 30 years of imprisonment; pillage as a war crime (Count 11): 12 years of imprisonment; forcible transfer of the civilian population as a crime against humanity (Count 12): 10 years of imprisonment; ordering the displacement of the civilian population as a war crime (Count 13): 8 years of imprisonment; conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime (Counts 14, 15, and 16): 18 years of imprisonment; intentionally directing attacks against protected objects as a war crime (Count 17): 10 years of imprisonment; and destroying the adversary’s property as a war crime (Count 18): 15 years of imprisonment.”. ICC, *The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Sentencing Judgment*, November 7, 2019, Doc. No.: ICC-01/04-02/06-2442, para. 246.

<sup>3</sup>*Ibid.*, para. 178.

<sup>4</sup>ICC, *The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Reparations order*, March 08, 2021, Doc. No.: ICC-01/04-02/06-2659, para. 182.

<sup>5</sup>*Ibid.*, p. 97.

<sup>6</sup>ICC, *The Prosecutor v. Bosco Ntaganda, The Appeals Chamber, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”*, September 12, 2022, Doc. No.: ICC-01/04-02/06-2782, para. 141.



eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health center in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health center, and the presumption of physical harm for victims of the attacks.”<sup>7</sup>

Additionally, the AC defined “transgenerational harm” as a “phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter. It is characterized by the existence of an intergenerational cycle of dysfunction that traumatized parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation”. The chamber explained that traumatized parents, who live in constant and unresolved fear, unconsciously adopt a frightening demeanor that affects “their children’s emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues. It is argued that the noxious effects of trauma may be transmitted from one generation to the next, with a potential impact on the structure and mental health of families across generations.”<sup>8</sup>

Thus, the AC establishes the importance of this concept and expressly uses the terms “transgenerational harm” and “intergenerational cycle” but does not indicate the existence of a distinction between these two. In fact, the chamber uses both terms within the same explanation; the latter term is used to elucidate the former.

A similar approach can be found in the recent Report of the Truth Commission in Colombia (2022) (created as a result of the Agreement between the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP) and the Colombian Government). In the definitions section, the Commission states that transgenerational impacts are:

“[...] those that give an account of the effects or repercussions of inherited traumatic experiences, which are manifested in the generations of the descendants of those who suffered them directly. These impacts recognize the perpetuation of trauma in contexts of impunity, as well as the inefficiency of governments in the face of their obligation to respond and attend to the impacts of war, including their duty to make full reparation to the victims.”<sup>9</sup>

In light of this, this work seeks to analyze whether there is any difference between “intergenerational” and “transgenerational” harm. Accordingly, the first section will study both terms from a psychological viewpoint. The second section will revolve around International Criminal Law (ICL) and International Human Rights Law (IHRL) research,

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<sup>7</sup>*Ibid.*, para. 1.

<sup>8</sup>*Ibid.*, para. 458.

<sup>9</sup>Truth Commission (2022), *Glosario*. (Translation made by the authors)



complemented by the decisions of: (a) the International Criminal Court (ICC); (b) the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR); (c) the Hybrid Criminal Courts; (d) the universal human rights' system committees; and, (e) regional tribunals for the protection of human rights.

## 2. Distinction between the terms intergenerational and transgenerational harm according to psychological literature

Authors such as Dan Bar-On, Eland, Kleber, Krell, Moore, Sagi, Soriano, Suedfeld and Van der Velden refer to intergenerational harm in relation to “attachment theory”, also known as “social transmission theory”. This theory is founded on the existence of a parent’s trauma that has not been resolved during the development stage of the children. This trauma is subsequently transmitted to their children, because they can perceive fear and assume it as their own.<sup>10</sup>

Attachment theory stems from the study of the trauma transmitted by Holocaust survivors to their children. These studies established that: (a) survivors had not overcome the fear generated by the crimes they had suffered, and that they therefore presented fearful behavior; and (b) this situation instilled insecurity and fear in their children throughout their upbringing.<sup>11</sup>

Psychologists continued to study the transmission of trauma - not only between parents and children, but also between grandparents and grandchildren; studies evaluating children and grandchildren of the Apartheid era survivors were carried out. A particularly relevant one for the present work is the Adonis investigation, which suggests that physical harm and psychological trauma suffered by direct victims can affect their parenting abilities. Therefore, trauma suffered by elder generations can negatively impact both children and subsequent generations, through the possible transmission of psychosocial harm. As such, “psychological disorders of primary victims can be genetically transmitted to subsequent generations”.<sup>12</sup> The same phenomenon has also been observed in the children and grandchildren of Holocaust

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<sup>10</sup>Bar-On, D., Eland, J., Kleber, R. J., Krell, R., Moore, Y., Sagi, A., Soriano, E., Suedfeld, P., Van-der-Velden, P. G. & Van-IJzendoorn, M. H. (1998), *Multigenerational Perspectives on Coping with the Holocaust Experience: An Attachment Perspective for Understanding the Development Sequel of Trauma across Generations*. International Journal of Behavioral Development, pp. 319-320.

<sup>11</sup>*Ibid.*, p. 321.

<sup>12</sup>Adonis, C.k. (2016), *Exploring the Salience of Intergenerational Trauma Among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violations*. Research Specialist Human Sciences Research Council (HSRC) Pretoria, South Africa, p. 2.



survivors<sup>13</sup> and of the Rwandan genocide.<sup>14</sup> Thus, children and grandchildren not only experience economic deprivation as a result of the material oppression of their parents and grandparents, but also suffer mental health problems as a result of the “cumulative impact” of the trauma suffered by their parents and grandparents (attachment theory).<sup>15</sup>

Based on the above, Lev-Wiesel has considered attachment theory to be applicable to trauma transmission between subsequent generations (grandfather/grandson), meaning that trauma can also cause transgenerational patterns of conduct. Furthermore, the author emphasizes the protective role assigned to the child towards the parent who has suffered the direct trauma caused by unresolved psychological issues and the feeling of not having been able to fulfill his caretaker duty. All of this is passed down to the third generation.<sup>16</sup>

Abraham and Torok agree with this and confirm that the transmission of harm through successive generations should entail an investigation as to the possible transmission of trauma and how it affected family memory and development, on account of the connection that binds each person to the experiences of previous generations.<sup>17</sup> Additionally, these authors distinguish between: (a) intergenerational harm, which occurs between contiguous generations that have a direct relationship (parents/children); and, (b) transgenerational harm, which occurs when psychological influence is transmitted between successive generations (grandparents/grandchildren).<sup>18</sup> This type of harm essentially consists of the negative effect that grandchildren may experience because of the mental functioning of their grandparents; in other words, mental functioning of elder generations marks the psyche of younger generations, even if grandparent and grandchild never met.<sup>19</sup>

Conversely, Lacal and Ventura highlight that the difference between intergenerational and transgenerational harm is not based on attachment theory, but rather on epigenetic

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<sup>13</sup>Bar-On, D., Eland, J., Kleber, R. J., Krell, R., Moore, Y., Sagi, A., Soriano, E., Suedfeld, P., Van-der-Velden, P. G. & Van-IJendoorn, M. H. (1998), *Multigenerational Perspectives on Coping with the Holocaust Experience: An Attachment Perspective for Understanding the Development Sequel of Trauma across Generations*. International Journal of Behavioral Development, *supra* 10, pp. 319-320.

<sup>14</sup>Rudahindwa, S., Mutesa, L., Rutembesa, E., Mutabaruka, J., Qu, A., Wildman, D., Jansen, S., Uddin, M. (2018), *Transgenerational effects of the genocide against the Tutsi in Rwanda: A post-traumatic stress disorder symptom domain analysis*. Open Research Africa, pp. 3-7.

<sup>15</sup>Adonis, C.k. (2016), *Exploring the Salience of Intergenerational Trauma Among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violations*. Research Specialist Human Sciences Research Council (HSRC) Pretoria, South Africa, *supra* 12, p. 5.

<sup>16</sup>Lev-Wiesel, R. (2007), *Intergenerational Transmission of Trauma across Three Generations: A Preliminary Study*. Qualitative Social Work, pp. 77-78.

<sup>17</sup>Abraham, N. & Torok, M. (2005). *La Corteza y Núcleo*. Amorrortu, p. 233.

<sup>18</sup>*Ibid.*, p. 53.

<sup>19</sup>Faúndez, X. & Cornejo, M. (2010). *Aproximaciones al estudio de la Transmisión Transgeneracional del Trauma Psicosocial*. Revista de Psicología, Vol. 19, N° 2. p. 47.



inheritance,<sup>20</sup> and thus the genes are transmitted from parents onto children. Epigenetic alterations can be the response to the trauma suffered by a previous generation (grandparents).<sup>21</sup>

### 3. Irrelevance of the terms intergenerational and transgenerational harm under International Criminal Law and International Human Rights Law

Unlike psychological doctrine, ICL and IHRL doctrine has not analyzed intergenerational and transgenerational harm until very recently; Gacka's analysis stands out as innovative, and studies victimization and causation. In it, the author mentions "transgenerational harm" without ever using the expression "intergenerational harm".<sup>22</sup>

The author explains that attachment and epigenetics' theories refer to intergenerational harm within the parent-child relationship; ostensibly, this would distinguish it from transgenerational harm, which limits them to successive generations. Gacka follows and analyzes ICC jurisprudence, specifically the Katanga case, which identifies "transgenerational harm" as the trauma that is transferred onto their children (indirect victims) by parents who directly suffered the crime.<sup>23</sup>

As Gacka points out, this type of harm is relevant to the ICC jurisprudence insofar as it can be included in the concept of indirect victim because it does not have the criminal act as the source of the harm, but the harm suffered by the direct victim.<sup>24</sup>

### 4. Jurisprudence of the International Criminal Tribunals and hybrid courts

#### 4.1. International Criminal Court

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<sup>20</sup>Lacal, I. & Ventura, R. (2018), *Epigenetic Inheritance: Concepts, Mechanisms and Perspectives*. Fronier in Molecular Neuroscience, p. 2. Epigenetic theory is based on the transmission of epigenetic marks from one generation to the next or from grandparents to grandchildren. These authors establish some criteria from which transgenerational epigenetic inheritance is represented: "only when two criteria are met: 1. exposure to an event in generation F0. 2. an effect of the event must be observed in the third or fourth generation—i.e., F2 or F3—depending on whether the mother or father was first affected (F0). Female exposure to a certain environmental factor during pregnancy might even affect the offspring's germ cells directly, for which reason only the fourth generation can be considered "event-free" and unsullied. When a certain event produces an epigenetic change in the father, it can only modify his sperm, effecting reliable nongenetic inheritance in the third generation"

<sup>21</sup>*Ibid.*, pp 2-3.

<sup>22</sup>Gacka, P. (2022), *Remote Victimisation and the Proximate Cause. Transgenerational Harms before the International Criminal Court*. International Criminal Law Review, pp. 452-455.

<sup>23</sup>*Idem.*

<sup>24</sup>*Idem.*



Initially, the ICC did not use intergenerational or transgenerational harm as relevant jurisprudential concepts. Instead, the court developed the concepts of direct and indirect victims. According to the Court, indirect victims, can be a spouse (same generation as the direct victim), children (next generation), and more distant relatives (which, hypothetically, could even include third generation relatives such as grandchildren), provided they have suffered a harm that has a direct causal link with the crime.<sup>25</sup>

In the Lubanga case, Trial Chamber I (TC I) considered in its Decision on indirect victims (2009) that a person can be considered a direct or indirect victim of a crime.<sup>26</sup> The chamber established that the harm suffered by a victim can affect others around her, especially the ones with whom she has a close relationship. This is clearly shown in the context of child recruitment; where the parents of a child soldier may experience personal suffering as a result of the enlistment.<sup>27</sup>

Moreover, Trial Chamber III (TC III) analyzed the concept of indirect victim in the Bemba Judgment (2016). The chamber recalled the research on the damaging effects that harm can psychologically transmit from one generation to the next (parents/children; grandparents/grandchildren). Mental disorders of anxiety and depression found in the children and grandchildren of Holocaust survivors provide an example this.<sup>28</sup>

Subsequently TC II, in the Lubanga case, (2017) further developed the distinction between direct and indirect victims by emphasizing that harm caused to victims and recognized by the Court does not need to be direct. Rather, it is required that the victim has personally suffered the harm. However, in order to determine the eligibility of an indirect victim (whether a spouse, sibling or descendant) it is necessary for her to have a previous and close relationship with the direct victim.<sup>29</sup>

The Katanga Reparations Order of 2017 proved to be a turning point for ICC jurisprudence, as TC II used the expression “transgenerational harm” for the first time. This is considered to be a critical juncture because, as evidence has shown, ICC decisions until that date exclusively used the expressions of direct and indirect victim. According to the Reparations Order, “[e]ven where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defense has, that no

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<sup>25</sup>ICC, The Prosecutor v. Thomas Lubanga Dyilo, The Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, July 11, 2008, Case ICC-01/04-01/06 OA 9 OA 10, para. 32.

<sup>26</sup>ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Redacted version of “Decision on indirect victims”*, April 8, 2009, Case 01/04/-01/06-1813, para. 41.

<sup>27</sup>*Ibid.*, para 42.

<sup>28</sup>ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, *Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute*, October 17, 2016, Case 01/05-01/08-3444, para. 28.

<sup>29</sup>ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber II, *Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”*, December 21, 2017, Case 01/04-01/06-3379, para. 41.



evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro".<sup>30</sup>

As mentioned in the introduction, the decision was appealed by the defense, and the AC, based upon the concept of indirect victim, held in 2018 that psychological harm between generations (called "transgenerational harm") ought to be understood as a "phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter."<sup>31</sup>

Furthermore, TC II in its Decision on the Question of Transgenerational Harm (2018) in the Katanga case developed further on the existence of the transgenerational harm based upon the epigenetic and attachment theories. According to the chamber, the first one consists in the "parent-to-child transmission of epigenetic marks that retain a memory of traumatic events experienced by the parents",<sup>32</sup> whereas the second one explains the link between the trauma suffered by the parents and the child's development of post-traumatic stress; this is underpinned by the parent's role as main emotional caregivers.<sup>33</sup>

As also mentioned in the introduction, TC VI's Ntaganda Reparations Order (2021), followed the same approach as TC II in the Katanga case.<sup>34</sup> Nevertheless the AC (2022) partially reversed the Order, as it considered that TC VI had not, *inter alia* "[...] (v) provide[d] reasons in relation to the concept of transgenerational harm [...]."<sup>35</sup> The AC also defined the concept of transgenerational harm by expressly using the terms "transgenerational harm" and "intergenerational cycle" without mentioning whether, in its view, there was any difference between the two.<sup>36</sup>

In conclusion, ICC jurisprudence did not use the expressions intergenerational or transgenerational harm until 2017, and chambers relied only on the concepts of direct and indirect victim. TC II, in addressing through the Katanga Reparations Order the broader concept of indirect victim, used for the first time the term "transgenerational harm" to refer to the psychological harm transmitted within the parent-child relationship. Consistently, TC VI followed the same approach for the Ntaganda reparations order (2021). This decision was

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<sup>30</sup>ICC, The Prosecutor v. Germain Katanga, Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, March 24, 2017, ICC-01/04-01/07-3728-tENG, para. 134.

<sup>31</sup>ICC, The Prosecutor v. Germain Katanga, The Appeals Chamber, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "*Order for Reparations pursuant to Article 75 of the Statute*" March 8, 2018, ICC-01/04-01-3778, para. 223.

<sup>32</sup>ICC, The Prosecutor v. Germain Katanga, Trial Chamber II, *Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018*, July 19, 2018, ICC Doc. No.: ICC-01/04-01/07-3804, para. 11.

<sup>33</sup>*Ibid.*, para. 13.

<sup>34</sup>ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Reparations order*, March 08, 2021, Doc. No.: ICC-01/04-02/06-2659, para. 182.

<sup>35</sup>ICC, The Prosecutor v. Bosco Ntaganda, The Appeals Chamber, *Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order"*, September 12, 2022, Doc. No.: ICC-01/04-02/06-2782, Para. 1.

<sup>36</sup>*Ibid.*, para. 458.





partially confirmed in 2022 by the AC, which also used the term “transgenerational harm” when referring to the transmission of trauma directly experienced by parents to children.

## 4.2. International Criminal Tribunal for the Former Yugoslavia and Rwanda

Notwithstanding Rudahindwa, Mutesa, Rutembesa, Mutabaruka, Qu, Wildman, Jansen and Uddin (2018), being studies on the effects of trauma suffered by the survivors of the Rwandan genocide, their children and grandchildren,<sup>37</sup> at no point did the ICTY<sup>38</sup> or ICTR<sup>39</sup> refer to the concept of indirect victim, nor did they use the expressions intergenerational and transgenerational harm.

This is underpinned by the fact that both ICTYS and ICTRS have no legal provisions as to a reparation system such as the one established in the ICC Statute. ICTY and ICTR Statutes refer only generally to the restitution of property “to their rightful owners,”<sup>40</sup> without considering reparations for personal harm of a physical or mental nature.<sup>41</sup> Rule 106 of the Rules of Procedure and Evidence (RPP) of the tribunals, establish that victims can access compensation through individual proceedings in national courts, thus excluding a discussion on the recognition of victims.

## 4.3. Hybrid courts

Much like the ICTY and ICTR, the Statute of the Special Court for Sierra Leone (SCSL) has no legal provision on the matter. Consequently, SCSL’s jurisprudence does not develop the concept of indirect victim, nor does it use the terms intergenerational and transgenerational harm. Rule 105 (B) of SCSL RPP, states that “[...] pursuant to the relevant national legislation, a victim or persons claiming through him or her may bring an action in a national court or other competent body to obtain compensation.”<sup>42</sup>

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<sup>37</sup>Rudahindwa, S., Mutesa, L., Rutembesa, E., Mutabaruka, J., Qu, A., Wildman, D., Jansen, S., Uddin, M. (2018), *Transgenerational effects of the genocide against the Tutsi in Rwanda: A post-traumatic stress disorder symptom domain analysis*. Open Research Africa, pp. 3-7.

<sup>38</sup>The cases Aleksovski, Babić, Banović, Blagojević & Jokić, Blaskic, Bobetko and Boškoski & Tarčulovski were reviewed, without finding information regarding transgenerational and intergenerational harm. Vid.: Table of references.

<sup>39</sup>The cases Jean Paul Akayesu, Michel Bagaragaza, Ignace Bagilishma, Simon Bikindi were reviewed, without finding information regarding transgenerational and intergenerational harm. Vid.: Table of references.

<sup>40</sup>United Nations. (2009), *Updated Statute Of the International Criminal Tribunal For the Former Yugoslavia*, art. 24 (3); United Nations. (1994), *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, art. 23 (3).

<sup>41</sup>Bassiouni, M. C. (2006), *International Recognition of Victims' Rights*. Human Rights Law Review, pp. 242-243.

<sup>42</sup>Perez, J., Acevedo, L. (2007), *Las Reparaciones en el Derecho Internacional de los Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional*. American University International Law Review 23, no.1, pp. 23-25.



By contrast, the Extraordinary African Chambers (EAC) analyzes the term of indirect victim, and defines it as “any person who has suffered direct harm caused to a member of his family by the commission of one or more crimes for which Hisssein Habré [was] convicted.”<sup>43</sup> According to the EAC, indirect victims (which may also include children and grandchildren) suffer harm as a result of arbitrary executions, forced disappearances, deaths from torture or massacres of one or more members of their families, and therefore ought to be repaired.<sup>44</sup> However, the EAC has not referred to intergenerational or transgenerational harm, nor has it addressed possible harms transmitted from parents to children or from grandfathers to grandchildren through parenting or genetic transmission.

The TC of the Special Tribunal for Lebanon (STL), in the case of Prosecutor v. Ayyash et. al., relied on the term of indirect victim, establishing that “[r]ule 2 defines a victim as ‘a natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction’. This definition of a victim encompasses both ‘direct’ victims and ‘indirect’ victims who personally suffered harm as a direct result of the attack”<sup>45</sup>. The TC recognizes that children and grandchildren may suffer harm that justifies their recognition as indirect victims. Nevertheless, and much like the EAC, the chamber does not use the terms intergenerational and transgenerational harm, nor does it refer to any social or genetic transmission of harm onto subsequent generations. The AC particularly emphasized that “[...] pursuant to Article 25 of the Statute, a victim or persons claiming through the victim, whether or not such victim has been identified as such by the Tribunal, may bring an action for compensation before a national court or other competent body.”<sup>46</sup> However, it made no reference to intergenerational or transgenerational harm.

Finally, neither the Extraordinary Chambers in the Courts of Cambodia (ECCC)<sup>47</sup> nor the Specialized Chambers of Kosovo (SCK)<sup>48</sup> have referred to harm transmitted between generations, either as part of the concept of indirect victim, or by using the expressions intergenerational and transgenerational harm.

## 5. Perspective from the universal and regional systems of human rights protection

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<sup>43</sup>CAE, *Ministère Public v. Hisssein Habré*, Trial Chamber, *Judgment*, 30 May, 2016, paras. 66-68.

<sup>44</sup>*Idem*.

<sup>45</sup>STL, *The Prosecutor v. Jamil Ayyash, Hassan Habib Merhi & Hussein Hassan Oneissi, Hassan Sabra*, The Trial Chamber, *Judgment*, 18 August, 2020, STL-11-01/T/TC, para. 794.

<sup>46</sup>STL, *The Prosecutor v. Hassan Habib Merhi & Hussein Hassan Oneissi*, The Appeals Chamber, *Sentencing Judgment*, 16 June, 2022, STL-11-01/T/TC, para. 72.

<sup>47</sup>In the cases 001, 002, 002/1, 002/2, 003, 004, 004/1, 004/2 the Extraordinary Chambers of the Courts of Cambodia mention neither transgenerational harm nor intergenerational harm as a type of harm that could justify the recognition of victim status for the purposes of reparations. Vid.: Table of references.

<sup>48</sup>In the documents of the cases of Salih Mustafa, Hysni Gucati and Nasim Haradinaj, Pjetër Shala, and Hashim Thaçi, Kadri Veseli, exhep Selimi and Jakup Krasniqi, transgenerational harm and intergenerational harm are not mentioned as a type of harm that could justify recognition of victim status for the purposes of reparations. Vid.: Table of references.



## 5.1. The Universal Human Rights System

None of the UN committees mentions the concept of harm transmitted between generations in their reparations decisions. This applies to all nine of them, being: the Human Rights Committee (HRC); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); Committee on the Rights of Persons with Disabilities (CRPD); and the Committee on Enforced Disappearances (CED). These nine committees do not use the expressions intergenerational and transgenerational harm.<sup>49</sup>

## 5.2. Regional Human Rights Systems

### 5.2.1. The Inter-American System

Article 63.1 of the American Convention on Human Rights (ACHR) establishes that the Court ought to guarantee and ensure an injured party (someone who experienced a violation of a right or freedom protected by the Convention) the enjoyment of his right or freedom, and that fair compensation be paid. This legal provision is further developed in rule 23 of the Rules of Procedure of the Inter-American Court of Human Rights (IACtHR), which states that the potential beneficiaries of reparations are direct victims and their closest relatives.

Until 2009, closest relatives were considered the ones who could be encompassed by the “*next of kin*” concept, which rule 2 (15) defined as: “[...] the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable”.<sup>50</sup> However, when this rule was overturned in 2009<sup>51</sup>, IACtHR jurisprudence made more frequent use of the “indirect victim” concept.

Although the IACtHR jurisprudence has never relied on the expressions intergenerational and transgenerational harm, it has ordered reparations to children and grandchildren of direct victims for psychological harm as a consequence of enforced disappearance.

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<sup>49</sup>The concept of indirect victim or trauma transmitted between generations (trans/intergenerational) is not mentioned in the searches done, as this type of reparations is not considered in the committees of the universal system. However, the term intergenerational equity is used when referring to the rights of children regarding the issue of climate change, a topic that is different from the subject of this paper, since it does not consider the trauma acquired between generations.

<sup>50</sup>Burgorgue, L., Amaya, L. (2011), *The Inter-American Court Of Human Rights: Case Law and Commentary*. Oxford, p. 225.

<sup>51</sup>*Ibid.*, p. 227.



The case of *Movilla Galarcio et al. v. Colombia* (2022) concerning the forced disappearance of Mr. Pedro Movilla (whose whereabouts are still unknown) is relevant in this regard. The IACtHR considered Mr. Movilla’s children as indirect victims based on the psychological harm caused by their father’s disappearance. According to the IACtHR:

"In the specific circumstances of this case, because they were children at the time of their father's forced disappearance, they were particularly affected, given their experiences in an environment that suffered suffering and uncertainty due to the lack of determination of their father's whereabouts. The forced disappearance of Pedro Movilla generated in his sons and daughter feelings of loss, intense fear, uncertainty, anguish, and pain, which varied and intensified depending on the age and particular circumstances of each one."<sup>52</sup>

Consequently, the IACtHR, decided that Mr. Movilla’s forced disappearance directly caused psychological harm to his children and, therefore, there was no transmission of harm onto his descendants (children).

The case of *Rocha Hernández et al. v. El Salvador* (2014) is also relevant, as the IACtHR expressly cited the testimony of expert witness Martha de la Concepción Cabrera Cruz on the “transgenerational consequences of enforced disappearances”, in the following terms:

“The Court also takes note of the expert opinion (supra paras. 38 and 43), according to which forced disappearance can produce transgenerational repercussions. The expert witness Martha de la Concepción Cabrera Cruz affirmed that “[w]hen the concept of trauma and (family) ties are combined, we can formulate a principle –which is the principle of systematic and transgenerational psychological trauma- whereby a mother who has suffered trauma and has not healed inevitably transmits that experience to her son or daughter in one way or another. Therefore, a traumatic experience continues to have effects on the next generations.” She also explained that “[t]he families of disappeared children feel that they alone have experienced the loss of their sons and daughters, but in reality it is a collective problem” and that “[the] collective trauma of war suffered by thousands of people is stored and frozen in the collective unconscious.” Finally, she considered that “the healing process must focus on the family, in other words, it is the family that was affected, and it is the family that should allow itself the space to heal and, in turn, the community, because we see that this was the result of the war, the war affected the community where that family lived.”<sup>53</sup>

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<sup>52</sup>IACtHR, *Movilla Galarcio and others v. Colombia*, *Judgment of 22 June 2022 (Merits, Reparations and Costs)*, June 22, 2022, para. 186.

<sup>53</sup>Expertise rendered by Martha de la Concepción Cabrera Cruz before the Inter-American Court at the public hearing held on April 1, 2014. IACtHR, *Rochac Hernández et al. v. El Salvador*, *Judgment of 14 October 2014 (Merits, Reparations and Costs)*, October 14, 2014, para. 114.



Nevertheless, the IACtHR did not elaborate in this case on the existence of psychological harm transmitted by the direct victims (who suffered the original harm) onto the next generations or descendants (children and grandchildren). In fact, it would have been impossible for the court to analyze this matter, as the case dealt with the forced disappearances of five children in El Salvador, and indirect victims were the disappeared children's siblings, mothers, fathers, grandmothers, grandfathers, aunts, and uncles. Indirect victims were compensated because of the psychological harm they had suffered. Thus, and according to the IACtHR:

“Owing to the facts of this case, the victims’ next of kin suffered psychological effects and irreversible harm to their immediate family, uncertainty regarding the whereabouts of the victims and a feeling of impotence due to the lack of cooperation from the State authorities and the resulting impunity for more than three decades”<sup>54</sup>

The only case in which the IACtHR seems to recognize children's and grandchildren's suffering (indirect victims) of psychological harm transmitted by their parents and grandparents during child rearing (who suffered the original harm), is the case of Gudiel Alvarez et al. (*Military Diary*) v. Guatemala (2012). In this case, the court analyzed the forced disappearance of 26 people who had, at the time of their disappearance, children, grandchildren, nephews and nieces. The Court also included consideration of family members not yet born. The IACtHR recognized all of them as indirect victims, and established:

“In addition, the Court notes that two of the children of those who disappeared were not yet born when their fathers were disappeared. In this regard, as it has in other cases and taking into consideration the terms of the State's acknowledgement of responsibility, the Court considers that they also suffered a violation of their mental and moral integrity, because the fact that they had to live in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims prejudiced the integrity of the children who were born and lived in this situation.”<sup>55</sup>

Particularly regarding the grandson and nephews' as victims, the IACtHR emphasized that:

“The testimonial statements, as well as the reports on the psychosocial impact on the families of the disappeared victims, together with other documents in the case file, reveal that, in this case, the personal integrity of the next of kin was affected in one way or another, by one or several of the following circumstances: (i) they have been involved in different activities such as the search for justice or information on their whereabouts; (ii) the disappearance of their loved ones has caused personal, physical

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<sup>54</sup> *Ibid.*, para. 258.

<sup>55</sup> IACtHR, Gudiel Alvarez et al. (“Diario Militar”) v. Guatemala, *Judgment of 20 November 2012 (Merits, Reparations and Costs)*, November 20, 2012, para. 287.



and emotional repercussions; (iii) in some cases, they were subjected to extortion, being offered their disappeared relatives or information on them in exchange for money; (iv) the facts have affected their social relationships, and caused a breakdown in the family dynamics, as well as a change in the allocation of roles within the family; (v) the harm they have suffered has been increased by the impunity which, on the facts of the case, remains; (vi) the failure to clarify what happened to their loved ones has kept alive their hope of finding them, or else the failure to discover and identify their remains has prevented them from giving them a decent burial according to their beliefs, altering their mourning process and perpetuating the suffering and uncertainty. Consequently, the Court finds that it has been proved that, as a direct result of the forced disappearance, the next of kin of the disappeared victims have undergone profound suffering and anguish to the detriment of their mental and moral integrity. Furthermore, owing to the effects on the next of kin and considering the State's acknowledgement of responsibility, the Court finds that the preceding considerations extend to the nieces and nephews and grandchildren of the disappeared victims who were indicated as presumed victims by the Commission and the representatives.”<sup>56</sup>

### 5.2.2. The European System

In the *Vallianatos and others vs. Greece* case, the European Court of Human Rights (ECtHR) stated regarding the victim's condition:

“[...] reiterates that, in order to rely on Article 34 of the Convention, an applicant must meet two conditions: he or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention. According to the Court's established case-law, the concept of “victim” must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act [...] The word “victim”, in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation.”<sup>57</sup>

Therefore, the ECtHR refers to indirect victims within the context of article 34 of the European Convention of Human Rights (ECHR) which “[...] concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end.”<sup>58</sup>

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<sup>56</sup> *Ibid.*, para. 288.

<sup>57</sup> ECtHR, *Vallianatos and others v. Greece*, *Judgment*, November 7, 2013, para. 47.

<sup>58</sup> *Idem.*



Nonetheless, in order for the ECtHR to recognize a person as a victim (direct or indirect) and obtain the compensation, the harm suffered must have been: (a) personal; (b) direct; and (c) certain. According to the ECtHR, this criteria only includes those who personally suffered the violation of the rights established in the ECHR.<sup>59</sup> Furthermore, the ECtHR indicated in the *Colozza vs. Italy* case (1985) that the right to reparation can be transmitted from parents to children only in the case of the death of the petitioners.<sup>60</sup> As a result, although the ECtHR has not expressly ruled on the matter, strict interpretation of the personal harm requirement (which notably limits the scope of the concept of indirect victim) seems to exclude cases of intergenerational and transgenerational harm that are the subject of this paper.

## 6. Conclusions.

This paper has analyzed whether there is a conceptual difference between the expressions “intergenerational” and “transgenerational” harm. The analysis carried out allows us to conclude that the psychological theories of attachment (or social transmission) and epigenetics confirm the existence of a real conceptual difference between both expressions.

Hence, according to these theories, intergenerational harm consists of the transmission of harm by the parents (direct victims of crimes or serious human right violations) onto their children, either as a result of upbringing, or genetic inheritance. These same theories state that transgenerational harm is transmitted from those who originally suffered it (the parents), to their children, and subsequently, to the next generations (grandchildren), by either of these two modalities.

By contrast, ICL and IHRL jurisprudence and doctrine had not referred to the term intergenerational harm until Gacka’s 2022 study on victimization and causation. In his study, the author exclusively analyses “transgenerational harm” (without ever using or mentioning the term “intergenerational harm”). By analyzing ICC jurisprudence, specifically the *Katanga* case, he considers transgenerational harm as the psychological harm transmitted by the parents who directly suffered the crime to their children (indirect victims).

In terms of international criminal law and hybrid tribunals, ICC jurisprudence did not use expressions of intergenerational or transgenerational harm until the *Katanga* Reparations Order issued by Trial Chamber II in 2017 (up until then, its decisions were limited to the concepts of direct and indirect victim).

As part of the discussion on the scope of and concept of direct victim, in its Reparations Order Trial Chamber II refers to the psychological harm transmitted by parents (direct victims) to children during child rearing, calling it “transgenerational harm”. Trial Chamber VI followed the same approach in the *Ntaganda* case, which was later confirmed in

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<sup>59</sup>Burgorgue, L., Amaya, L. (2011), *supra* 51, p. 225.

<sup>60</sup>ECtHR, *Colozza v. Italy*, *Judgment*, February 12, 1985, para. 38.



2022 by the Appeals Chamber. However, Trial Chamber VI introduced as a specificity the use of the terms intergenerational and transgenerational harm interchangeably to refer to the transmission to children of the trauma experienced directly by the parents.

The ICTY, ICTR and SCSL have never used nor analyzed the terms intergenerational and transgenerational harm, despite studies on the effects that the trauma suffered by survivors of the Rwandan genocide has had upon the children and grandchildren of direct victims. Moreover, these tribunals did not refer to the concept of indirect victim. This is largely due to the fact that their Statutes do not include any legal provision in regard to a reparations system such as the one established in the ICC Statute.

Regarding hybrid tribunals, the ECA, the STL, the ECCC, and KSC, although they apply the concept of “indirect victim”, and under certain circumstances recognize as such the children and grandchildren of the direct victims, none of them have used the expressions intergenerational and transgenerational harm, nor have they addressed the issue of the transmission of harm between immediate (parents/children) or successive generations (grandparents/grandchildren).

None of the various committees of the universal and regional systems of human rights protection, nor the ECtHR have so far issued a reparation decision specifically related to harm transmitted between generations, and therefore have not used the expressions intergenerational and transgenerational harm. Moreover, within the European system of protection and under a strict interpretation of the ECtHR of the requirement of personal harm (which significantly limits the scope of the concept of indirect victim), children and grandchildren of the direct victims cannot be recognized as victims.

Finally, the Inter-American system for the protection of human rights is the only one which seems to recognize the status of indirect victims to include children and grandchildren who have suffered psychological harm as a result of their parents and grandparents’ trauma (which is transmitted through upbringing). Such is seen in the case of *Gudiel Alvarez et al. (Military Diary) v. Guatemala* of 2012. Also relevant to the present research, may be the IACtHR’ reference to the expert witness testimony of Martha de la Concepción Cabrera Cruz, on the transgenerational aftermath of enforced disappearances in the case of *Rocha Hernández et al. v. El Salvador* in 2014.





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