UNIVERSITÀ DEGLI STUDI DI PADOVA

DEPARTMENT OF POLITICAL SCIENCE, LAW,
AND INTERNATIONAL STUDIES

Master's degree in
Human Rights and Multi-level Governance

COVID-19 AND INDIGENOUS PEOPLE'S RIGHTS VIOLATION IN BRAZIL: EVIDENCE OF CRIMES AGAINST HUMANITY DURING JAIR BOLSONARO'S GOVERNMENT

Supervisor: Prof. PAOLO DE STEFANI

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Matriculation No.: 2070729

A.Y. 2023/2024

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ACRONYMS

APIB	Articulation of Indigenous Peoples of Brazil
CIMI	Indigenous Missionary Council
CNDH	National Human Rights Council
CPI	Parliamentary Commission of Inquiry
DSEI	Special Indigenous Health Districts
FIOCRUZ	Oswaldo Cruz Foundation
FPMDPI	Mixed Parliamentary Front in Defence of Indigenous Peoples
FUNAI	National Indigenous Foundation
ICC	International Criminal Court
ILO	International Labour Organization
SESAI	Special Secretariat for Indigenous Health
SPI	Indigenous Protection Service
SASISUS	Indigenous Health Care Subsystem
UN	United Nations

ABSTRACT

This thesis examines the violation of Indigenous people's rights in Brazil during the COVID-19 pandemic, with a focus on actions taken by Jair Bolsonaro's government that may amount to Crimes Against Humanity. The research is grounded in two main areas of analysis: legal and public health policies. The legal analysis investigates the flexibilization of Brazilian laws protecting Indigenous lands, examining how Bolsonaro's government permitted illegal exploitation by mining groups in protected territories. This encroachment has threatened the health, cultural integrity, and survival of Indigenous populations. It further explores the impacts of illegal mining activities on environmental degradation and the spread of infectious diseases, exacerbating the vulnerabilities of Indigenous communities. The public health policies analysis scrutinizes the government's approach to managing the COVID-19 crisis, particularly its promotion of "herd immunity" through the uncontrolled spread of the virus. The government's delay in purchasing and distributing vaccines and the endorsement of ineffective treatments like Ivermectin, despite a lack of scientific evidence, are also critically assessed. These actions are framed within a broader context of negligence and hostility towards Indigenous rights and well-being, highlighting systemic failures that contributed to severe health crises and the loss of lives within these communities. This thesis aims to provide comprehensive legal and policy insights into the Bolsonaro administration's response to the pandemic, emphasizing the enduring impact on Indigenous populations and the potential legal implications under International Human Rights Law.

Keywords: COVID-19; Bolsonaro; Indigenous

INTRODUCTION

The neglect towards indigenous peoples by the Brazilian state is well known. Since the invasion of Brazilian lands in 1500, the original peoples have been defined and controlled by the conqueror, according to his own interests, with no protection against the violence that the state itself has sometimes carried out. It was only in 1910, at the beginning of the so-called Old Republic, that an indigenous policy was created in Brazil, with the creation of the former Indian Protection Service (SPI), which, however, did not act in favour of indigenous peoples, but rather in favour of economic interests, given that its mission was to settle indigenous people in agricultural and pastoral fields as servile labour and that it did not even have a representative of the peoples it protected within its management (Povos Indígenas No Brasil, 2018).

Since then, more than a century has passed and, despite not being ideal, new public policies have been adopted, resulting, after much struggle by the indigenous peoples, in the replacement of the SPI by the National Indian Foundation (FUNAI) and also in the inclusion of representatives of the original peoples among the drafting members of the new Constituent Assembly of 1985-1987, and of the bodies that tutored them.

Since then, many public indigenist policies have been created and altered that have both benefited and harmed these peoples; however, with the victory of Jair Messias Bolsonaro to the Presidency of the Republic in 2018, the framework of indigenist policies has suffered a huge setback. Proof of this are his institutional statements that demean the dignity of indigenous people, such as: ‘Too bad the Brazilian cavalry wasn't as efficient as the American cavalry, which exterminated the Indians’ (Bolsonaro, 1998) and ‘In 2019, we're going to clear Raposa Serra do Sol. We're going to give rifles and guns to all the ranchers’ (Bolsonaro, 2016). This marks the beginning of a government led by someone who has repeatedly expressed anti-indigenous opinions, which in turn influence the direction of the elaboration of the insufficient policies that led to the complaints filed with the International Criminal Court.

In November 2019, the Human Rights Advocacy Collective (CADHu) and the Arns Commission called on the human rights protection system of the International Criminal Court (ICC) to request an investigation into evidence of crimes against humanity and

incitement to genocide of indigenous peoples in Brazil by the President of the Republic, Jair Bolsonaro (Articulação Dos Povos Indígenas No Brasil, 2020b).

However, that same year, the proliferation of Sars-Cov-2 began to take great proportions, and the COVID-19 pandemic began to take a turn for the worse. In order to safeguard the lives of their populations, all the countries of the world had to take extreme sanitary measures, based on the recommendations of the world's health institutions, while they researched more and more about the 'new coronavirus', new prophylactic measures were recommended in order to prevent contamination and death of the populations, so that, as they were adopted, they mitigated the situation until the first vaccines began to appear, which vertiginously reduced deaths as a result of the COVID-19 disease.

In Brazil, there was an undeniable delay in adopting prophylactic measures, which, together with the insistence on denying the existence of the disease, became hallmarks of the top government, which disseminated, through official channels, various denialist statements about the existence of the pandemic and the effects it would cause. Later, when it became impossible to maintain that there was no virus, the presidential stance was changed to underestimate the effects of COVID-19, even comparing it to a 'little flu', as well as recommending remedies with no proven efficacy, defying various recommendations and clashing with World Health Organisation authorities, which, added to the lack of interest on the part of government leaders, led, above all, to the delay in the purchase and delivery of COVID-19 vaccines.

However, in the context of indigenous peoples, the situation is more dramatic, due to their notorious greater susceptibility to respiratory tract diseases and due to the delay in creating a plan that would adequately cater for native peoples. It took more than a year after the pandemic for a plan to be partially granted by the Supreme Court, which was responsible for ordering the drawing up of a plan that was sufficient, due to the apparent unwillingness of the executive branch.

Faced with this situation, the vulnerability of the indigenous peoples, who were already under threat, was amplified. Thus, new representations were made to the International Criminal Court, such as that of the chiefs Raoni Metuktire and Almir Suruí, who denounced the environmental destruction of the Amazon, as well as the Bolsonaro government's attacks on indigenous populations and the dismantling of Brazilian

environmental agencies such as Ibama and ICMBio. These denunciations pointed to Jair Bolsonaro as being directly responsible for the deaths and violation of rights against Brazil's indigenous peoples, given his encouragement of violence and constant failure to combat it. In addition, the representation of the Amazon Mobilisation Front in Defence of Indigenous Rights (Famddi) denounced the President of the Republic as responsible for the serious situation of contamination of indigenous communities by COVID-19 and the extermination of indigenous peoples in the Amazon Region.

Among other crimes, the Front accuses Bolsonaro of being directly or indirectly responsible for attacks by miners in indigenous areas, arson, spreading negative propaganda about vaccination and neglecting to care for indigenous people living in urban areas or on undemarcated lands, and has also said that the Brazilian president 'uses the coronavirus as an instrument of his death policy' (Weissheimer, 2021).

Given all these facts, the main objective of this thesis is to analyse the discourses that accuse the Chief Executive of crimes against humanity, based on the study of the indigenous public, legal and health policies adopted to prevent the contagion by COVID-19 of indigenous peoples and to ascertain whether, by action or omission, the President could have his actions and neglection typified as a crime against him, according to the International Law in the context of the pandemic.

In order to carry out this research, it will be necessary throughout the work: i) to explore the concept of necropolitics developed by Achille Mbembe; ii) to conceptualise Crime Against Humanity according to international criminal law; iv) to list Brazilian policies to protect indigenous people, and finally; iii) to analyse the complaints against Brazil at the ICC and their origin. This research will use a qualitative-quantitative bibliographical methodology, in order to survey the concepts used on the subject, according to legal doctrine and current case law, with the presentation of data organised by the indigenous movement itself.

CHAPTER I - LITERATURE REVIEW: ACHILLE MBEMBE AND THE CONCEPT OF *NECROPOLITICS*

1.1 Overview

The idea of sovereignty is a concept that has a long history and has evolved over time. In the Middle Ages, sovereignty was seen as a divine attribute granted to kings. During the Renaissance, the idea of nation-state sovereignty emerged, where authority was attributed to the state, representing the people. The concept of sovereignty appeared in the modern political vocabulary in the 16th century with Jean Bodin's definition in the famous book Les Six Livres de La République (originally published in 1567). Jean Bodin defined sovereignty as an absolute and indivisible power that cannot be shared with other institutions (Bodin, 1992). Sovereignty was considered a fundamental aspect of the modern state, characterised by a monopoly on the legitimate use of violence, control over territory and the authority to make political decisions on behalf of the people. During the Modern Age, the idea of sovereignty became increasingly linked to the concept of nationalism and the formation of nation states. With the rise of colonialism and globalisation, sovereignty was questioned in relation to its application on the international stage, and the debate about its role in global governance continues to this day.

Since it was first coined, the term has undergone changes in its etymological and semantic meanings. In its current meaning, it is intrinsically related to the emergence of the modern state, in a formulation that underpins the modern understanding of law and politics. Authors such as Hegel, Bataille, Giorgio Agamben, Carl Schmitt, Michael Foucault and others have analysed the concept and its political and legal implications for the nation state. The aim of this article is to discuss the concept of sovereignty and its relationship with the notion of Necropolitics, developed by Cameroonian philosopher Achille Mbembe. In developing his analysis, the author reinterprets Michel Foucault's concepts of biopower and biopolitics, relating them to the notions of imperium, state of siege and state of exception, to examine sovereign power in contemporary times, especially in colonial and neocolonial contexts, in dialogue with a whole critical fortune on the debate (Mbembe, 2018b).

For Agamben (2004), the state of exception has become a permanent condition in many modern states, where the suspension of laws and democratic institutions has become the rule, not the exception. He develops the idea that the state of exception has become a form of government that seeks to maintain social and political control by creating crisis situations, and that this can lead to a permanent state of exception that threatens freedom and democracy.

The relationship between the notions of imperium, state of siege, state of exception and necropolitics according to Mbembe (2018b) can be understood as follows: imperium refers to the power of the state to exercise sovereignty and authority over a territory and its population. In times of crisis, the state can declare a state of siege or exception, which is a temporary suspension of constitutional guarantees and the normal legal order so that the government can deal with the emergency situation.

Mbembe (2018b) argues that necropolitics emerges as an extreme form of sovereignty, where the state becomes capable of deciding who lives and who dies. The state of exception is fundamental to the implementation of necropolitics, as it allows the state to act extrajudicially, eliminating threats to its sovereignty without the need to follow normal legal procedures. Thus, the relationship between Mbembe's notions of imperium, state of siege, state of exception and necropolitics can be seen as an expansion of the state's sovereign power, which can be used to impose control over a population through violence and death. With necropolitics, the state becomes capable of ruling through fear and the threat of violence, thus perpetuating its sovereignty over the population.

1.2 Foucauldian dialogues: *necropolitics* and the return of the negativity of power

The formulations on biopolitics and biopower are central to Mbembe's discussion of Necropolitics and consequently have ramifications for the question of sovereign power. Mbembe analyses sovereignty in terms of its "content", (re)interpreting it as a generalised form of instrumentalisation of human existence and destruction of bodies (Da Silva, 2021, p. 147). In other words, the author discusses the forms of sovereignty in contemporary times, pointing out the limits of Foucauldian concepts for thinking about the place given to dead bodies today.

The concept of Biopolitics runs through Michel Foucault's major works, from In Defence of Society (1999); History of Sexuality - vol. 1 (2012); Security, Territory and Population (2008b) and later in The Birth of Biopolitics (2008a), where he systematises his reflections on the subject. The French philosopher develops the concept when reflecting on the ways in which life is regulated in modernity under the advent of liberalism and the nation state. It is important to note that the focus of Foucauldian analyses is not power itself, but the subject. Under the triad of power, law and truth, the

author analyses how the mechanisms of power have their own solidity and technology and produce effects of truth and domination over the subject.

In this sense, biopolitics and biopower are terms that emerge in Foucault's reflections on the mechanisms of power that are established as a way of maintaining life, both individually and collectively, with the focus on maintaining and expanding a relationship of domination of the population. In the author's terms, biopolitics means "rationalising the problems posed to government practice by the phenomena specific to a group of living people constituted into a population: health, hygiene, birth rate, longevity, race." (Foucault, 2015, p. 431). Therefore, the power of death and life constitute the notion, to the extent that death is configured as a right when exercised with the intention of normalising and regulating a biopolitical society, with the aim of making it purer and healthier, in other words, preserving it.

> The biopolitics of population, which acts on the human species, on the body as a species, with the aim of ensuring its existence. Issues such as birth and mortality, standard of living and length of life are linked not only to disciplinary power, but to a type of power that is exercised within the species, the population, with the aim of managing the life of the social body (Foucault, 2015).

The concept of biopolitics is intertwined with the emergence of the nation state. The modern state is identified as the generator of truth effects and although it is not the epicentre of power, it has a privileged dimension in the multiplicity of correlations of forces in modernity, insofar as it captures the foci of power, in a way, assumes a privileged role in the procedures and practices of domination (Foucault, 2015). In this sense, to think about biopolitics and biopower is to think about the state and liberalism, insofar as the historical context in which these notions emerge involves the constitution of nation-states and the emergence of liberalism, which in a correlation of forces implement a new form of government, unlike the medieval context. Thus, for Foucault, sovereignty is transferred to the nation and the figure of the king as sovereign is removed from the scene, and a type of power emerges that cannot be translated into terms of law, that is, in terms of sovereignty:

> If the development of state apparatuses guaranteed the maintenance of relations of production, the rudiments of anatomy and biopolitics acted at the level of economic processes, their unfolding, the forces at work in these processes and

> sustaining them; They also operate as factors of social segregation and hierarchisation, acting on the respective forces of both the one and the other, guaranteeing relations of domination and effects of hegemony; the adjustment of the accumulation of men to the expansion of the productive forces and the differential distribution of profit were, in part, made possible by the exercise of biopower with its multiple forces and procedures (Foucault, 2012).

After all, Foucault (2008a, 2008b) circumscribes the concepts historically, in that he reflects on how the ancient right to kill, which was constituted as an inalienable and indivisible right of the king, can be translated into modernity, in a society governed by biopolitics and circumscribed in a nation state whose historical framework is the industrial and French revolutions. In this way, the author breaks with normative theories and differs from contractualist theorists, especially the Hobbesian model, in that he opposes an understanding of power as a substance that can be held or ceded. However, when faced with the modern state, the author points out the insufficiency of legal and sovereign theories to analyse power relations under modernity. He is interested in this shift in power that occurs with the advent of modernity and presents a reflection that breaks with analyses that start from universal and abstract concepts such as State, Law and Sovereignty, focusing on the networks of relationships that produce subjection. With this analysis, the author starts from the perspective that power is not to show its nature, that is, to demonstrating the insufficiency of theories of sovereignty to understand power relations in modernity, the author points out the meaning of the political based on negation. When dealing with sovereignty, he starts from its negation and analyses it by showing the positive dimension that power produces. In the meantime, Achille Mbembe's discussions emerge, pointing to his concern with discussing "less abstract and more tangible" categories of the exercise of sovereignty, such as life and death (Mbembe, 2018b).

Biopolitics and necropolitics are related concepts, since they both deal with the management of life and death in society. Biopolitics, a term coined by Michel Foucault, refers to the power exercised over individual and collective bodies, as well as the administration of life in society. Necropolitics, a concept developed by Achille Mbembe, deals with the power exercised over death, i.e. the ability to decide who should die and under what conditions. The relationship between these concepts is based on the idea that political power exercises control over both the life and death of individuals. In biopolitics,

the aim is to manage the lives of the population in order to increase their productivity and well-being, but this management can lead to a form of power that excludes and marginalises certain groups, making them "bare life". In necropolitics, power is exercised directly and violently over death as a way of maintaining political control and domination of certain populations.

The relationship between biopolitics and necropolitics also arises from the fact that the administration of life can lead to death. For example, neglecting public health can lead to epidemics and mass deaths, as we have seen during the COVID-19 pandemic. In addition, the use of medical techniques to prolong life can lead to a form of "death in life", as in the case of terminally ill patients kept alive by devices. In this sense, biopolitics and necropolitics can be seen as two sides of the same coin, in which political power is exercised over both the life and death of individuals and the population as a whole.

However, Mbembe (2018b) argues that Foucault's biopolitics is insufficient to explain the extreme violence that occurs in situations of necropolitics. He argues that necropolitics is a negativity of power that goes beyond the simple regulation of life, as it involves the intentional use of death as a tool of political control. Thus, the discussion on the relationship between biopolitics and necropolitics emphasises the importance of understanding how political power can be used to control people's lives and deaths, and how this relationship can manifest itself in different political and social contexts.

1.3 *Necropolitics* and the discussion on sovereignty

The notion of the "corrosion of the Commonwealth" is an idea developed by the Italian philosopher Giorgio Agamben in his work State of Exception. According to Agamben (2004), the "corrosion of the Commonwealth" is a process that occurs when the state treats part of its population as "enemies" and consequently excludes them from the body politic, taking away their rights and subjecting them to precarious living conditions.

This concept is directly related to the idea of necropolitics, developed by Achille Mbembe. Necropolitics is a process in which certain groups are subjected to violence and death as a way of maintaining political and social control. In many cases, necropolitics is exercised by the state, which uses its sovereignty to decide on the life and death of individuals. Thus, the "corrosion of the Commonwealth" can be seen as a form of

necropolitics, in which the state excludes part of its population from the body politic and subjects them to precarious living conditions. This process can be observed in different contexts, such as in situations of war, political conflicts and humanitarian crises.

The concept of the "corrosion of the Commonwealth" also highlights the importance of Agamben's notion of "bare life". "Bare life" is life that does not have access to the rights and protections that the state offers its citizens. For Agamben (2004), "naked life" is life that can be sacrificed by the state in the name of security and the common good. In this way, the idea of the "corrosion of the Commonwealth" and the notion of necropolitics emphasise the importance of thinking about politics from the perspective of the forms of exclusion and violence that occur in our societies, especially when the state is the agent of these forms of oppression.

The concept developed by Achille Mbembe is systematised in a work of the same name, which is the adaptation to book format of an essay published in 2003 - and which had already been incorporated into a chapter of the book Politics of Enmity (2020), in which the Cameroonian philosopher seeks to answer the question of what position is reserved for life and death in the contemporary order of power. In a dialogue with the tradition of political philosophy that discusses sovereignty, the author, like Foucault, breaks with normative theories about sovereign forms, analysing their content and distinguishing himself from the contemporary philosophical tradition that understands it as a process that unfolds in "self-institution" and "self-legitimation".

The discussion around the concept of Necropolitics is based on the concern to show the limits of biopolitics as a form of exercising power and biopower as hegemonic domination over life, in order to think about neoliberal governmentality and the contemporary context. Mbembe's concern is no longer with life, but with how to manage dead bodies:

> But under what practical conditions is the power to kill, let live or expose to death exercised? Who is the subject of this law? What does the implementation of this right tell us about the person who is therefore condemned to death and about the relationship that opposes this person to his or her killer? Is this notion of biopower enough to account for the contemporary ways in which the political, through war, resistance or the fight against terror, makes the murder of the enemy its first and

> absolute goal? War, after all, is both a means of achieving sovereignty and a way of exercising the right to kill (Mbembe, 2018b)

Dialoguing with the critical fortune of the debate without extensively revisiting the classical discussion on sovereignty, Mbembe (2018b) puts together a theoretical framework that unites the discussions of Hegel and Bataille in order to think about what he calls politics, the work of death and the "becoming of the subject". The notion of "labour of death" appears both in Hegel's philosophy and in Mbembe's theory of necropolitics, albeit with different approaches and meanings.

Hegel's notion of "labour of death" appears in his work Phenomenology of Spirit (2008b), where he describes the process of fighting for existence and freedom as a "labour of death". According to the German philosopher, the struggle for existence and freedom involves overcoming individuality in favour of a higher idea, which represents collective life and freedom from the state. For Hegel, this process of "death work" is necessary for the construction of society and the state, based on the renunciation of individuality in favour of the common good. In this sense, the "labour of Death" is a form of sacrifice, involving the renunciation of individual life in favour of a higher collective life (Hegel, 2008a; 2008b). Mbembe's notion of "death work" appears in his theory of necropolitics. For Mbembe, necropolitics involves the ability to decide on the life and death of individuals. In this context, "death work" appears as a form of sacrifice imposed by the state on certain groups who are subjected to violence and death as a way of maintaining political and social control.

Thus, although the notion of "death work" appears in both Hegel and Mbembe, in both cases it refers to a form of sacrifice in the name of the collective good. However, while for Hegel "death work" is a necessary process for the construction of society and the state, for Mbembe it is a form of exercising sovereign power, which involves subjecting certain groups to violence and death. When talking about death, he deals with the concept of the state of exception which, for authors such as Foucault, Arendt and Agamben, had in the Jewish Holocaust a paradigm of the exception in modernity. By elaborating a political economy of violence and placing the colony, the plantation and democracy as objective parts of the same historical matrix, Mbembe, like Foucault, criticises the discourse of truth that prevails in modernity about the absolute equality

between fellow citizens and the sense of order and peace that prevails in the parliamentary democratic state. In his formulations, one can see the idea that what actually exists is a masking of the brutalities committed. In other words, brutality, violence and those moments of "exception" were not just expressions of totalitarian regimes or the colonial Empire, because "the idea that life in a democracy would be fundamentally peaceful, policed and devoid of violence (including in the form of war and devastation) does not stand up to scrutiny for an instant (Mbembe, 2018b).

In this sense, the state of exception and the state of siege are not just expressions of the modern state as seen in Europe, but rather became a "necessity" in the colonies, given that this war against the enemy, the basis of Necropolitics, originated in the colonial states, in the techniques used against the colonial populations who were seen as a group of non-subjects and beings without rights: "the colony represents the place where sovereignty consists of fundamentally in the exercise of power outside the law (ab legibus solutus) and in the in which 'peace' tends to take on the face of an endless war" (Mbembe, 2018b).

Mbembe has a political dimension to the discussion of death, since his reflections point out that the processes of subjection are derived from political imperatives. Furthermore, "killing or letting live constitute the limits of sovereignty, its fundamental attributes. To be sovereign is to exercise control over mortality and to define life as the deployment of power" (Mbembe, 2018b). In contemporary times, war is, according to Mbembe, the means of exercising the right, except that war now takes place not only between states or populations, but within populations, in the exercise of reason in the public sphere. Returning to Hegel, he points out that human death acts as a bearer of meaning, as an exercise of rationality, loaded with political meaning. In the context of democracies, war takes on the character of a phármakon, i.e. it works as both an antidote and a poison, and Mbembe points out that in contemporary times, war is used to guarantee legality by acting in the guise of illegality.

Mbembe also revisits Bataille's notion of the sovereignty of being. Bataille (1989, 2013) points out that sovereignty takes place in a relationship, power is not necessarily limited to state power and does not respect the limits of identity. His definition of sovereignty runs counter to Hegel's, which is related to the discussion of the world of

labour and, from his perspective, sovereignty consists of the limits of subjects' experience, which takes place in the form of violence. Georges Bataille's notion of the sovereignty of being can be understood from his work "The Inner Experience", where he develops the idea that sovereignty is not an attribute of the state or of a political authority, but rather an intrinsic characteristic of the human being.

For Bataille (1989, 2013), the sovereignty of being is manifested in inner experience, that is, in the individual's ability to experience a loss of self and a dissolution of the boundaries that separate the self from the world and others. In this experience, the human being feels part of something bigger and wider than themselves, and this feeling of loss of control and dissolution of the self is seen by Bataille as a form of sovereignty.

This notion of the sovereignty of being is influential in Achille Mbembe's theory of necropolitics, especially in his understanding of sovereign power as a force that decides on the life and death of individuals. Mbembe (2018b) argues that state sovereignty is based on a conception of power that rests on the ability to decide over life and death, which results in practices of exclusion and violence that particularly affect marginalised and disadvantaged populations. By emphasising the idea that sovereignty is an intrinsic characteristic of the human being, Bataille offers a critical perspective on the sovereign power of the state, suggesting that true sovereignty lies in the inner experience of the individual and not in the external imposition of political power.

According to Bataille (2013), sovereignty can be considered paradoxical, since it involves the ability to set limits, but also the possibility of going beyond them, of transgressing them. The paradox of sovereignty in Bataille is an idea based on the relationship between sovereign authority and its own power. Bataille argues that sovereign power is paradoxical because, at the same time as it is based on its ability to maintain order and stability, it also depends on its ability to destabilise that order. In other words, sovereign authority can only maintain power if it is able to break the very rules it has established to maintain order. This paradox arises because, in order to maintain order, sovereign authority must be able to employ violence and coercion, but these very actions threaten the stability it seeks to maintain. Bataille argues that this tension between the need to maintain order and the need to break with it is what creates the paradox of sovereignty. For him, this tension is especially evident in moments of crisis or exception,

when sovereign authority is forced to act in order to protect itself and the established order (Bataille, 2013; Agamben, 2005).

The work of Georges Bataille has had a major influence on Achille Mbembe, especially in his reflections on necropolitics. In The Theory of Religion (2013), Bataille addresses the issue of violence and sacrifice as fundamental elements in the construction of society and in the relationship between the individual and the collective. He argues that religion is a fundamental aspect of human life, which involves renouncing individuality in favour of a collective ideal. This idea of sacrifice and violence Symbolic violence is fundamental to Mbembe's reflection on necropolitics. From his perspective (Mbembe, 2018b), this violence can be physical, as in the case of genocide, torture and extrajudicial executions, or symbolic, as in the form of exclusion, marginalisation, invisibilisation and stigmatisation. Mbembe also emphasises that necropolitics is linked to the global political economy, which is based on the exploitation of certain groups for the benefit of others.

In this way, Bataille's (1989) notion of the sovereignty of being influenced Mbembe insofar as it helped to develop a critical theory of necropolitics and the sovereign power of the state, questioning the bases on which political power is exercised and emphasising the importance of inner experience and loss of control as forms of resistance and true sovereignty.

Uniting the perspectives of Hegel and Bataille, Mbembe (2018b) argues that, within this war that takes place within the population, the state abdicates its monopoly on violence, thus revealing its necropolitical face by allowing death and murder. In contemporary times, the power to kill, previously under the exclusive control of the state, now permeates the whole of society, manifesting itself through militias, private security companies, among others. In this sense, the concept of the Commonwealth, introduced by Hobbes in his work Leviathan (representing the public interest or the state), loses its political meaning, since, in Hobbes' view, the individual renounces his individualistic nature through the social contract, becoming part of the whole governed by the Sovereign (the king). However, according to Mbembe, the sovereign, once considered the head of the body politic, finds himself alienated in the exercise of sovereignty. Death, once considered an evil attributed only to the sovereign (initially personified by the King and later by the State), now becomes an object of dispute within society. War, once restricted

to man's state of nature, in Mbembe's view (2018b, 2020), permeates the whole of democratic society, becoming a form of exercising power in contemporary times. Consequently, the monopoly of force exercised by some states becomes problematic, since they can turn into war machines, which operate like commercial enterprises and have the characteristics of a political organisation, offering services and becoming highly organised predatory mechanisms, surpassing the traditional paradigm of war (Da Silva, 2021).

In this way, the discussion on necropolitics is intertwined with the debate on war machines and heteronomy. Contemporary wars go beyond the limits and borders of state security and territory, aiming to annihilate enemies by destroying the essential mechanisms for the survival of the population. Necropolitics is not limited to death itself, but represents a technology of power that not only allows death, but also promotes it by destroying all the means necessary for existence. As Negris (2020) states, it is a technique of power present in the era of neoliberal governmentality, manifesting itself especially in the peripheral areas of neoliberalism, outside the sphere of the world's major economic powers. However, its reach is not restricted to the periphery, since necropolitical power also manifests itself in central regions of capitalism, since its devices create mobile borders that act from the inside out (Franco, 2021).

This debate is important in the theory of necropolitics because it helps to understand how the sovereign power of the state is sustained through exclusion and violence. In this context, war machines are seen as a form of resistance and confrontation against sovereign power, since they operate outside of established political and social structures. War machines are understood as forms of social organisation that operate through a heteronomous logic, i.e. a logic based on disobedience and subversion of established rules. They do not submit to the sovereign power of the state and can act autonomously, resisting the violence of political power and fighting for their own freedom and autonomy. By highlighting the importance of war machines in resisting sovereign power, Mbembe proposes a critique of state sovereignty and the political and social structures that sustain exclusion and violence against marginalised and disadvantaged populations. Although he does not focus on the discussion of legitimacy and legality when dealing with sovereignty, Mbembe points out that, with the global reintroduction of colonial status, acting under the state of exception as a way of

guaranteeing survival has become the norm in contemporary times. In his own terms, the law is not capable of protecting the Rule of Law nor the population, as this would imply the "absolute use of sovereignty" (Mbembe, 2018b). Although democracy emasculates the brutalities at its core, the suspension of rights and freedoms are the norm in this type of regime. There is a large-scale production of death that has been generalised, and this is not a mere accident or driven by instincts alone, but rather derives "from a purely instrumental calculation of life and the political." (Mbembe, 2018b).

Carl Schmitt's thinking had a significant influence on Achille Mbembe's work on sovereignty and necropolitics. For the German jurist, sovereignty is understood as the ability to decide on the state of exception and, therefore, the ability to decide who is friend and who is foe. In his work Political Theology (1922/2006), Schmitt argues that the sovereign is the one who has the power to decide in moments of exception, and that this power is the essence of politics. According to him, the state of exception is the moment when the normal political order is suspended and the authority of the sovereign is put into action. In this sense, Schmitt argues that sovereignty is the supreme expression of political authority and is therefore above any law or established order.

From his perspective, sovereignty is a theological issue, based on concepts such as divine will. He argues that sovereignty cannot be grounded in a natural or rational order, but must be understood as a matter of divine will. For him, sovereignty is a form of exercising power that is beyond morality and the law, and is justified only by the need to maintain political and social order. In particular, Mbembe emphasises Schmitt's notion that sovereignty lies in the power to decide on the state of exception and that the state of exception is the supreme form of sovereign power. Mbembe (2018a, 2018b) expands on this idea by arguing that necropolitics is a form of permanent state of exception, in which certain bodies are excluded from the protection of the state and are treated as killable. Mbembe also draws on Schmitt's ideas about the concept of the enemy, which is central to the politics of sovereignty, and applies it to the concept of the internal enemy, which describes those considered dangerous to the security of the state.

It is important to emphasise that the historical context on which Mbembe is reflecting is the crisis of capitalism, which is based on the model of the neoliberal state, he uses the political economy of war as a backdrop, pointing out how the market is part

of this production of death on a large scale, bearing in mind that contemporary war and terror have become, to a certain extent, modes of production, contributing to the destruction of human bodies: "death in a myriad of small deaths, a dying by drops, with which domination intensifies and perpetuates itself." (Franco, 2021, p. 42). The annihilation and exposure to annihilation produced by necropolitics also have racism as a technology of power, and it is the great driving force behind the necropolitical principle, "insofar as this is the name given to organised destruction, it is the name of a sacrificial economy whose operation requires, on the one hand, a general reduction in the price of life, and on the other, familiarity with loss." (Mbembe, 2018b).

The theory of necropolitics is often linked to neoliberalism and racism, as these phenomena are deeply intertwined in contemporary society. Neoliberalism is an economic ideology that values market freedom, the reduction of the state's role in the economy and the privatisation of public services. In practice, this has resulted in economic policies that emphasise competitiveness, the pursuit of profit and deregulation, leading to growing social and economic inequality. In this context, necropolitics can be understood as a form of government that uses violence to maintain social order and protect the interests of economic elites. This violence can manifest itself in various ways, from the criminalisation of marginalised populations to the violent repression of popular demonstrations.

In addition, racism is a central element in necropolitics, since black, indigenous and other ethnic minority populations are often the most affected by state violence. Thus, the theory of necropolitics is relevant for analysing the relationship between neoliberalism, racism and violence, since it highlights the importance of violence as a way of maintaining the political and economic power of the elites, as well as the fundamental role of racism in the production and reproduction of social and economic inequalities.

Mbembe (2018b) points out that, despite emerging at the end of the century XIX an international humanitarian law that served as the basis for the permanent state of exception is an intrinsic feature of contemporary life. The situations of the populations in Syria, the Gaza Strip, the West Bank, prisons and the Brazilian peripheries are examples of how terror and the production of this "life in spasms" are not restricted to the colonies:

"Military occupations, barricades, daily humiliation, tanks on the streets and shootings mean that terror, pain, fear and violence are constant and present themselves as aspects [of today]" (Da Silva, 2021, p. 151). Colonial status, once reserved for slaves, is now revealed in the bodies of black people, Jews, the unemployed, immigrants, slum dwellers, prisoners, prostitutes, etc. and "what happens in these cases is the disappearance of the status of citizen, the individual and the person are transformed, no longer just black people, but all the unfortunate in the midst of neoliberalism (Costa; Queiroz, 2021, p. 125).

1.4 Considerations

Mbembe's reflection on Necropolitics is not limited to a discussion of race, because despite taking Africa as the centre of his discussions and placing the issue of racism as a necropolitical driving force, he takes up a classic debate in political philosophy, the paradigm of sovereignty. Unlike Michel Foucault, who removes the centrality of sovereignty in his debate on biopolitics, Mbembe points out that this notion of sovereignty, together with that of biopower and the state of exception, are fundamental to understanding contemporary power relations.

Thus, the author lists war as a central element of the discussion, given that it is present in colonies, totalitarian states and nation states alike, so that the war on terror has always been present in these historical configurations and used as a political principle for the extermination of those considered abnormal. Even under democracies that propose universal equality, war has not been eradicated, but is now being used not only by the state, but by the market and by war machines inside and outside the confines of states. Under the neoliberal regime, everyone is reduced to a commodity, "while the fusion of capitalism and animism is no longer even questioned, while that the intertwining of the tragic and the political tends to become the norm" (Mbembe, 2018b).

The relationship between war and necropolitics is close, as necropolitics can be seen as a form of prolonged, covert warfare. While traditional war seeks the physical destruction of the enemy, necropolitics seeks the slow and gradual elimination of groups considered undesirable by political power. This elimination can take place in various ways, such as by controlling the distribution of basic resources, social and political exclusion, police violence, among others. In addition, necropolitics can also be present in

situations of conventional warfare, such as the use of drones for selective attacks and the production of refugees and forced displaced people. In both cases, necropolitics involves the production and administration of death as a form of governance, with profound ethical and political implications.

Thus, under neoliberalism, life is no longer useful, making everyone a victim target, due to the way of legislating that strips subjects of their political status, leaving populations at the mercy of all kinds of violence, which goes beyond the scope of the state and government. Therefore, war is not just about the administrative organ of the state, but about bodies, which come under siege and have their history revealed to them. In this sense, Mbembe goes one step further than Foucault by focusing on the bodies of the dead and bringing sovereign power back into the discussion, now reflecting on episodes of late colonisation and the peripheral contexts of capitalism. Necropolitics can also be seen as a threat to sovereignty, as it can undermine the legitimacy of the state and increase popular opposition to it. When a state uses excessive and indiscriminate violence against its own population, it can lose the trust and obedience of its citizens, which can lead to instability and the disintegration of the political order.

Therefore, the relationship between sovereignty and necropolitics is complex and can vary depending on the political and social context in question.

Finally, Achille Mbembe’s concept of necropolitics, which refers to the use of social and political power to dictate who is allowed to live and who is subjected to death, finds a stark parallel in Jair Bolsonaro’s policies toward indigenous populations during the COVID-19 pandemic in Brazil.

Bolsonaro’s administration, through both intentional neglect and active dismantling of protective policies, created conditions that left indigenous communities especially vulnerable to the virus and its fatal consequences. By withholding timely healthcare, delaying vaccine access, and even promoting unproven treatments, the government effectively weaponized its public health response, allowing the pandemic to ravage these communities with limited interference.

Such policies resonate with Mbembe’s theory, as Bolsonaro's approach systematically marginalized and endangered indigenous lives, framing them as

expendable in pursuit of his administration's broader economic and ideological goals. This strategic neglect not only disregarded indigenous rights to health and safety but also exemplified a form of state-sanctioned abandonment that fits within Mbembe's necropolitical framework to be further discussed in the upcoming chapters.

CHAPTER II - INDIGENOUS RIGHTS IN INTERNATIONAL LAW

2.1 History of Indigenous rights and the debate regarding their definitions

The study of indigenous peoples' rights requires more than a particular study of one indigenous group in isolation from the others, it requires an understanding that indigenous peoples collectively constitute a global mosaic of peoples who, despite their diversity, share a common experience of colonisation and similar struggles, hence the debate around a universal definition of "indigenous peoples".

The term "Indigenous Peoples" is now accepted worldwide to designate some human groupings scattered around the globe. It covers a huge diversity of social groups living under very different geographical, political, economic and social conditions. Many of these peoples live in inhospitable environments, not by choice, but as a result of forced displacement by historical circumstances, such as the Aborigines of Australia, the Inuit of Canada, the Touareg of the Sahara Desert and others of the Amazon rainforest. Others live on the outskirts of cities (Deroche, 2005).

According to UN estimates, they represent around 370 million people spread around the world, more than 5 per cent of the world's population, and more than 5,000 distinct groups in around 90 countries[1]. Because of the great diversity of these peoples it may seem inappropriate to group them all under the same name of "indigenous peoples", but despite this, they all have a common past of marginalisation, exclusion and assimilation, the consequences of which are still felt today, and many of them have been able to retain elements of their own ways of life and worldviews (Deroche, 2005).

It is important to first get to know the delimitation given to the concept of indigenous peoples by international law and the definition of the criteria for qualifying a people as indigenous, since "indigenous peoples" is a fundamental conceptual category in this thesis. This concept has a history that reflects the political issues at stake

surrounding indigenous peoples' claims at the UN and the definition of the new relationships to be established with the states where these peoples live. The aim here is not to provide a precise definition, but to understand the political uses of the expression "indigenous peoples" in this legal debate in order to have a clearer understanding of the categories used in the Brazilian constitutional text, in public policies and in other texts that govern the lives of indigenous peoples in Brazil.

Indigenous peoples around the world represent a social group that has long been subject to domination by national states and still lives under the effects of this domination today. The very concept of "indigenous peoples" is based on the notion of subordination, as can be seen in the definition proposed by José R. Martínez Cobo, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.

> 379 - Indigenous communities, populations and nations are those that, linked by historical continuity to the pre-invasion societies and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of society that currently dominate their territories or part of those territories. They are currently non-dominant elements of society and are determined to conserve, develop and pass on their ancestral territories and ethnic identity to future generations, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[2]

The "working definition"[3] described above has been cited repeatedly in specific literature and has made the concept of "indigenous peoples" operational. For the purposes of this thesis, it has the advantage of relating the concept of "indigenous peoples" to the historical processes of colonisation and domination while underlining that contemporary indigenous identity depends on their determination and will to perpetuate their cultural, social, political and legal specificity; a will expressed in their struggle for autonomy.

The notion of "indigenous peoples" enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples is directly linked to the emergence of the indigenous peoples' movement on the international stage and it is important to emphasise their direct participation in the debate around the definition of "indigenous peoples". This participation is not only of symbolic importance, but it was the first time that the UN authorised members of civil society, directly affected by the political decision at stake, to

participate in the negotiation of an international instrument. This, according to Irène Bellier, can be seen as a first sign of self-determination (2013, p. 18).

The Declaration leaves the definition of "indigenous peoples" open in the same way that no text of international law provides a secure definition of "people". The consequence of this is that courts, both national and international, end up playing a very important role in that they must be able to "reflect concretely on situations, contexts and approaches" when using the concept (Bellier, 2013, p. 14). The legal vagueness of the category clashes with the existing definitions, which vary according to the states and languages that express them.

> (...) the dilemmas of the uses of this new legal category articulated around the recognition of the rights of indigenous peoples and how it is applied in States that have organised political treatment with semantic categories that place these peoples in a situation of dependence, marginalisation and exclusion in relation to national society (Bellier, 2013, p. 14).

The doctrinal debate has been intense since the first sessions of the Working Group on Indigenous Peoples of the UN Sub-Commission on Human Rights, starting in 1983, "not only because of the difficulty of grasping this great diversity of peoples in a single definition, but also because of the political challenges at stake" (Deroche, 2005, p.47-48). One of the political challenges was to what extent would a universal definition of indigenous peoples really be desirable? While some representatives of indigenous peoples expressed their fear that a very narrow definition could prevent many peoples from enjoying their recognised rights, others argued that the absence of a definition could allow some states to argue that there are no indigenous peoples in their territory. Organisations such as the World Bank also argued that they needed a definition in order to be able to identify the beneficiaries of special programmes or projects. A definition was necessary, but it should not be universal because of the risk of excluding many groups. It was therefore decided to identify some criteria that would meet the need to develop an international normative system for the protection of peoples' rights (Deroche, 2005, p. 63).

The UN Working Group on Indigenous Peoples, set up in 1982, tried to determine the criteria for classifying a population as indigenous in order to then specify the nature of the legal category that covers these peoples. In other words, since a precise and closed

definition of indigenous peoples was not what international organisations wanted because of the risk that some groups could be excluded from the body of rights that was being created, it was a question of defining the minimum criteria so that the system of protection under international law could be implemented (Bellier, 2013, p. 16).

Other international bodies such as the International Labour Organisation (ILO) and the World Bank have also drawn up definitions of work. According to Fréderic Deroche, "an analysis of these definitions allows us to identify four main avenues for reflection": a) it is possible to see an evolution of the concept that reflects the abandonment of a "primitivist" conception that had prevailed until then; b) the prevalence of the notion of autochthonous (in French), indigenous (in English and Spanish); c) it is possible to identify the criteria recognised on the international stage, used to establish the definitions of labour common characteristics of these various groupings and d) the debate as to whether indigenous communities constitute peoples or minorities (Deroche, 2005, p. 48).

The abandonment of the "primitivist" conception can be seen in the process that led to the replacement of Convention 107 of 1957 by Convention 169 of 1989 at the ILO[4]. In 1957, one of the first official definitions in the UN framework was presented in Article One of Convention 107 *Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations of Independent Countries*[5]. Article 1 of Convention 107 stipulated that these populations have social and economic conditions corresponding to "a stage less advanced than the stage reached by other sectors of the national community". According to Deroche, it is possible to recognise in this stratum "the evolutionist and Eurocentrist conception" typical of 19th century thinking, which made indigenous populations the last representatives of a society at the previous stage of development, taking as a reference the model of development centred on the Western world. "This tendency can also be seen in the 'spirit' of the Convention's text, which envisages the integration of indigenous populations into the dominant society as the only alternative" (Deroche, 2005, p. 49).

Article 1 of ILO Convention 107 of 1957 refers to the socio-economic conditions of indigenous peoples at the time of conquest or colonisation; once again we find "the racist doctrine that supports the theory of a hierarchy of cultures and considers these

populations susceptible to evolution" (Deroche, 2005, p. 49). The use of the term "Semitribals"[6] in the title of Convention 107 translates, according to Deroche, "the idea that these groups progressively lose their 'sub-evolved' characteristics in contact with European civilisation" (2005, p. 49).

The emergence of the international indigenous movement as well as developments in the field of international law, especially after decolonisation, led "the ILO to recognise that the text of Convention 107 was no longer acceptable". Its integrationist vision was no longer in line with advances in international law and, from the 1980s onwards, it began to defend the idea that "indigenous peoples should have control over their economic, social and cultural development, interacting with national society in an equitable manner through their own institutions" (Figueroa, 2009, p. 20).

The evolutionist and integrationist concept disappeared from international doctrine and instruments in the 1980s. The study on discrimination against indigenous populations by the UN Rapporteur, Ecuadorian sociologist José Martínez Cobo, published between 1981 and 1983, played a key role in this process (Figueroa, 2009, p. 19). This study was so important for understanding the situation of indigenous communities that it contributed to a break with previous theories. This study led to a "long reflection on the criteria for identifying indigenous peoples" (Bellier, 2013, p. 17). From this study, it was accepted "that indigenous peoples have the right to be different not only culturally, but also in terms of political, social and economic organisation, and to be recognised as such" (Deroche, 2005, p. 49). After the publication of this study, Convention 107 became "highly criticised by indigenous peoples for its paternalistic and assimilationist nature" (Deroche, 2008, p. 16) and was finally replaced in 1989 by Convention 169.

ILO Convention 169 on Indigenous and Tribal Peoples, in its preamble, insists on "the particular contribution of indigenous peoples to the cultural diversity and social and ecological harmony of mankind and to international co-operation and understanding". Thus, recognising the value of cultural diversity, it goes on to condemn all forms of assimilation expressed in previous norms[7]. The term "populations" is no longer used in the new Convention; the term "peoples" is used instead. This change in terminology translates the shift from object to subject of rights. There was a strong mobilisation of

indigenous representatives and support organisations to make this happen within the UN and the aim was to reintroduce the indigenous person, not as an individual, but as a member of a people, a subject of international law. This debate lasted more than twenty years before the term "peoples" finally replaced the term "populations". This change in terminology also reflects the desire to establish new relations between states and indigenous peoples based on recognising and respecting cultural diversity (Deroche, 2005, p. 49).

An analysis of the terms used in the documents of these international organisations to refer to indigenous peoples reveals a preference for the expression "indigenous peoples". The main definitions use the following terms: autochthonous, indigenous, aboriginal and tribal groups. An etymological study shows that the English and Spanish languages use the same Latin root indigenae, "a term used to distinguish people born in one place from people who came from another place advenae"[8] in the expressions "indigenous peoples" and "pueblos indígenas". Indigenous, therefore, means a person originally from the country where they live. The French language uses the word autochthonous of Greek origin, which combines two words Khthon meaning "land" and autos meaning "proper to"; an autochthonous person "is one who has come from the very soil where he lives and who has not come to this place by immigration." In Australia, the term Aboriginal is used to refer to people from the country where they live. “The he semantic roots of these three terms are identical and have a common denominator: that of priority in time in relation to the occupation of a place” (Deroche, 2005, p. 50).

Convention 107 of 1957 uses the expression "tribal populations" and Convention 169 of 1989, "indigenous and tribal peoples". The term "tribal", according to the Aulete dictionary, means "living in a tribe", and a "tribe", according to this same source, is "a social group of the same ethnicity, living in community under the authority of one or more chiefs and sharing the same language and customs". According to the definition in Convention 107, "tribal" peoples are mainly characterised by their "distinctive social, cultural, economic, legal and institutional features". The only distinguishing factor between "tribal" and "aboriginal" refers to a past of "conquest and colonisation", but according to Erica Daes, this distinction has no practical consequence since the Convention guarantees exactly the same rights for these two categories.

What distinguishes "indigenous peoples" (or aborigines) from "tribal peoples" is therefore the historical element, i.e. the common ancestry of the former with populations that have undergone processes of colonisation or conquest. Convention 169 on Indigenous and Tribal Peoples of 1989, which replaced ILO Convention 107, maintained this distinction. The purpose of this distinction between indigenous and tribal peoples for the two ILO Conventions was to guarantee the inclusion of some groups that do not fit the criterion of common ancestry with the first inhabitants of a territory and who were at risk of being excluded from the set of rights guaranteed by the ILO Conventions, such as many peoples in Asia and Africa who have not experienced colonisation or settlement, as explained in the ILO Manual for Understanding Convention 169[9].

In the same manual, the ILO clarifies that Convention 169 does not define who indigenous and tribal peoples are, but only provides objective and subjective criteria for describing the peoples it aims to protect. The first identification criterion is subjective: awareness of their indigenous identity or self-identification. Article 1 of ILO Convention 169 states that "Self-identification as indigenous or tribal shall be considered a fundamental criterion for defining the groups to which the provisions of this Convention apply".

Martínez Cobo's study explains this criterion as follows:

> [...] from the point of view of the individual, the indigenous person is the person who belongs to an autochthonous population by self-identification (group consciousness) and who is recognised and accepted by this population as one of its members (group acceptance).[10]

According to Martínez Cobo, the use of the criterion of self-identification or group consciousness "emphasises the fact that the individual or group considers itself to be indigenous, or that the community in which the individual or group lives considers it to be indigenous, or that the notion of indigenousness derives from a set of personal and collective considerations. In other words, the subjective criteria of the person, group or community in question are taken into account."[11]. However, the rapporteur himself admits that this criterion has "all the drawbacks of purely objective considerations", since for this criterion the "accuracy of census results depends largely on the sincerity of the people questioned and their particular way of conceiving the elements at stake [...]". He explains

that it is common for some people to make mistakes or conceal certain things when it comes - as in the case of many indigenous peoples - to people who are part of a group that is in the middle of a census at the bottom of the economic and social scale and who do not want to express their true group consciousness.

The World Bank's Operational Directive 4.20 of 1991, which "describes the Bank's policies and procedures for processing projects that affect indigenous peoples" (Introduction, § 1), also mentions self-identification as one of the characteristics that identifies indigenous peoples:

> 5. Given the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous peoples are generally among the poorest segments of the population. They engage in economic activities ranging from nomadic agriculture in or near forests to wage labour or even small-scale market-oriented activities. Indigenous peoples can be identified in certain geographical areas by the presence, to varying degrees, of the following characteristics: (a) close ties to ancestral territories and natural resources in these areas; (b) selfidentification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) the presence of customary social and political institutions; and (e) production orientated primarily towards subsistence. (Emphasis added) (World Bank, OD420, 1991, p. 1).

It therefore seems indispensable that a definition of indigenous peoples takes into account the way they perceive and define themselves in relation to other groups. Each people must have the ability to determine, according to its own standards, who can belong to the group and must also have the right to accept and exclude such individuals[12]. It is possible to recognise in this criterion a manifestation of the right to self-determination, since indigenous peoples are recognised as having the ability to define who is autochthonous and who is not.

The criterion of self-identification was also considered fundamental in defining who indigenous peoples are by the representatives of these peoples themselves who were present at the 14th Session of the Working Group on Indigenous Populations, which took place at the same time in Geneva between 29 July and 2 August 1996. On this occasion, Erica Irene Daes, the UN Special Rapporteur who chaired the session, presented her working document on the concept of "indigenous peoples". The Chairperson-Rapporteur

insisted that the point of view of indigenous peoples' organisations and governments be taken into account in the work on this issue. The representatives of indigenous peoples presented a joint resolution on the concept and definition of indigenous peoples with the following text:

> We, the indigenous peoples present at the preparatory meeting of indigenous peoples, which took place on Saturday 27 July 1996 at the Ecumenical Council of Churches, reached a consensus on the issue of defining indigenous peoples and unanimously approved Resolution 1995/32 of the Sub-Commission. We categorically rejected any attempt by governments to define indigenous peoples. We also approve the report by Mr Martínez Cobo (E/CN.4/Sub.2/1986/7/Add.4) concerning the notion of 'indigenous'. In addition, we endorse the conclusions and recommendations of the Chairperson-Rapporteur, Mrs Erica Daes, set out in her working document on the concept of indigenous people.[13]

Many representatives of indigenous peoples spoke out during the 14th Session of the UN Working Group and stated that a universal definition of "indigenous peoples" was neither necessary nor desirable and that the criteria announced in Martínez Cobo's report and ILO Convention 169 were sufficient to determine whether a person or community was indigenous or not. They also stated that "the fact that indigenous people identified themselves as a separate people or community was a fundamental element that made it possible to determine who was indigenous" and that "the right to determine who they are without outside interference was an integral part of their right to be indigenous of their right to self-determination". They concluded that the denial of this right by states would perpetuate the oppression and colonisation of indigenous peoples.

The subjective criterion is therefore considered by both experts and the indigenous themselves to be a determining element in the definition of indigenous peoples, but it is not the only one. It must be complemented by other objective criteria: previous occupation of the territory or descent from the first inhabitants of a colonised territory; cultural specificity and the situation of marginalisation. These criteria that appear in Martínez Cobo's working definition were also emphasised by indigenous representatives from various parts of the world during the 13th and 14th Sessions of the UN Working Group on Indigenous Populations.

The second criterion includes, as an additional element to define "indigenous peoples", the historical factor according to which indigenous people are the "descendants of the original settlement of a territory before any colonisation process". The very etymology of the words autochthonous, aboriginal and indigenous translates this historical element (Deroche, 2008, p. 18). Martínez Cobo, in his aforementioned working definition, makes this historical factor an essential element in identifying who indigenous peoples are. Convention 169, in its first article (b), also defines indigenous peoples based on this criterion:

> b) peoples in independent countries who are considered indigenous because they are descended from populations who lived in the country or geographical region in which the country was located at the time of its conquest or colonisation or the establishment of its current borders and who, regardless of their legal status, maintain some or all of their own social, economic, cultural and political institutions.

Considering that groups have been dispossessed of their territories and have moved to cities or reserves, continuity with the first occupants of the territory is difficult to prove (Deroche, 2005, p. 55). Martínez Cobo explained that this idea of historical continuity is not restricted to the continuous occupation of a territory, but can be translated into many other elements:

> This historical continuity can consist of one or more of the following factors being maintained over a long, uninterrupted period: occupation of ancestral lands or at least part of these lands; common ancestry with the first occupants of these lands; culture in general or some of its manifestations (such as religion, life in a tribal system, belonging to an indigenous community, means of existence, way of life, etc.); language (whether it is used as the only language or as a mother tongue, or as the main, preferred, general or normal language).); the language (whether it is used as a single language, as a mother tongue, as a habitual means of communication in the home or family, or as the main, preferred, habitual, general or normal language); the implantation in some parts of the country or in some regions of the world; other relevant factors.[14]

During the debate on the concept of "indigenous peoples" at the UN, some delegations argued that the concept of "indigenous" would only apply in situations where the first inhabitants of the territory had been subjected to and physically dispossessed of their possessions by settlers from other countries, bearers of a foreign culture and values.

This situation corresponds to that experienced essentially by the indigenous peoples of America and Oceania. Rapporteur President Erica Daes considered, however, that this allegation was tantamount to making a distinction between aggressors who came from far away and aggressors who came from nearby regions. If the historical element that indigenous people are the descendants of the first inhabitants of the place is maintained in the definition of "indigenous peoples", it would end up excluding many autochthonous groups, mainly from Asia and Africa, for whom the processes of conquest and colonisation were different from America and Oceania. Many African states reject the claims of indigenous peoples, saying that in Africa the entire population is indigenous (Deroche, 2008, p. 18).

The third criterion to be considered is cultural specificity. Indigenous peoples are those who have cultural characteristics that are distinct from those of the dominant society with which they live (Deroche, 2008, p. 19). Article 1 of Convention 169 mentions "the social, cultural and economic conditions" that distinguish indigenous peoples from "other segments of the national community" and Article 5 states that

> a) the social, cultural, religious and spiritual values and practices of these peoples should be recognised and the nature of the problems they face, as a group or as individuals, should be duly taken into account;
>
> b) the integrity of the values, practices and institutions of these peoples must be respected.[15]

The World Bank's Operational Directive 4.20 also recognises the importance of certain cultural elements in characterising indigenous peoples, such as the "close ties to ancestral territories and natural resources in these areas", the "indigenous language, often different from the national language", the "presence of customary social and political institutions"; and a "production oriented primarily towards subsistence". As well as recognising that these are "social groups that have a different social and cultural identity from mainstream society", the directive understands that it is these specificities that make them "likely to be disadvantaged in the development process"[16].

The 1994 UN Draft Declaration, which in many ways is more detailed than the 2007 Declaration, also refers to the distinctive cultural characteristics of indigenous peoples. Article 12 establishes the right of indigenous peoples to observe and revitalise their

traditions and customs and to protect and develop their cultural manifestations such as "archaeological and historical sites, handicrafts, designs and models, rites, techniques, visual arts, performing arts and literature". Article 14 stipulates the right to use and transmit to future generations "their history, their language, their oral traditions, their philosophy, their writing system and their literature". And Article 25 guarantees the right of indigenous peoples "to preserve and strengthen the particular spiritual and material ties that bind them to their lands, territories, river and coastal waters and other resources". Similarly, the United Nations Declaration on the Rights of Indigenous Peoples (DDPI) in Article 5 establishes the right of indigenous peoples "to conserve and strengthen their own political, legal, economic, social and cultural institutions (...)" and in Article 25 emphasises the right of indigenous peoples to "maintain and strengthen their own spiritual relationship with lands, territories, waters (...)[17].

The particular spiritual and material ties that bind indigenous peoples to their territories are considered to be one of the main cultural characteristics that identifies these peoples. Erica Daes presented a working document specifically on this issue at the 53a Session of the UN Sub-Commission on the Promotion and Protection of Human Rights on 11 June 2001 under the title Indigenous peoples and their relationship with the land. She explains that of all the reports, statements and information submitted to the Working Group by representatives of indigenous peoples, the problems relating to land and resources stand out, and particularly the "dispossession of indigenous peoples from their lands" which appears as a "crucial and urgent" issue. Ever since the Working Group on Indigenous Peoples was set up, the representatives of these peoples "have not ceased to insist on this question of the fundamental nature of the relationship that binds them to their lands". According to the rapporteur, it is clear from the statements made by these representatives that this special relationship "has social, cultural, spiritual, economic and political implications and functions", that it has "a collective dimension" and that it has an "intergenerational aspect" that is "essential for the identity, survival and cultural viability of indigenous peoples"

According to Deroche, the fact that indigenous peoples do not have "a patrimonial view of the land as conceived by the dominant society" and that, for them, the land is not "susceptible to private appropriation", as well as having political and social structures based on solidarity and consensus and therefore different from the Western model

established on individualistic logic, should not, however, serve to associate them "with a particular way of life and fall into the trap of cultural immobilism" (Deroche, 2005, p. 56).

The fourth and final criterion is the situation of non-dominance and the marginalisation of most indigenous peoples around the world. The Discrimination Study Martinez Cobo places this element in his working definition. The World Bank's Operational Directive 4.20 recognises that "Indigenous peoples are generally among the poorest segments of the population" and that they are disadvantaged in the development process.

The situation of non-dominance of indigenous peoples is confirmed in the annual reports of the Working Group on Indigenous Populations. Indigenous representatives from various parts of the world have emphasised this by showing that indigenous people have a lower standard of living than the rest of the population, with "lower incomes, greater risk of unemployment, more restricted access to education, worse health conditions (...)" (Deroche, 2005, p. 57).

The criterion of non-dominance characterises indigenous peoples in international law. Thus, ILO Convention 169 in its preamble, paragraph 6, recognises that indigenous peoples in various parts of the world "are not able to enjoy their fundamental human rights to the same extent as the rest of the population of the States in which they live". The United Nations Draft Declaration on the Rights of Indigenous Peoples, in its preamble, paragraph 5, also states that the UN is concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms and that, among the consequences, they have been colonised and dispossessed of their lands, territories and resources, which has prevented them from exercising, in particular, their right to development in accordance with their own needs and interests.

In her working document on the concept of indigenous peoples, rapporteur chair Erica Daes emphasises four main elements for understanding the concept of indigenous peoples. She points out that the regional and national dimension of the concept of "indigenous" should not be ignored, and that the representatives of indigenous peoples who took part in the discussions insisted on the need to show flexibility and respect for the wishes and right of each people to define themselves. However, he believes that these

four elements make it possible, in practice, to verify the pretensions of a group whose legal character can be contested. The factors that international organisations and legal experts believe are relevant are:

> a) prior occupation and use of a specific territory;
>
> b) the voluntary perpetuation of a cultural particularism that can manifest itself in certain aspects of language, social organisation, religious and spiritual values, modes of production, laws or institutions;
>
> c) a sense of belonging to a group and recognition as a distinct community by other groups and national authorities, and
>
> d) the fact that they have been subjected to, marginalised, dispossessed, excluded or discriminated against.[18]

Regarding these four factors, Daes clarifies that "they do not and cannot constitute a general and exhaustive definition". They are simply factors that can be found, to a greater or lesser extent, in different regions and national and local contexts. As such, they can only provide some general indications for decision-making. According to Deroche, to illustrate this situation, it is enough to consider that in the Americas and the Pacific, it is the "original" character of the previous occupation of a territory and the historical continuity with the first inhabitants that is the fundamental criterion. In Africa and Asia, on the other hand, "the particular and 'original' way of life of some groups", which leads these groups to marginalisation, is the element that should be considered most pertinent (2005, p. 58).

From an anthropological point of view, each of these criteria would give rise to much discussion. For Bellier, "indigenous issues" mobilise elements other than prior occupation of a territory or cultural difference. Today, 50 per cent of indigenous people live in urban contexts, which represents a separate situation. Also, in many places, young people no longer think like their elders. These are facts and figures that further complicate understanding who indigenous peoples are (2013, p. 20).

With regard to the confusion between "peoples" and "minorities", we see that international and national instruments use the expression "indigenous populations", "indigenous peoples" or "indigenous minorities". Depending on the terminology used, the legal and political consequences are completely different. The term Population is more

neutral as it defines a group of individuals without considering the ties that bind them together. The term minority designates a "group in a position of numerical, ethnic, economic, cultural or linguistic inferiority in relation to the dominant groups which, more or less voluntarily, exclude them from participation in social life" (Deroche, 2005, p. 59). By comparing these definitions, it is possible to see that there are many commonalities between minorities and indigenous peoples. Minorities, like indigenous peoples, are in a position of non-dominance and represent a cultural difference that can be ethnic, religious or linguistic.

However, indigenous peoples are not always numerically inferior and, furthermore, even if minorities wish to retain a certain cultural particularism, they almost always want to be integrated into the dominant society and state structures, while indigenous peoples, for the most part, claim to retain their identity, their social and political organisation and to have their own development model. The main distinguishing factor is the historical element, descent from the first inhabitants of a territory, which is why indigenous peoples' main demand at international level is to be recognised as "peoples", subjects of collective rights and not just as "minorities".

Since the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007, the term "indigenous populations" has been progressively abandoned to be replaced by the term "indigenous peoples", which is increasingly used in UN documents. Terms such as "ethnicity" or "community" have also become rare on the UN scene. According to Irène Bellier, this confirms that even if the international instruments have not provided a precise definition of who "indigenous peoples" are, they do show the horizon of treatment to be given "to the problems that the international community recognises as specific" (2013, p. 30).

The debate on the notion of "indigenous peoples" at the UN shows that by appealing to international bodies to recognise their rights, indigenous peoples have reached a new level or "changed scale", as Bellier puts it (2013, p. 31). Little by little, they have managed to impose themselves as legitimate interlocutors with their respective states, in order to redefine the policies that affect them. By mobilising for the recognition of the political category of "indigenous peoples", they are not just trying to demonstrate that they are groups with their own organisational systems, but are "campaigning for equal

rights for all peoples" in the international community with the aim "of redefine their position with regard to the forces that organise states, that decide the conduct of public affairs and the rules that govern the social interactions of (and with) collectivities that have been historically marginalised (...)" (Bellier, 2013, p. 24).

After 2009 and 2010, the four countries - Canada, Australia, New Zealand and the United States of America - which, during the twenty-five years of negotiation for the approval of the UN Declaration on the Rights of Indigenous Peoples, stood out for their opposition, finally ratified the Declaration, which enshrined the expression "indigenous peoples" (Bellier, 2013, p. 14). Although the Declaration is universal in scope, it is necessary to consider how each country, according to the history of its relations with indigenous peoples, has accepted this new internationally approved legal category. The reception of the concept of "indigenous peoples", as developed by international law, is not just a question of "linguistic affirmation" (Bellier, 2013, p. 22), but may reveal the weight of the Declaration's legal status. 22), but it can also reveal the weight of a political and legal heritage, as in the case of Brazil, which, when examining the semantic tensions between the terms "Indians", "forest dwellers" and "communities" or "indigenous populations" within the national legal framework, reveals the divorce between the state that signed the 2007 Declaration, but which does not use the expression "indigenous peoples" in its political uses, and the indigenous organisations that use it in their demands.

2.2 The International Criminal Court: definition of Crimes Against Humanity and the Brazilian case

The International Criminal Court arose from the need to create a permanently recognised world body capable of judging crimes affecting the international community, such as genocide, crimes against humanity, war crimes and crimes of aggression. This conceptualisation will be of the utmost importance for what is intended later. This is because, in the last chapter, the accusation against Jair Bolsonaro will be debated.

The importance of the creation of an international criminal body can be observed by briefly analysing the history of humanity and necessary response to tragedies and horrifying actions in armed conflicts (Maia, 2001, p.45).

The Second World War was the fuse that was needed to proclaim, once and for all, the need to programme an international justice system independent of political positions. Even before the end of the conflict and the emergence of the United Nations Organisation, an agreement was signed at St James's Palace, setting up the United Nations War Crimes Commission (Maia, 2001, p.47).

This agreement, signed at St James's Palace, was insufficient, since it restricted its action to war crimes. As a result, it was prevented from acting in crimes against humanity, such as the Holocaust in the Nazi concentration camps (Maia, 2001, p.48).

In this context, the need to create an institution like the one mentioned above remained. As the creation of a criminal court involved controversial and delicate issues, commensurate with its importance, the negotiation was complex. It is worth noting the resistance to including crimes against humanity in the institution's remit. It is safe to say that making threats against humanity a criminal offence would most likely mean giving the institution great importance and extreme power. Not to mention the fact that this would mean opening up a wide range of semantics capable of putting conduct that is often carried out with state political support on trial.

The ICC Statute was the subject of arduous negotiations. This was because it was a multilateral convention, with the sole aim of creating a court with international legal personality, capable of concluding treaties with other subjects of international law (Maia, 2001, p. 61).

It's no surprise that the negotiation was very difficult, since it involved the interests of several countries, especially the major powers. The International Court would have a very big responsibility, since it would be responsible for judging crimes on an international scale. It was therefore understandable that countries were concerned about debating at length, for example, which crimes would fall under the jurisdiction of the ICC. It is also worth remembering that the configuration of this institution would undeniably mean a reduction in the power of countries, their sovereignty would be affected in some way, since crimes that were previously judged internally or went unpunished would now be judged by an institution other than the internal one.

Thus, in 1988, the Statute of the International Criminal Court was a milestone in the history of the international conjuncture with the main aim of putting an end to impunity, being a response to a long-standing lack on the part of the international community (Maia, 2001, p. 61). The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.

The Statute of the Criminal Court was a milestone because a large number of countries, despite their differences and divergences, opted to create a permanent body with a jurisdiction capable of judging international crimes. It was believed that punishing these crimes on an international scale would be a way of preventing them from happening again.

The Statute is made up of 128 articles divided into 13 parts, similar to the structure of the preliminary draft presented at the Diplomatic Conference, which was an important contribution to analysing the process of constructing the definitive text of the Statute (Maia, 2001, p. 63).

The Court was not set up by an ordinary treaty; on the contrary, it was set up by a *special treaty of a centrifugal nature*, and is therefore supraconstitutional in nature, its rules derogating from domestic law (Mazzuoli, 2011, p. 46).

This is an important aspect, placing the ICC in a higher hierarchical position than domestic norms, which is of great value, because if this were not the case, domestic norms could override the jurisdiction of the international criminal court, so that the institution would lose much of its effectiveness.

This means that centrifugal human law treaties or norms are those that have global (also called universal) jurisdiction. They are known as such because they leave the centre, i.e. the subject and the state are removed from the ordinary jurisdiction and are therefore taken to universal jurisdiction. These agreements are responsible for regulating situations that go beyond the limits of the domestic or regional sphere. With this in mind, it can be concluded that only the International Criminal Court today has universal jurisdiction, and therefore has supra-constitutional status in relation to state systems (Mazzuoli, 2011, p. 47).

Moreover, the International Criminal Court functions as an automatic court, diverging from international courts in general (International Court of Justice or International Court of Human Rights). Therefore, the ICC does not need any acceptance from the state that falls under its jurisdiction; it automatically takes action (Mazzuoli, 2011, p. 48).

It is worth making it clear that the *preamble* to the Statute shows that the Criminal Court is independent and remains within the United Nations, complementing national criminal jurisdictions. In this sense, the institution exists to prosecute and judge people who are accused of committing excessively serious crimes, capable of affecting the whole of international society (Mazzuoli, 2011, p. 51).

As a result, not just any crime will be judged by the International Court, as this would imply trivialising its jurisdiction. The institution focuses on extremely reprehensible crimes that sensitise the international community.

The Court will initially be made up of 18 judges, a number that may be increased at the proposal of its President. These judges will be elected based on their high moral standing, impartiality and integrity, and they must also fulfil the requirements to hold the highest judicial posts in their home countries. Therefore, in the case of Brazil, it would be necessary to fulfil the requirements of a candidacy at the Supreme Court in order to be able to run for a position as a judge at the ICC (Mazzuoli, 2011, p. 53).

Regarding the crimes within the jurisdiction of the Criminal Court, the ICC is responsible for the independent and permanent judgement of major crimes capable of affecting the international community. It is therefore possible to see that the ICC's jurisdiction is restricted to crimes of great magnitude for logical reasons arising from the very structure of the court.

> Thus, the final document of the Rome Statute has the merit of defining the crimes of genocide, crimes against humanity and war crimes. During the Conference of Plenipotentiaries, the crimes of aggression were not defined. (Maia, 2001, p. 84)

After the II World War, the typification of the crime of genocide was one of the greatest needs, which led to the United Nations General Assembly adopting Resolution 260-A (III) of the Convention on the Prevention and Punishment of the Crime of

Genocide on 9 December 1948, which came into force on 12 January 1951, stating that genocide was an international crime and the highest form of crime against humanity (Mazzuoli, 2011, p. 61).

Moreover, what will be specifically discussed in this research is *crimes against humanity*, an expression that must be interpreted according to its historical antecedents, namely the massacre carried out by the Turks against the Armenians in the I World War (Mazzuoli, 2011, p. 64), but it was only during the II World War that this issue gained greater weight, due to the catastrophes that occurred with the Holocaust.

According to the Rome Statute of the International Criminal Court, these crimes include acts such as murder, extermination, enslavement, deportation, torture, and persecution based on political, racial, or ethnic grounds (ICC, 1998). Unlike war crimes, crimes against humanity do not require a nexus to armed conflict, and they can be committed during peacetime, as long as they are part of a systematic policy. Their prosecution seeks to ensure accountability for gross human rights violations and to prevent future atrocities.

The case of Jair Bolsonaro, the former president of Brazil, has drawn significant attention regarding potential crimes against humanity during his tenure, particularly in the context of the COVID-19 pandemic. Bolsonaro's government has been accused of undermining indigenous rights, neglecting public health protocols, and promoting policies that disproportionately harmed vulnerable populations, especially indigenous communities in the Amazon. His administration's promotion of herd immunity, delay in vaccine distribution, and encouragement of unproven treatments like Ivermectin (González, 2021), coupled with the environmental devastation of indigenous lands due to illegal mining, may constitute a deliberate and systematic attack on specific populations, making these actions subject to scrutiny under international law.

The last chapter of this thesis will explore the case against Jair Bolsonaro in detail, analyzing whether the actions of his government meet the threshold for crimes against humanity as defined by the ICC. It will assess evidence of policies that led to the marginalization and harm of indigenous communities, drawing on legal frameworks and precedents in international criminal law. The discussion will consider how Bolsonaro’s

governance might fit into the broader context of human rights violations in Brazil, offering a critical analysis of potential accountability mechanisms (Carvalho, 2022).

CHAPTER III - INDIGENOUS RIGHTS IN BRAZIL

3.1 History of the Brazilian Indigenous rights

The indigenous peoples who have survived to this day, with all their woes, and who have generally experienced a significant demographic increase, are there to disprove the myth of the one-size-fits-all thinking.

While the unbridled expansion of the model imposed on the world by the West is a fact, it is also a fact that people are resisting and clinging to their own systems of values, the only ones that give meaning to everyday life in their local community.

When Europeans came into contact with the Amerindians, there was a legal debate in Europe about how to frame the new international relations in International Law. Numerous treaties were established between these parties and the kings of Portugal repeatedly stated in their laws that they had no jurisdiction over the indigenous peoples (Barbosa, 2006).

The autonomy of the indigenous peoples was emphasised in the legislation of the 17th century, especially in its second half. In the provision of 13 September 1663, the king declared that “the Indians, in temporal times, could be governed by their principal” (Barbosa, 2006). In fact, the charter of 1st April 1680 was the first explicit legal recognition by the Portuguese state of the territorial rights and autonomy of Brazil's indigenous peoples and is still invoked contemporaneously in defence of their rights.

Based on the Royal Charter of 1st April 1680 and the Law of 6th June 1755, João Mendes Junior, at the beginning of the 20th century, formulated the Brazilian theory of *indigeneity*.

Through the *indigenato*, instituted by the Charter of 1680, the indigenous right to land in Brazil is recognised as a special right, absolutely distinct from the right of any other citizen, and does not form part of the system relating to the rights of possession and

ownership provided for in the Civil Code, but constitutes an autonomous right, special and independent from the general system.

The São Paulo judiciary ruled that "indigenato has always been considered a congenital right and therefore legitimate in itself, not to be confused with occupation or mere possession. Indigeneity is the primary and congenital source of territorial possession, whereas occupation is an acquired title" (Barbosa, 2006).

With the Royal Charter of 1680 and the Law of 1755, therefore, the Portuguese state recognised that there was an original right of the Indians over Brazilian lands, which was imprescriptible, non-derogable, exclusive and derogatory from any other, including titles of *sesmarias* or other forms of concession made by the state. This right is not subject to any kind of taxation or confirmation, in other words, the title is the innate condition of being Indigenous.

Thus, it was established *de lege* in the colonial period, by provision of the central government, that the right of private individuals to land in Brazil would only be valid if there were no Indians on the land acquired, without considering whether the indigenous habitation was prior or subsequent to the title acquired by the private individuals.

> However, there should be no illusions about the charter of 1st April 1680 and the other laws that came to recognise indigenous rights, territory, freedom, autonomy and even sovereignty. It comes at a time in history when land grabbing was blatant and already in place. Although the legislation and social practice contradict each other, it can be said that, during the colonial period, the Portuguese Crown recognised the territorial rights, freedom and even autonomy and sovereignty of Brazil's indigenous peoples (Barbosa, 2006).

Of all the legislation in force in Brazil, the most important in terms of recognising indigenous territorial rights is certainly the charter of 1st April 1680, which established the indigenato. This charter was not revoked, neither in the Empire nor in the Brazilian Republic (Mendes Junior, 1912), and was incorporated into the Republican Constitutions, including the current one.

3.2 Indigenous territorial rights in the 1988 Federal Constitution

By stating that indigenous are recognised as having original rights over the lands they traditionally occupy, the current constituent legislator aimed to make it clear that the Brazilian state recognises indigenato, i.e. that indigenous territorial rights are pre-existing to the Brazilian state itself, hence the use of the expressions: *recognised* and *original* rights (Barbosa, 2006). Moreover, the indigenous right to land exists regardless of any question about occupation. It is not a question of possession, nor is it property. It's a congenital right. Indigenous people, just by being born indigenous, are born with the right to their lands.

In 1973, the main law on indigenous peoples' rights to date was published in Brazil: the Indigenous Statute, with the main aim of integrating all indigenous people into society. It is no coincidence that Article 1 of Law 6.001/73 (Indigenous Statute) states that: "this Law regulates the legal situation of indigenous or forest dwellers and indigenous communities, with the purpose of preserving their culture and integrating them, progressively and harmoniously, into the national community". Now, the intention of the Brazilian legislator at the time the statute was issued was to conceive the condition of being indigenous as something temporary and transitory, since, with over time, all indigenous people were supposed to integrate into the majority society, characterising what specialist doctrine calls the integrationist paradigm[19].

Thus, the members of the indigenous communities went through a process of cultural assimilation, to the extent that they were initially classified as non-integrated Indians and, in the course of this process, came to be called Indians in the process of integration and, finally, integrated Indians. It so happens that this situation reflected a colonising bias on the part of the majority society, which can no longer be accepted today; after all, the so-called theory of cultural relativity is in force in the globalised world, which advocates that there is no hierarchy between cultures and that it is impossible for one culture to be superimposed on another (Kayser, 2010).

Furthermore, being a member of an indigenous community is a question of cultural identity, which must be fostered, preserved and developed by all individuals, whether they are indigenous or members of the surrounding society.

Thus, with the advent of the 1988 Federal Constitution and the ratification of ILO Convention 169, Brazil adopted a multi-ethnic state model,

> no longer based on supposed homogeneity, guaranteed either by a perspective of assimilation, through which new tastes and habits are surreptitiously installed among the different ethnic groups, corrupting them and leading them to disown themselves by eliminating what is specific to their identity, or by forcibly subjecting them to invisibility (Pereira, n.d.).

Article 215, caput and §1, of the 1988 Federal Constitution is treated as a landmark of pluriethnicity in the Brazilian state, since it imposes on the state the obligation to guarantee everyone the full exercise of cultural rights, as well as the obligation to protect the manifestations of popular, indigenous and Afro-Brazilian cultures, and those of other groups participating in the national civilisation process. The provisions of ILO Convention 169 go in the same direction, as they recognise the right to be and remain indigenous for those who so wish and recognise themselves.

It is from this perspective, in the light of the 1988 Federal Constitution and ILO Convention 109, that the Law of Indigenous Peoples has made the paradigm of integrationism obsolete and is now governed by the paradigm of interculturalism.

Firstly, it is extremely important to emphasise the difference between so-called multiculturalism and interculturalism. Although both concepts recognise the existence and autonomy of different cultures, multiculturalism represents the multiplicity of cultures in a given place, while recognising the hegemony of the majority society over minority cultures, flirting with the phenomenon called *cultural cannibalisation* by Boaventura de Souza Santos (2008). Interculturalism, on the other hand, can be defined as contact and exchange between cultures on equal terms. It is important to emphasise that such contacts and experiences should not be viewed solely in ethnic terms, but also as a process of communication and permanent learning between people, groups, knowledge, values and traditions (Santos, 2008).

Thus, on the basis of an intercultural dialogue provided by the paradigm of human rights interculturalism, a large number of authors of specialised doctrine already recognise the nonreception of various provisions included in the Indigenous Statute, since a large part of the articles of Law n. 6.001/73 reflect the ideals of the integrationist paradigm, no longer conceived or tolerated after the advent of the 1988 Federal Constitution and the ratification of ILO Convention 109 by the Brazilian state[20]. Therefore, it was fundamental, in the paradigm shift that took place in the Law of

Indigenous Peoples, that members of indigenous communities ceased to be the object of tutelage and began to be seen as autonomous subjects of rights. However, this paradigm shift and the recognition of new rights for indigenous communities would never have happened if it hadn't been for the international human rights treaties and documents signed by the Brazilian state, as will be shown below.

Because of its allographic nature[21], law is currently going through a stage of conventionalisation, in which we are trying to interpret domestic rules in the light of international treaties. In the field of Indigenous Peoples' Law, the movement to interpret domestic rules on the basis of international treaties and conventions ratified by the Brazilian state is even stronger and more visible, given that the main rule on the subject in Brazil was issued more than forty years ago. It is clear that, with the passage of time, all domestic legislation becomes obsolete and must therefore be updated by the legislative branch. However, in the field of Indigenous Peoples' Law, the Brazilian legislator seems to have shown no interest or concern in correcting the asymmetries and gaps caused by the fact that the Indigenous Statute was enacted more than four decades ago[22].

As a result, law enforcers have no choice but to use the human rights treaties and conventions ratified by the Brazilian state to correct the asymmetries caused to the rights of indigenous peoples by the inertia of the Brazilian legislature. Thus, various international documents are often used by the courts in decisions involving the rights and interests of indigenous communities. Among the best known are ILO Convention 169 - the main international convention ratified by the Brazilian state on the rights of indigenous peoples, the American Convention on Human Rights, the UN Declaration on the Rights of Indigenous Peoples and the recent American Declaration on the Rights of Indigenous Peoples, the latter formulated by the Organisation of American States in 2016.

Therefore, in view of the Brazilian legislator's neglect of indigenous communities and based on the principle of maximum protection for indigenous people[23], it is possible to conclude that the movement to conventionalise Indigenous Peoples' Law is a path of no return, because Brazilian indigenous communities can’t be at the mercy of the majority group represented in the National Congress, otherwise they would authorise the asphyxiation of the minority group by the surrounding society.

For some time now, the use of language and semantic issues have ceased to be treated as perpendicular themes in the daily life of the interpreter of the law and have come to play an extremely important role in his activity. In his classic work Philosophical Investigations, the German Ludwig Wittgenstein developed the concept of language games, according to which the meaning of words should not be understood as something fixed and delimited, as a property that emanates from the linguistic utterance, but rather as something that linguistic expressions exercise in a specific context and with specific objectives. Therefore, for the philosopher, meaning can vary depending on the context in which the word is inserted and the purpose of this use (Wittgenstein, 1988).

Based on the idea of language games formulated by Wittgenstein, it is possible to see that language and the semantics of each word play an important role in the social context, as well as portraying the level of evolution of a given society as a result of the use of this or that word. Thus, language and semantic issues vary according to the conditions of time, place and culture, which is why the hermeneutics of Indigenous Peoples' Law must be reconstructed, guided by the experiences generated by interculturalism and based on the aforementioned movement to conventionalise the branch of law under study.

As a result of the effects of Intercultural Human Rights on Indigenous Peoples' Law, a series of words and expressions have become obsolete and should be removed from the daily vocabulary of those who deal with the subject.

Firstly, a distinction must be made between indigenous law and indigenist law. Indigenous law is law produced by the surrounding society, i.e. the Legislative Power, with direct and immediate application in the daily lives of indigenous communities; an example is the Indian Statute (Law No. 6.001/1973). Indigenous law, on the other hand, corresponds to the legal norms produced and applied by the indigenous community itself, such as indigenous customs and criminal sanctions. On the difference between indigenous law and indigenist law, Vitorelli reads:

> Technically, indigenist law is the appropriate name for the law produced by the dominant group that deals with the indigenous condition. The expression indigenous law is intended to designate the law produced by the indigenous group itself. In English, the first expression is referred to as indigenous law, while the second is called indian law (2016, p. 25).

Continuing to deal with indigenous intercultural grammar, one of the ways of referring to members of indigenous communities that should be promptly eliminated from the vocabulary of those dealing with the subject is the term "silvícola". According to the Portuguese Aurélio Dictionary, the word "silvícola" means "one who is born or lives in the jungle; savage." In this case, the very meaning of the word already shows a tone of prejudice towards individuals who are members of traditional communities; based on the Interculturalism of Human Rights and the radiating efficacy of the international human rights treaties signed by the Brazilian state, it is not up to the interpreter of the law to use a prejudiced and archaic expression. Furthermore, such an expression does not portray the current situation of Brazil's indigenous communities, since a large part of these communities have a relationship with urban life and speak Portuguese.

In relation to the indigenous community, the terms "tribe" and "village" should also be considered obsolete and excluded from the vocabulary of Indigenous Peoples' Law. These terms convey the idea that each and every indigenous community's modus vivendi is linked to primitive and undeveloped customs and practices, which cannot be taken as true. Furthermore, these terms convey the idea that members of indigenous communities are individually incapable, a fact that is also at odds with reality; recognising the civil incapacity of indigenous people simply because they were born into an indigenous community is a consequence of integrationism, an outdated paradigm in current Indigenous Peoples' Law.

Nor should it be seen as correct to use the term "acculturated" to refer to a particular indigenous person, since, having overcome the old paradigm of Indigenous Peoples' Law, it matters little whether or not a particular member of an indigenous community is involved with the predominant culture of the surrounding society.

The most damaging classification applied to Brazil's indigenous people, unfortunately still used in the Brazilian legal system, is the one that, based on the Indian Statute, differentiates indigenous people into isolated, in the process of integration and integrated. This is an obsolete classification, which was idealised based on the paradigm of integrationism, in other words, with the aim of giving the Indian a useful distinction by integrating them into the culture of the surrounding society. As has already been said, it is understood that, in the light of the 1988 Federal Constitution, such a classification

would not have been accepted, since, with the consolidation of the current Democratic State of Law, the classification in question would violate the very dignity of indigenous people. Unfortunately, this classification is still being used by the higher courts[24], although there are already decisions that classify such criteria as archaic, prejudiced and obsolete[25].

Another issue that is little debated, although it is not really a question of terminology or semantics, is the supposed "incapacity" of indigenous people simply because they are Indians; a notorious instance from which this notion emerges can be found in the Brazilian Civil Code, which calls into question the full civil capacity of indigenous people when it states in Article 4, sole paragraph, that: "The capacity of indigenous people will be regulated by special legislation."

With the advent of the Statute for Persons with Disabilities (Law No. 13.146/2015), the incapacity regime underwent a substantial change: currently, only minors under the age of sixteen are absolutely incapable. However, the Statute of Persons with Disabilities itself has maintained this, in the Brazilian Civil Code, the article that deals with the civil capacity of indigenous people. The special law referred to in article 4, sole paragraph, of the CCB is the Indian Statute, a piece of legislation devised in the light of the obsolete and prejudiced integrationist paradigm, as already mentioned in this article. Article 9 of this law stipulates that, in order for the Indian to be considered capable of carrying out the acts of civil life normally,

> [...] may apply to the competent court for their release from the guardianship regime after fulfilling the legal requirements, which are: to be at least 21 years old; to know the Portuguese language; to be qualified to carry out a useful activity in the national community; and to have a reasonable understanding of the uses and customs of the national community (Art. 9, Law No. 6.001/73).

Thus, in the light of the principle of equality laid down in Article 5, caput, of the Federal Constitution of 1988, together with the constitutional and conventional provisions already mentioned, it is possible to conclude that the rules on indigenous (in)capacity laid down in the Indian Statute violate the international human rights treaties on the subject, as well as not having been accepted by the Federal Constitution of 1988 itself, and that the general rules on (in)capacity laid down in the Brazilian Civil Code should be applied to members of indigenous communities.

But all is not lost. As a way of providing an intercultural dialogue on human rights, Boaventura de Souza Santos proposes what he calls diatopic hermeneutics, which, in short, consists of a mutual understanding of the different universes of meaning of the cultures involved in the dialogue, so as to achieve the universality of human rights constructed by different cultural conceptions. The main objective of diatopic hermeneutics is to make the interpreter of the law as aware as possible of the incompleteness that exists in all the world's cultures, proposing a dialogue that develops with one foot in one culture and the other in another, creating a true intercultural dialogue (Santos, 2008, p. 3). Thus, it is on the basis of this idea formulated by the Portuguese sociologist that the current intercultural grammar of Indigenous Peoples' Law should be conceived, given that the standards and terminology used in this branch of law should not be imposed by the surrounding society, but conceived on the basis of an intercultural dialogue between the majority society and the indigenous communities.

Thus, using the concept of diatopic hermeneutics as a starting point, the expressions mentioned above should be excluded from the intercultural grammar of Indigenous Peoples' Law, and the interpreter of the law should use the expression "indigenous" to refer to the member of an indigenous community, and the designations "community", "people" or "group" to refer to the collectivity of Indians[26].

3.3 The consequences of Interculturalism in Indigenous' People law

The first and best-known consequence of the Interculturalism of Human Rights in the Law of Indigenous Peoples is the right to self-recognition. According to Article 2(I) of ILO Convention 169, it is up to the indigenous community itself to decide who is or is not indigenous. It is not up to the dominant society, outside that culture, to decide who is or is not indigenous, but only to the individual and the group of which they claim to be a member. This is because there is no one better than the members of the traditional community themselves, who are already part of that culture, to recognise their fellow human beings. This is the so-called criterion of self-attribution of identity, also known as self-definition or self-recognition. Sarmento explains the benefits of the self-recognition criterion:

> This is an extremely important criterion, since it is based on the correct assumption that, in defining ethnic identity, it is essential to take into account the perceptions

> of the subjects themselves who are being identified, otherwise ethnocentric or essentialist readings by external observers from another culture, often full of prejudice, will be chancelled. The basic idea, which can be traced back to the principle of the dignity of the human person, is that in defining identity there is no way of ignoring the view that the subject of the law has of himself, otherwise serious arbitrariness and violence, whether concrete or symbolic, will be perpetrated (2010, p. 302).

In the same vein as ILO Convention 169, Article 2 of the Quilombola Statute expressly recognises the criterion of self-recognition as the formula used to define who should or should not be considered a quilombola[27]. Furthermore, the higher courts are beginning to recognise the criterion of self-recognition as the best way to assess who should or should not be considered a member of an indigenous community[28].

Thus, the obsolete and prejudiced criteria established by the Indian Statute, in which it was left to members of the surrounding society to decide who would or would not be "categorised" as indigenous, was set aside.

A second consequence of the influence of Human Rights Interculturalism on the Law of Indigenous Peoples was the recognition of the right to self-determination of indigenous peoples as a cogent norm. In this vein, the preamble to the UN Declaration on the Rights of Indigenous Peoples provides for the right to self-determination of indigenous peoples, stating that "nothing in this Declaration may be used to deny any people their right to self-determination, exercised in accordance with international law."

It was after the paradigm shift in Indigenous Peoples' Law that these communities began to effectively enjoy the right to self-determination, which, in the words of Albuquerque, can be defined as:

> [...] a right as a set of socially recognised rules, norms, standards and laws that guarantee certain peoples, segments or social groups the power to decide their own way of being, living and organising themselves politically, economically, socially and culturally, without being subjugated or dominated by other groups, segments, social classes or peoples foreign to their specific formation (2008, p. 148).

The United Nations divides the right to self-determination into two facets[29], which are external self-determination and internal self-determination. While the former

corresponds to the guarantee of not suffering foreign domination, the latter includes the right to self-government and to preserve one's cultural and linguistic identity.

Specifically on the recognition of indigenous peoples' right to self-determination, Anjos Filho explains that “there is no doubt about the fact that indigenous peoples have the right to self-determination, which is necessary to broaden their possibilities of choice and to increase the well-being of all their members” (2013).

Thus, the self-determination of indigenous communities, a right provided for in the aforementioned UN declaration, corresponds to the social organisation set out in article 231, caput, of the 1988 Federal Constitution[30]. Furthermore, this right must be understood as a grant of autonomy to indigenous communities, and not from the perspective of sovereignty, since the right to self-determination of indigenous peoples does not grant them the right to secede[31]. Therefore, the autonomy referring to self-determination is internal in nature, and its content is fulfilled by both territorial autonomy (indigenous land is demarcated land and different from nonindigenous land) and cultural autonomy, since indigenous society has the right to possess its own culture, regardless of the predominant culture in the surrounding society. Therefore, it is the indigenous peoples' right to self-determination that ultimately leads to the construction of a right to social differentiation, popularly known as the "right to be different"[32].

It is therefore fair to conclude that the right to self-determination is one of the great achievements of the recent history of indigenous communities, which aims to protect these peoples from colonial rule and domination by the surrounding society. Furthermore, to deny indigenous communities the right to self-determination would be inconsistent with the current state of international human rights protection, which guarantees indigenous peoples various rights, such as freedom, equality, the right to development, the right to cultural and linguistic identity, among others (Albuquerque, 2008).

The third and the most important consequence of the Interculturalism of Human Rights in the Law of Indigenous Peoples is precisely the famous right to consultation.

According to Article 6 of the ILO Convention 169, the main normative instrument for traditional communities at international level, indigenous communities have the right

to consultation and participation before the imposition of any type of public policy that could affect them.

Although the Brazilian Federal Supreme Court does not recognise the absolute obligation of the right to consultation with indigenous communities, the jurisprudence of the Inter-American Court of Human Rights takes a different view, even establishing a procedural iterary to be followed in applying this right. Firstly, the consultation must be prior, that is, the act of consultation must be carried out before any public policy is imposed that could affect the members of the indigenous community. Next, the consultation must be free, after all, the members of the indigenous community must express their will freely and unhindered, and cannot be coerced at the time of the consultation. Finally, the consultation must be informed, i.e. carried out in good faith.

In this way, the act of consultation must be culturally situated so that the members of the indigenous community understand the issue at stake. In this way, the act of consultation must be culturally situated, so that the population of the indigenous community can internalise the controversy that needs to be resolved. On the procedural iterary of the right to consultation, Pereira reads:

> This consultation therefore presupposes the control of these peoples over their existence, and the expectation that, eventually, external actions will be projected onto it. Consultation must be prior ('whenever they are foreseen'), well-informed (conducted 'in good faith'), culturally situated ('appropriate to the circumstances') and aimed at reaching agreement or consent on the proposed measure (2016, p. 179).

Along the same lines, the role of the Public Prosecutor's Office as a supervisory agent in this procedural process of the right to consult indigenous communities is extremely important; after all, the right to consultation is a duty of the state and not an obligation of indigenous communities. Therefore, in addition to filing public civil actions in the judicial sphere, extrajudicial instruments such as the civil enquiry, the conduct adjustment agreement, the administrative procedure and the preparatory procedures can be used by the ministerial agent as an instrument for monitoring and realising the right to consultation. Regarding the role of the Public Prosecutor's Office in monitoring and implementing the right to consultation with indigenous communities, Mattos writes:

> In this regard, given the certainty that consultation is a right enshrined in the country's legal system and, at the same time, an instrument aimed at implementing participatory democracy in relation to indigenous communities, it is up to the Public Prosecutor's Office (state or federal) to demand that it be carried out whenever there is an intention to carry out any administrative or legislative act that may affect these peoples, ensuring that all its characteristics are fully observed (2015, p. 116).

Still on the right to consultation, the Inter-American Court of Human Rights differentiates between consultation and consent. The duty to obtain the consent of indigenous communities is required in the event of major undertakings that could lead to the loss of indigenous territory or significantly jeopardise the indigenous community's relationship with its land, which in this case includes access to the fundamental resources that foster the existence of the group and its cultural traditions. The duty of prior, informed and good faith consultation, on the other hand, is necessary in the case of events that do not involve the loss of indigenous land or significantly jeopardise the traditional community's relationship with its land[33].

Furthermore, the right to consultation provided for in ILO Convention 169 and widely debated in national and international jurisprudence should not be confused with the situation known as the "constitutional hearing" provided for in art. 231, § 3, of the 1988 Federal Constitution, which consists of the situation in which the National Congress hears from indigenous communities as a prerequisite for authorising or not a hydroelectric or mining project that takes advantage of their natural resources[34].

It is therefore imperative to conclude that the right to consultation is an important instrument for democratising public acts and policies that involve the rights and interests of indigenous communities, encouraging the active participation of their members and serving as a way of combating so-called *environmental racism*[35].

Based on the perspective set out in this chapter, there is no doubt about the importance of international human rights treaties and documents in Indigenous Peoples' Law, since it was through the conventionalisation of this branch of law that indigenous communities and their members came to be seen as autonomous subjects of rights and not as mere objects of protection, effectively consolidating the transition from the integrationist paradigm to the intercultural paradigm. Thus, it is possible to conclude that

the current stage of protection for indigenous peoples is a path of no return, as the bundle of new rights won by indigenous communities is increasingly consolidated in the Brazilian legal system.

CHAPTER IV - ALLEGATIONS OF CRIMES AGAINST HUMANITY IN BOLSONARO'S COVID-19 RESPONSE

4.1 Brazilian policies to protect Indigenous people from the pandemic

According to the NGO Survival Brasil (2021), the first indigenous death dates back to March 2020, when an 87-year-old woman died. According to the Articulation of Indigenous Peoples in Brazil (2021b), around 60,000 indigenous people had been contaminated by the end of 2021, and around 1,200 had died as a result of COVID-19, of which 13,801 had been contaminated by June 2020, resulting in the death of 493 members of these peoples, even at the beginning of the pandemic, when the helplessness of these peoples was gigantic. (Socioambiental, 202-)

Faced with the proliferation of the virus around the world, in January 2020, the Special Secretariat for Indigenous Health (SESAI) produced information note no. 2/2020-COGASI/DASI/SESAI/MS making recommendations on how to avoid possible transmission of the virus. Despite this, it turned out that despite being published, it wasn't really effective, since it wasn't even enough to raise awareness among the secretariat's own employees, since they ended up becoming part of the spreaders of the disease among army soldiers who were on missions in indigenous territories. However, another group that contributed to the infection of the indigenous people were people who shouldn't even be on their lands: gold miners, loggers and other invaders of indigenous lands. (Articulação Dos Povos Indígenas No Brasil, 2020a, p. 10-11, p. 22-23)

In March 2020, the Special Secretariat for Indigenous Health drew up the Preliminary National Contingency Plan for Human Infection by the new Coronavirus (COVID-19) in Indigenous Peoples, which defined the levels of response, as well as the command structure to be organised, in order to guide the actions of the Ministry of Health in responding to the possible public health emergency, so as to seek coordinated action within the SUS..

Later that year, in April, SESAI produced Technical Note No. 21/2020-COGASI/DASI/SESAI/MS (Brasil, 2020c), providing guidance to professionals at the Indigenous Health Houses (CASAI) of the 34 Special Indigenous Health Districts, as well as the National CASAI, on measures to prevent and control the COVID-19 pandemic, in addition to a strategy, called the Indigenous Primary Care Unit (UAPI), which had the mission of strengthening indigenous primary health care services in the care of the indigenous population covered by the DSEIs for COVID-19, respecting their cultural specificities. In August of that year, an updated and corrected version of the health protocol for entry into indigenous territories for indigenous health workers working within the Special Indigenous Health Districts (Brasil, 2020e).

Despite the production of various documents by that secretary, in practice, there was no effective application that generated results, in fact, it ended up characterising inertia on the part of the executive branch, which would be characterised by the omission to produce feasible and concrete plans aimed at protecting the indigenous peoples, since the acts promoted by the government up to that point were unsuccessful in fulfilling the duty to protect the protected peoples, a fact demonstrated by the growing number of infections and deaths at that time, according to data from SESAI itself. (Socioambiental, 2021)

In addition, another body responsible for their protection would be the National Indian Foundation (FUNAI), which, shortly before the start of the pandemic in Brazil, had cut off the supply of basic food baskets to these peoples, which, according to indigenous leaders, had a high potential to generate malnutrition, and added to the known invasions of the territories of these peoples, These issues were mentioned in one of the speeches made by Alberto Terena, an indigenous leader, before the legislative assembly of Mato Grosso do Sul, "In the community we have a whole generation that needs to dream together with their parents, that's why the land issue is so important, as well as the resumption of the redistribution of the baskets because the families suffer a lot" (2020).

Later, in the midst of the pandemic, Funai published Normative Instruction 9/2020. - responsible for authorising non-indigenous people to remain within indigenous territories with already known boundaries, even negotiating real estate (Socioambiental, 202-) - and then, when emergency resources were being distributed across the country,

even though it received more than 11 million reais as emergency resources for the protection of indigenous peoples, it spent less than half, around 39%, during the critical period from 7 April to 17 June (Atoji, 2020). Thus, it is clear that there were not only omissions, but also commissions, which resulted in the worsening of the situation of the indigenous peoples.

In view of this situation, on 29 June 2020, with the aim of guaranteeing indigenous health, in the face of infection by the New Coronavirus, in an effective and necessary way, guaranteeing above all the basic right to existence for these peoples, six political parties PCdoB, PDT PSB, PSOL, PT and Rede joined the Articulation of Indigenous Peoples of Brazil (Articulation of the indigenous peoples of brazil, 2020a).

After that, some other actions dealing with indigenous health, in the context of the COVID-19 pandemic, were also the preparation of guidelines, in order to inform about the sanitary and technical measures for the teams that work in the sanitary barriers, such as the one made, through Informative Note No. 14/2020-COGASI/DASI/SESAI/MS, of 10 August 2020 (Brasil, 2020a, p. 1-4).

In addition, in 2021, letters were issued by SESAI, such as Circular Letter No. 3/2021/COGASI/ASI/SESAI/MS, dated 6 January 2021 (Brasil, 2021c), which, in turn, sent information to the Coordinators of the 34 Special Indigenous Health Districts about planning to vaccinate against COVID-19.

Returning to FUNAI, in 2021, among other things, it produced FUNAI Resolution No. 4, of 22 January 2021 (Brasil, 2021b), which revised the specific hetero-identification criteria to be observed by the foundation, seeking to improve the protection of the indigenous population, for the implementation of public policies, but in practice, limiting self-declaration as indigenous and adding unprecedented criteria for thus identifying oneself and, consequently, hindering the access of those communities to public policies, especially health policies.

Finally, with regard to other institutions, it is worth mentioning the creation of the Technical Report Framework - The 6th distribution agenda, of 2nd March 2021, by the Ministry of Health itself, which dealt with the national plan for the operationalisation of vaccination against COVID-19, covering technical guidelines regarding the continuity of

the national vaccination campaign against Covid-19 and, more recently, also the drafting of Recommendation No. 004, of 30th March 2021, (BRASIL, 2021a), by the National Health Council, which suggests possible actions related to the health care of vulnerable populations in the context of the pandemic.

4.2 ADPF 709

ADPF 709 began with its distribution, in July 2020, to Justice Roberto Barroso. The action in question had as its object a set of actions and omissions by the Public Power, with regard to combating the pandemic by COVID-19, which would culminate in a high risk of contamination and extermination of indigenous peoples, as well as a violation of the dignity of the human person, the rights to life and health, as well as the right of indigenous peoples to live in their respective territories, in accordance with their culture and traditions, as provided for in Article 231 of the Federal Constitution.

According to the plaintiffs, native peoples were subject to immunological, social and political vulnerability, resulting in, according to APIB, a mortality rate of 9.6 per cent compared to 5.6 per cent for the rest of the population due to COVID-19 and the rapid expansion of contagion (Articulação dos povos indígenas do brasil, 2020a, p. 5). Some of the acts The omissions and commissions of the state cited were the failure to contain or remove invasions of indigenous lands; poorly structured actions by the federal government in terms of health, since they sent professionals who did not comply with quarantine or other preventive measures before coming into contact with those peoples; as well as the decision by FUNAI and SESAI to provide assistance only to peoples living on homologated indigenous lands, which would result in the imminent risk of an indigenous genocide resulting from inaction or inappropriate actions by the government and justified the request for a precautionary measure for that action.

One of the notable facts of the decision on the precautionary measure in the action for breach of fundamental precept ADPF No. 709, was the recognition of the active legitimacy of APIB, a civil society entity, as a nationwide class entity, which had a limited definition by the Supreme Court, but which, given the reduction in opportunities for the Court to act in the protection of fundamental rights, was overcome, revolutionising the list of legitimate parties to bring a constitutional control action. (Eloy, 2020)

The institution in question is relevant because it is the voice of the Brazilian indigenous movement, not least because it was created by the movement itself at the 2005 Terra Livre Encampment, a movement responsible for creating national and annual mobilisations since 2004 in order to draw attention to the indigenous cause and make demands on the state so that their demands and claims are met. (Articulation Of Brazilian Indigenous People, 2020)

It is also described as a national reference for the indigenous movement and was created from the bottom up. It is the union of various regional indigenous organisations and was set up to help strengthen the unity of these peoples, coordinate organisations between regions and mobilise indigenous peoples and organisations against any threats or attacks on the rights of indigenous peoples.

Returning to the ADPF, Justice Barroso analysed the indigenous demands in the context of various statements made by the President of the Republic showed government resistance to realising indigenous rights. However, he emphasised the fact that there were records of the Armed Forces working in partnership with the Ministry of Health and the Ministry of Justice, which showed that these bodies were making an effort to tackle the indigenous issue. Even so, given the preventative nature of a request for an injunction, it should be considered that the information was expected to be incomplete, so in order to preserve life, the injunction was granted, but only partially (Brasil, 2020f, p. 14).

The precautionary orders, which were later upheld by the court, were the inclusion in the Covid-19 Confrontation and Monitoring Plan for Indigenous Peoples of an emergency measure to contain and isolate the invaders from the indigenous communities or an alternative measure to avoid contact; the extension of the provision of SESAI services to indigenous people from non-approved lands; as well as the partial granting of the request to extend these services to indigenous people living in urban areas, since it was determined that they should only be extended to urban indigenous people unable to access the general SUS (Brasil, 2020f, p. 26, 34).

As for the request that a COVID-19 coping plan for indigenous peoples be drawn up and monitored, this was also only partially accepted, ending in a determination that the Federal Government formulate, within 30 days, a COVID-19 coping plan for Brazilian indigenous peoples and that health barriers also be created in order to avoid

contagion between those peoples and people from outside those territories, as well as the creation of a Situation Room. (Brasil, 2020f, p. 20, 33, 34)

On 29 July 2020, the Federal Government presented the "Health Barrier Plan for Isolated and Recently Contacted Indigenous Peoples" and the APIB, PGR, DPU and CNJ were summoned to comment on the content of the plan, so that the consensus was that it was an incomplete, confusing, generic plan and, therefore, should be complemented, the STF then accepted this suggestion and also requested information on compliance with the precautionary order to extend SESAI's service. (Brasil, 2020i, p.1-3)

Then, on 14 August 2021, the second version of the plan was presented, which attempted to incorporate comments and suggestions, as well as determining the adoption of measures to assist indigenous people on non-approved lands. This version has also been criticised, but there has been a great deal of progress, with only a few new determinations, mainly focused on defining and prioritising the most appropriate measures areas of greatest risk, in order to start implementing the health barriers as soon as possible. In addition, with regard to the issue of indigenous people on non-approved lands, the main determination was related to identifying the areas for the sizing of teams and supplies, and finally the health barrier plan was partially approved, with measures remaining to be taken for full compliance with the precautionary measure. (Brasil, 2020j, p. 1-3)

Also in August, the Federal Government presented the first version of the Plan for Coping with and Monitoring COVID-19 for Brazil's Indigenous Peoples. The opinions of APIB, CNDH, FIOCRUZ, the Federal Public Prosecutor's Office and the Federal Public Defender's Office were convergent in the conclusion that the plan presented by the Federal Government did not incorporate the suggestions made by the participants in the Working Group; In addition, there was a refusal to present the epidemiological data essential to understanding the evolution of the epidemic, on the grounds that it would preserve the rights of indigenous people, which was considered inconsistent, since it was enough to suppress the identification of patients. Furthermore, it was concluded that the plan focussed more on narrating facts that had occurred than on planning future actions and that, among other criticisms, in short, it was a generic plan, culminating in the

determination that a new version be drawn up and that the missing data be provided. (Brasil, 2020h, p. 1-10)

In September 2020, a decision was published on the analysis of the second version of the health barrier plan, which, after corrections, showed surprising progress compared to the first version, having made effective progress (Brasil, 2020g, p. 1-13). However, this was not the case with the General Plan for Coping, which found it very difficult to make progress, since according to statements by ABRASCO and FIOCRUZ, APIB, the PGR, the DPU and the CNJ, the new version remained unsatisfactory, since it did not respond to previous suggestions and insisted on the same errors, resulting in the non-approval of that version and the determination to draw up a new plan, by means of a decision on 21/10/2020.

In November 2020, the third version of the COVID-19 Coping and Monitoring Plan for Indigenous Peoples was presented, however, before the other party's statement, APIB contacted the STF denouncing that the Federal Government had failed to put sanitary barriers in place on some of the indigenous lands, and an extraordinary meeting of the Situation Room was called for immediate implementation and clarification was requested on the Federal Government's failure to comply with a court order.

Then, on 18 December 2020, the third version of the aforementioned plan was finally submitted, which was again labelled as generic and assessed as insufficient and unfeasible, resulting in the denial of approval.

The following year, in March 2021, the Oswaldo Cruz Foundation (FIOCRUZ), the Brazilian Association of Collective Health (ABRASCO), the Articulation of Indigenous Peoples of Brazil (APIB), the Attorney General's Office (PGR), the Federal Public Defender's Office (DPU), the National Council of Justice (CNJ) and the National Council of Human Rights (CNDH) expressed their views on the fourth version of the General Plan to Combat COVID-19 for Indigenous Peoples (General Plan), presented by the Federal Government, in such a way that most of the criticisms remained; however, although minimal, progress was made in terms of complying, albeit partially, with the court's previous orders.

According to Justice Roberto Barroso's analysis, there is a "profound disarticulation on the part of the bodies involved" (Conselho Indigenista Missionário, 2021), and FUNAI's insistence on making differentiations, already prohibited by the court, is criticised, hetero-identification as the criterion for defining indigenous people, when it had already been determined that self-identification was the criterion, which, even after the aforementioned decision, was not adopted by the institution, which even produced a resolution to the contrary, greatly harming members of indigenous peoples. Barroso attributes the other difficulties to a supposed managerial collapse, rather than to resistance to complying with the orders (Brasil, 2021d, p. 6).

However, faced with a situation of extreme precariousness and urgency, he decided on partial homologation, excluding, however, the part that deals with the isolation of invaders, and also determined various measures with the aim of fixing the structural problems of the plan presented, with effect from the date of homologation. Finally, it should be noted that an addendum to the petition was accepted, requesting that indigenous people from lands that had not been ratified be prioritised for vaccination, since, in his words, there is no more essential and inherent measure. (Brasil, 2021d, p. 1-18)

Then, in June 2021, several members and amicus curiae requested that the Court grant an incidental provisional injunction, due to the escalation of violent conflicts and rights violations involving the indigenous lands that are the subject of this ADPF, which was partially granted, ordering the Federal Government to immediately adopt all measures necessary to protect the life, health and safety of the indigenous populations inhabiting the Yanomami and Mundurucu Indigenous Lands, in the face of the threat of violent attacks and the presence of invaders, and should deploy all the personnel necessary for this purpose, so that they remain in place as long as this risk is present, a decision that was upheld.

Finally, later that month, in Petition 43.906/21, the Union requested the submission of the Fifth Version of the General Plan to Combat COVID-19 for Indigenous Peoples and the Governance and Monitoring Plan, but these were considered to be disconnected from the previous version and out of place. As a result, the fourth version of the general plan was kept and the monitoring plan was dispensed with, instead using spreadsheets and reports for this purpose.

4.3 Law No. 14.021 of 2020

On 8 July 2020, President Jair Messias Bolsonaro published in the Official Gazette the sanction of Law 14.021 of 7 July 2020, with the veto of 22 items. Among the vetoed points, the biggest criticisms are those that provided for access to drinking water, hygiene materials, hospital beds and mechanical respirators for the villages. The text of the law, according to Agência Senado (2020), proposed creating these:

> Emergency Plan to Combat Covid-19 in indigenous territories, with health and epidemiological surveillance measures to prevent contagion and the spread of the disease. In addition to isolated or recently contacted villages, the law applies to individuals living outside demarcated lands and to indigenous peoples from other countries who are in Brazil in a situation of temporary migration.

The aim was to ensure that groups in situations of extreme vulnerability and high risk had access to prevention, treatment and recovery. According to the text, the Federal Government would have the mission of coordinating the actions carried out in the states, as well as in the Federal District and municipalities, with the effective participation of indigenous peoples.

The President's vetoes had the greatest impact on six of the provisions for community access to certain services, including the provision of free, urgent and periodic universal access to drinking water; free distribution of hygiene, cleaning and surface disinfection materials; emergency provision of hospital and intensive care unit (ICU) beds; and the purchase of ventilators and ventilator machines; blood oxygenation; distribution of information materials on covid-19; and internet points in the villages (Agência Senado, 2020)

That said, there has been a fierce and in-depth criticism of Jair Bolsonaro's denials, which have a direct impact on indigenous protection, facts that corroborate the thesis of the existence of an anti-indigenous and even genocidal policy, according to some critics. Consequently, days after approving the bill with its vetoes, Congress overturned 16 of them, guaranteeing the supply of drinking water, hygiene and cleaning materials, hospital beds, ICUs, as well as information materials for indigenous territories and also the veto related to mechanisms that sought to facilitate access to emergency aid for the populations included in the law. However, among the vetoes maintained, the one relating to creating

an obligation for the Federal Administration to distribute food baskets to indigenous peoples stands out, since according to the argument, there are already projects with this objective. In addition, the veto on the specific agricultural credit programme for indigenous peoples and quilombolas was maintained and the proposal to create a budget allocation for the actions provided for in the bill was denied.

Finally, it is also important to mention Law No. 14,160 of 2 June 2021, enacted by the President of Congress, Rodrigo Pacheco, which is valid until 31 December and deals with the establishment of sanitary barriers in indigenous territories in order to prevent the spread of the New Coronavirus in these populations.

4.4 The analysis of the Chamber of Indigenous Populations and Traditional Communities of the Federal Public Prosecutor's Office

On a note produced by the 6CCR/MPF (6th Chamber of Indigenous Populations and Traditional Communities of the Federal Public Prosecutor's Office) on 14 April 2021, which aimed to analyse the federal government's measures over the last year and how they impact traditional peoples, multiple setbacks in indigenous policy were pointed out]. (Ministério Público Federal, 2021). Amongst the criticisms, a relevant section listed some of the main violations:

> The failure to realise the demarcation of indigenous lands, the dismantling of the National Indian Foundation and the failure to adopt public policies in times of pandemic make up a picture of unprecedented violations in the current constitutional order. (UOL, 2021)

The afore mentioned excerpt refers to the reiteration of actions by the Executive Branch during Jair Bolsonaro's government to draw up a series of measures and normative acts that would prevent FUNAI from fulfilling its institutional mission. Among other examples was a provisional measure issued on the first day of the government, which, according to the Federal Public Prosecutor's Office, would empty the attributions of that body and submit such issues to the interests, especially of the agriculture portfolio, as well as the consequent vacuum of demarcations of indigenous lands, since the beginning of this government. It should also be noted that at the beginning of 2019, there was a proposal to abolish the Special Secretariat for Indigenous Health, a measure that was fortunately reversed due to the strong reaction of the indigenous movement. However, it

still ended up costing the SESAI management department, the extinction of the Forum of Presidents of District Indigenous Health Councils (Condisi) and the freezing of the budget and workforce of the Indigenous Health Care Subsystem (Sasi-SUS). (Fiocruz, 202-)

In addition, the letter also referred to FUNAI's Normative Instruction 09 (2020), which provided for the exclusion of non-regularised lands from the Land Management System database and, according to this institution, in the factual context, the measure brought authenticity to private properties located on lands claimed by indigenous peoples, making the situation even more delicate during the pandemic.

Faced with a new direction, FUNAI's actions have also been criticised, such as the fact that, together with the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA), through an instruction issued in February 2021, it facilitated the environmental licensing of projects inside indigenous lands, which in reality provided the possibility of rural leasing in indigenous territories (PERON, 2021).

Despite criticism of the federal management of public policies by the Federal Public Prosecutor's Office, the actions of the legislature and judiciary were praised for preventing a worsening of the contemporary situation of institutional disruption in indigenous policy. One of the highlights was the overturning of a provisional measure which intended to grant amnesty to occupiers and perpetrators of deforestation within the territories of traditional peoples that had not been definitively demarcated. Also decisive was the action of the Federal Supreme Court (STF), which ordered the adoption of measures considered extremely urgent to contain the spread of the New Coronavirus in indigenous territories, by means of ADPF 709 (Ministério público federal, 2021, p. 2-3).

4.5 The CPI of the pandemic

During the Covid-19 pandemic, the federal government's management generated notorious dissatisfaction and was criticised for its lack of effectiveness in dealing with the spread of the virus and its effects, as well as the emergence of various irregularities, omissions and deliberate actions aimed at spreading false information. In this sense, even though its establishment was hindered by the government, a parliamentary commission of enquiry (CPI), better known as the Pandemic CPI, was set up on 13 April 2021 to investigate these issues.

After a few months of the Commission's operation, a lot of data could be gathered from interviews and the compilation of various documents, and then, as a result of requests from the senators who are part of the CPI and private interest, some opinions were drawn up by renowned jurists and researchers from different Brazilian universities. Two of these opinions will be highlighted below, followed by the imputations of the CPI's final report.

According to the opinion, dated 13 September 2021, coordinated by the notorious jurist Miguel Reale Jr. et al, which analysed the appropriateness of imputation for crimes of responsibility, against public health, against public peace, against public administration and also crimes against humanity, a topic in which the indigenous issue was addressed. Chapter V, in the first part, deals with the lack of assistance for indigenous peoples, when the government's deliberate lack of interest in assisting native peoples is reported, as part of a policy of attacking those populations, which in turn would aim to remove these peoples from their traditional lands or acculturate them, or even allow them to be exterminated, in order to hand over the Amazon to economic interests (Reale Júnior, 2021, p. 167).

In addition, attention is drawn to several events that occurred during and as a result of the current government's administration and the respective public policies adopted in the context of the pandemic. The first point dealt with the genericity of the "National contingency plan for human infection by the new coronavirus (Covid-19) in indigenous peoples" (Brasil, 2020d). The way this plan was drawn up, according to the opinion, failed to mention concrete measures and timetables for the planned and suggested actions, and finally, there was no participation from any member of the indigenous peoples, which led to a situation of urgency and necessary intervention by the judiciary, and a petition was then presented to the STF proposing the following an Argument for non-compliance with a fundamental precept, which was received by the plenary and became ADPF 709. Subsequently, following the rapporteur, the plenary ordered that a series of actions be taken in order to put into practice feasible and necessary measures for the protection of indigenous peoples (Reale júnior, 2021, p. 167-169).

However, what we saw was insistent non-compliance with these rulings, leading to the creation of successive versions of the contingency plan, at the request of the STF,

with repeated errors on the same points, according to the analyses of the Reporting Justice and the advisory bodies, which resulted in the creation of generic plans full of ineffective measures. Only in its fourth version was it partially approved, on the grounds that it was a case of extreme urgency. Then, in June 2021, the fifth version of the General Plan and the Implementation and Monitoring Plan was drawn up, which was rejected and the partial approval of the fourth version was maintained, given the lack of a concrete and feasible plan.

Among the comments highlighted was a statement by Supreme Court Justice Luís Roberto Barroso, who emphasised how the protection measures and the preparation of the Contingency Plan for indigenous communities largely reflected the federal government's way of managing the crisis generated by the pandemic in Brazil.

Furthermore, in the context of FUNAI's actions, mention should be made of the agency's Ordinance 419, produced in 2020, which authorised activities in isolated indigenous communities. This act in turn led to a statement from the Federal Public Prosecutor's Office, which pointed out how the possible exposure of indigenous peoples to Covid-19, resulting from these agglomerations, groups known to have reduced immunity, could put them at intense risk and, in response, FUNAI took a reactive stance and suspended the points relating to this issue. (Reale Júnior, 2021, p. 169)

Another point that was criticised was the President of the Republic's vetoes of various provisions of Law 14.021/20, which would have been responsible for creating protective measures for indigenous communities in the face of the pandemic, on points considered indispensable such as the supply of water, hygiene and cleaning materials, hospital and ICU beds to the villages. (Reale Júnior, 2021, p. 170)

In a context beyond Brazil's jurisdiction, the Inter-American Commission on Human Rights (IACHR) has already expressed its views on the insufficient protection of indigenous peoples, by granting precautionary measures in favour of two of these peoples, through Resolution 35/20 and later also through Resolution 94/20, which dealt with another people, asked Brazil to take effective measures to protect the rights to health, integrity and life of these peoples, as they felt that they were in an urgent and serious situation, on the verge of suffering irreparable damage. Some of the points cited in the request, which was formulated by the Hutukara Yanomami Association and the National

Human Rights Council (Reale Júnior, 2021, p. 170-172), were that the beneficiaries were particularly susceptible to respiratory diseases and were already suffering outbreaks of contagion in their territories. On top of all this, they pointed to a failing health system for the indigenous populations, whose situation has worsened as a result of the pandemic, and also cited the illegal presence of around 20,000 miners on indigenous lands.

In the context of the IACHR's decisions, it highlighted some highly relevant data on the issue, one of the most important being the information that the contagion rate in the Guajajara population alone was estimated at 50 per cent. In addition, they analysed the plans presented by the federal government in favour of indigenous peoples and came out in the same vein as the STF, warning against genericity and the failure to explain how those guidelines would be implemented in favour of the beneficiaries.

In addition, several other measures were cited that were seen as irresponsible and pointless, such as a social action by the military wives whose mission was to "beautify" the indigenous women by using props typical of the white man, which only resulted in crowding and put several families at risk.

To corroborate the rest of the analysis, research coordinated by infectologist Prof Dr Pedro Hallal together with researchers from the Federal University of Pelotas/RS was cited (Reale Júnior, 2021, p. 178-182), which was deliberately censored by the Planalto Palace in order not to make this data public, which, according to the opinion, can be seen by analysing Document CPIPANDEMIA 1898216, through which the Ministry of Health reported on the conclusion of the EPICOVID19 study, and in which there is not even one piece of data on the incidence of Covid-19 in indigenous peoples. One of the most intriguing pieces of data from the study stated that the mortality rate among indigenous peoples exceeded that of the general population by at least 50 per cent, with greater differences at the extremes of age.

That said, the conclusion of the document points out that the existence of omissions and commissive behaviour by the President of the Republic, as well as by the bodies that are subordinate to him, denote that there is an undeniable anti-indigenist policy being put into practice publicly by the President, even before he took office, and that the pandemic has ended up becoming a This is reinforced by the various policies to

cede traditional indigenous lands to loggers, miners, ranchers and foreigners in order to exploit them.

Therefore, they end with the conviction that Jair Messias Bolsonaro used his position as President of the Republic and the influence guaranteed to him to premeditatedly plan, encourage, authorise and allow the spread of the epidemic in the country, but more especially in indigenous communities, leading to an unacceptable number of deaths, serious injuries, malnutrition, forced displacements, attacks by armed groups, mercury contamination, among other inhumane acts of equal gravity.

The conclusion of this part of the opinion is in line with the conclusion implicit in the criminal complaint presented by the Articulação dos Povos Indígenas do Brasil to the International Criminal Court, which accused the government of indigenous genocide and found that:

> Indigenous peoples are among the most vulnerable groups in the Covid-19 pandemic. According to the new study, in the Legal Amazon the incidence rate is 136% higher than the national average in the period studied, and 70% higher than the average among all inhabitants of the region. The indigenous mortality rate per 100,000 inhabitants is 110% higher than the Brazilian average and exceeds the average for the region by 89%. (Reale Júnior, 2021, p. 178)

Later, still in Chapter V, but in its third part, it deals with possible criminal charges in relation to crimes against humanity. Firstly, the crimes considered by the Rome Statute of the International Criminal Court to be crimes against humanity are mentioned, which is detailed in Article 7 of the Statute. (Reale Júnior, 2021, p. 200)

In order to justify that the imputation is appropriate, the authors highlight article 3 of the Introduction to Crimes against Humanity, in the Elements of Crimes, annexed to the Statute, since it provides that the attack against the civilian population is understood as a line of conduct that implies the multiple commission of the acts provided for in article 7 of the Statute, which would take place as a result of a policy of a state or organisation, not even a military attack being necessary for the configuration (Reale Júnior, 2021, p. 200-206).

It should be emphasised that for an act to be considered an international crime, not just an ordinary crime, certain contextual elements must be present, reinforced by the

existence of the principle of legal reservation, expressed in article 22 of the Statute. Article 7 also mentions the necessary contextual elements, which are the existence of an attack against the civilian population; that this attack is widespread or systematic; and that there is a policy by a state or organisation in the conception, implementation and carrying out of this attack.

In order to form a clear causal link, it is important to point out that a policy that targets a civilian population must be implemented by actions of the state or organisation; exceptionally, it can be implemented by a deliberate failure to act, as long as it has the clear and conscious intention of encouraging such an attack. Finally, it should be noted that the existence of such a policy cannot be inferred solely from the absence of government or organisational action.

In short, they conclude that in order to fall within the scope of international criminal law, there must be a nexus, a functional relationship, between the conduct and the context of the violating act, be it murder, torture, sexual violence, etc. The context must be (i) the existence of an attack against the civilian population, (ii) generalised or systematic, (iii) perpetrated as part of a plan or policy of a state or organisation.

Then, in topic 3.3, the issue of crimes against humanity is analysed in depth, starting with the lack of assistance to indigenous populations. Firstly, it is noted that the fight against the pandemic has been jeopardised by the dissemination of post-truths by government bodies that defame science, encouraging practices that are proven to be ineffective in overcoming the virus and disseminating adulterated data on the population's contagion.

In addition, it is said that in the context of the national plan, the delay in acquiring the vaccine was deliberate and ideological, while investments were being made in ineffective drugs and influence peddling was taking place in the most diverse spheres of government. The helplessness of Manaus was highlighted, given the lack of mobilisation by the local and federal governments.

With regard to the deliberate failures and omissions in the care of indigenous communities, based on the evidence in the case, it is reasonable to believe that the federal government's actions and omissions followed a policy that deliberately attacked the

original populations, ignoring their special sensitivity and vulnerability. This policy would have denied the native populations access to the prophylactic means necessary to guarantee their protection, as well as relaxing isolation measures, in addition to ignoring and encouraging the various invasions of indigenous lands by miners, loggers and deforesters, who not only attacked the populations and their lands but eventually acted as disease spreaders and , finally, there would also have been signs of the policy by the targeted use and indiscriminate use of drugs that have no efficacy in preventing or treating the disease.

All this would then have caused a percentage of deaths to these populations that would have exceeded the percentage of the rest of the population and would have required judicial intervention, through the determinations of the STF in ADPF 709 and the IACHR, with more than enough evidence to believe that there was an attack directed at these populations and that it was a generalised attack against the civilian population, since it affected various indigenous groups and communities, indiscriminately, in addition to occurring systematically, following a government plan, through repeated actions in the same direction (Reale Júnior, 2021, p. 218-219).

In this way, the elements for the classification of crimes against humanity, provided for in Article 7 of the Rome Statute of the International Criminal Court, are present.

In contrast, another opinion, dated 27 September 2021, was drawn up by four professors of constitutional law and administrative law, Ives Gandra da Silva Martins, Samantha R. Meyer-Pflug Marques, Adilson Abreu Dallari and Dirceo Torrecillas Ramos, requested by the leader of the Bolsonaro government in the Chamber, Senator Fernando Bezerra Coelho. It is organised around ten questions and chapters dealing with accusations against the government and the President of the Republic, in which questions are answered chapter by chapter.

In view of the above, it is to emphasise that only the points relating to the government's actions in relation to indigenous people during the pandemic will be reported. Starting with the third point of the opinion, in which the first mention of these peoples is made, the chapter deals with considerations about possible crimes of responsibility. In this chapter, the jurists argue that at no time did the government act deliberately in order to generate such herd immunity, which would be achieved by

abstaining from measures to combat the pandemic, in addition to denying the existence of any omission in the supply of inputs to indigenous and riverside populations, which according to them would have been continuously supplied by the Armed Forces. (Martins, 2021, p. 12-13)

The next reference to indigenous peoples was in the authors' defence that it would be impossible to impute crimes against humanity to the president, since, according to them, the measures taken in relation to the indigenous population were sufficient. In this regard, they mention that the federal government created the "Previne Brasil" programme, which was instituted by Ordinance No. 2,979, of 12/11/2019, and aimed to serve indigenous people not scheduled to be served by SESAI.

In addition, Ordinance No. 3.396, of 11/12/2020, which provided for the transfer of federal financial incentives to strengthen equity actions in Primary Health Care, considering the registration of traditional peoples and communities, also cites the fact that, in February 2020, a Situation of Public Health Emergency of National Importance (ESPIN) was declared, as a result of COVID-19, through Ordinance No. 188, which in turn would have given rise to the issuing of the first guidelines on the virus, initially given through Informative Note No. 2/2020- COGASI/DASI/SESAI/MS (BRASIL, 2020b), in order to provide guidelines to prevent the proliferation of the pathogen. In addition, SESAI created a portal to issue epidemiological reports and bulletins on COVID-19 from the Indigenous Health Care Subsystem.

That said, they conclude that it would not be valid to defend the point that the federal government has left indigenous peoples unassisted, since a series of normative acts have been issued in order to assist them, which would eliminate any hint of an anti-indigenous policy. Finally, they claim that since the Federal Government adopted preventive measures against Covid-19 in relation to indigenous peoples, before the pandemic was declared by the World Health Organisation (WHO), the President of the Republic could not be accused of committing a crime against humanity and that, in fact, the role and responsibility of the WHO should be discussed, given that it took so long to declare the existence of a pandemic.

As for the issue of ADPF 709, they do not deny that the "Contingency Plan for Indigenous Communities" was the subject of a decision by the Supreme Court, but they

claim that this decision was limited only to partially ratifying the Contingency Plan and requesting the presentation of a new plan for monitoring, and that, according to the professors, at no point was there any reference to the government's inertia in the decision. They also claim that all of the Supreme Court's demands were met when a new plan was published (Martins, 2021, p. 44-45).

Later, in the same chapter, they argue that there was no conduct that could be classified as a crime against humanity on the part of Jair Bolsonaro, given that, under international criminal law, a causal link is required between the act committed and the conduct, as well as the presence of intent, which, according to them, is ruled out, given that the President at the time none of them had any intention of contaminating people, using as an argument that in addition to other points, there was a defence of "early treatment".

Finally, they conclude that in their view, during the pandemic, the Federal Government, within its remit, took steps to prevent the spread of Covid-19 among indigenous peoples and anticipated the WHO, having adopted a policy of assistance and support for indigenous people, as well as citing that there is no proof of the presence of intent, which would invalidate the accusation of a crime against humanity (Martins, 2021, p. 66-71)\.

On 26 October 2021, the final report by Senator Renan Calheiros, the rapporteur of the case, was approved, in which a total of 78 people and 2 companies were indicted and President Jair Bolsonaro was held responsible for having committed at least 9 crimes, framed as crimes of epidemic with result of death, infraction of a preventive health measure, charlatanism, incitement to crime, falsification of a private document, irregular use of public funds, prevarication, crimes against humanity and crimes of responsibility. However, it is worth noting that in the preliminary version of the report two more crimes had been listed, those of aggravated homicide and genocide against indigenous populations. These crimes were removed after much discussion among the parliamentarians, since one side did not believe that there was enough evidence to support the accusations, but a topic was dedicated to them in the final report, which would justify the retention of only crimes against humanity:

> The definition of genocide is certainly defensible, but the systematic character with which anti-indigenism manifests itself in the policies and attitudes that have exposed indigenous people to the virus and to violence is better suited to the definition of a crime against humanity, in the modalities of extermination and, undeniably, persecution. (SENADO FEDERAL, 2021, p. 587)

Finally, among the conclusions, it is relevant to this article to highlight the finding that the CPI proved that the federal government had carried out acts "deliberately aimed against the rights of indigenous people" (Senado Federal, 2021, p. 1284). Once the commission's report has been approved, the legal procedure to be followed is for the document to be sent to the competent bodies to be used to punish those indicted, specifically the International Criminal Court.

4.6 The complaints against Brazil at the ICC

By the end of 2021, at least 6 complaints had been filed with the International Criminal Court against Brazil, specifically the President of the Republic Jair Messias Bolsonaro, and at least one more has yet to be sent, authored by the Pandemic CPI, accusing him of Crimes against Humanity.

The first complaint was filed in November 2019 by the Human Rights Advocacy Collective (CADHu), reporting evidence of crimes against humanity and incitement to genocide of indigenous peoples, as well as institutionalised environmental destruction. According to the organisation, since the beginning of his government, Jair Bolsonaro has incited violence against indigenous peoples, weakened control and inspection institutions", as well as being flagrantly omissive in responding to environmental crimes in the Amazon", having acted in collusion with invaders of indigenous lands, among other actions, all of this protected by an alleged rigging of institutions, so that no investigation has been carried out (Articulação Dos Povos Indígenas Do Brasil, 2020b).

In its complaint, the CADHu said that a total of 33 measures had been adopted to facilitate the indigenous genocide, including the reduction of inspections and the failure to provide aid to Brazil's native peoples. It is worth noting that on 14 December 2020, he was officially informed by the Office of the Prosecutor of the International Criminal Court that his accusations were formally under preliminary assessment of jurisdiction, the first

time that the body has been willing to make such an analysis of a Brazilian President of the Republic (Arns Commission, 2020).

The second complaint, filed in April 2020 by the Brazilian Association of Jurists for Democracy (ABJD), accused the Chief Executive of poor management of the crisis arising from the COVID-19 pandemic and asked the Court to initiate proceedings to investigate Bolsonaro's conduct and convict him of crimes against humanity, since he had exposed the lives of Brazilian citizens to mortal danger, with effective actions that encouraged contagion, as well as the proliferation of the virus.

The third complaint was also related to the President's conduct during the pandemic, filed by the PDT in June 2020, and accused him of crimes against humanity, considering that he repeatedly went in the opposite direction to the WHO's determinations, as well as technicians on the subject such as scientists and infectologists, and influenced the behaviour of the public citizens for failing to comply with the prophylactic measures needed to reduce the spread of COVID-19 among Brazilians.

The fourth complaint, produced by APIB, was filed in August 2021, accusing Bolsonaro of acting deliberately in order to exterminate ethnic groups and establish a country free of indigenous people. They also claim that the anti-indigenous policy is deliberate, since it involves the consistent repetition of behaviour during his years in office, which would be aimed at producing a nation without indigenous people, by destroying them, whether through disease or murder, as well as destroying their culture through a process of assimilation.

Then, in September 2021, it was the turn of the Free Brazil Movement (MBL) to file a complaint, the fifth, accusing Jair of genocide as a result of his actions during the coronavirus pandemic, which were marked by ignoring scientific evidence and acting with disregard during the pandemic. Finally, he also highlights the fact that he has purposely rejected vaccines and encouraged the population not to get vaccinated.

Finally, it is important to mention that the intention has been confirmed that at least one more complaint will be filed, authored by the Parliamentary Commission of Inquiry into the pandemic, which will accuse the government of committing crimes against humanity, according to the final report of the aforementioned commission, which,

due to the disagreement of some senators, ended up not including the accusation of genocide against indigenous peoples.

4.7 The complaints of APIB

During the course of the pandemic, the Articulation of Indigenous Peoples of Brazil (APIB) has played an essential role in the defence of indigenous rights. In November 2020, it published a report on the impact of COVID-19 on indigenous peoples, and has been active in the higher courts, including filing ADPF 709, having revolutionised the list of those entitled to do so.

Furthermore, on 9 August 2021, it filed a statement with the International Criminal Court (ICC) to denounce the government of Jair Bolsonaro for committing, among other crimes, indigenous genocide, which consists of the deliberate practice of inflicting conditions aimed at the destruction of these peoples, as well as causing them severe physical and mental harm.

In addition, on 16 August 2021, it published the International Dossier of Denunciations, which aimed to expose the anti-indigenous project drawn up by the executive branch and taken forward by the National Congress.

Firstly, however, the complaint to the ICC must be dealt with. In it, the prosecutor of the court in The Hague was asked to examine the crimes committed by the president against native peoples since the beginning of his mandate, with emphasis on the pandemic period due to the proliferation of the Sars-CoV-2 virus.

The communiqué sent for analysis is made up of complaints from various indigenous organisations and leaders, official government documents, academic research and technical notes which, according to the organisation, prove the planning and execution of an explicit, intentional and systematic anti-indigenous policy led by the chief executive.

Among other consequences, it points out that the dismantling of environmental and indigenous protection bodies has resulted in an increase in invasions of indigenous lands, deforestation and fires. According to APIB (2020), facts that show the existence of an anti-indigenous project include the repeated refusal to demarcate new lands, but also

the drafting of decrees and ordinances, as well as the attempt to pass bills aimed at making it easier for invaders of native lands to go unpunished.

The communiqué is 86 pages long and contains facts organised into three main points: the first is an amalgam of the actions of the President of the Republic attacking indigenous peoples, as well as the dismantling of the bodies responsible for protecting these peoples and the environment. The compilation includes administrative acts, regulations, speeches, meetings and projects by the government and the Chief Executive.

The second part is a description of the consequences of the destruction of the public infrastructure responsible for guaranteeing indigenous and socio-environmental rights: "the invasion and dispossession of indigenous lands; deforestation; mining and mining in the territories and the impact of the Covid-19 pandemic on indigenous peoples, including research, reports and data." (Articulation Of The Indigenous Peoples Of Brazil, 2021a)

Finally, the third part deals with several indigenous people's accounts of invasions, deforestation, mining and the spread of the COVID-19 pandemic among indigenous peoples.

In the midst of various questions about the timeliness of a denunciation and why it occurred under this government, even though some of the facts denounced had already been present in recent years, it is justified that the main factor was the unprecedented antiindigenous stance in such a blatant, systematic and intentional way. Furthermore, it was the first time that the dismantling of indigenous and environmental rights protection bodies, such as FUNAI, from a body that guarantees rights to one that persecutes. Finally, they point out that it was the first time that a president had taken a stand against the demarcation of indigenous peoples' lands and actively encouraged the illegal activities of gold miners and land grabbers, so that we can see not just a violent stance in the discourse, but the realisation of an anti-indigenous policy through concrete and concatenated actions (Articulation Of The Indigenous Peoples Of Brazil, 2021a).

Furthermore, with regard to the classification of genocide, much is doubted by legal operators, there is much disagreement on the subject, however, according to APIB, there is indeed talk of genocide, since the existence of a systematic and intentional anti-

indigenous policy, promoted by the President, fulfils the requirements for the type to be characterised, as it would cause severe physical and mental harm and seek to subject indigenous peoples to conditions that could lead to their destruction, whether through lack of health care, food insecurity, contamination by Covid or metals due to the expansion of illegal mining and land invasion.

As for the dossier prepared by APIB, with regard to the pandemic, it highlighted the fact that SESAI (Special Secretariat for Indigenous Health) has been dismantled since the beginning of the Bolsonaro government, which in the pandemic has contributed to the death toll of more than 1,100 indigenous people, by Sars-Cov-2, to date, and has encouraged invasions of traditional territories, in the midst of a pandemic situation.

Finally, they also recall the fact that indigenous communities, contrary to scientific studies, were given huge quantities of hydroxychloroquine as a prophylactic measure for Coronavirus, a drug that has been proven to be ineffective.

GENERAL CONCLUSIONS

As it has been pointed out, the aim of this research was to investigate the issue of the accusation of Crimes Against Humanity in the pandemic by analysing the policies adopted to combat the spread of COVID-19 among indigenous peoples. It should also be noted that the research had to deal with the scarcity and inaccuracy of official data, so it was necessary to compile information from various sources.

It is not new to hear about the indigenous struggle and the difficulties they face in fighting for their rights, throughout the many governments Brazil has had. However, with the victory at the ballot box of the president Jair Messias Bolsonaro, who is known for countless defamatory and insulting statements about indigenous peoples, the situation of indigenous peoples has taken a turn for the worse and many of the advances made have been put to the test, as the dismantling of various minority protection bodies in Brazil began, including those protecting indigenous rights, with the withdrawal of budgets, changes in leadership and the transfer of competences to antagonistic bodies.

In addition, claims to indigenous territories have been massively rejected or interrupted altogether. The government leadership issued decrees, ordinances and bills

that facilitated invasions of territories guaranteed by law to indigenous people and created real impunity for this type of crime. The combination of these factors by the Chief Executive in time intensified the difficulties in maintaining various communities, leading to a shortage of essential items for basic health.

Along these lines, what was seen by many as a policy of neglect also began to be seen as an anti-indigenous policy, since it was systemic and repeated, causing insistent denunciations by the native peoples, which, unfortunately, continued to be ignored by the federal government, but which served as the basis for denunciations to other authorities such as the one drawn up by the Arns Commission to the International Criminal Court, in which crimes against humanity were imputed.

However, it was with the onset of the pandemic that the situation was taken to another level, given that, among other bodies, SESAI, the secretariat subordinate to the Ministry of Health, responsible for indigenous health, which was already showing precariousness, after the sequence of dismantling actions that hit it, failed to minimally guarantee indigenous safety from COVID-19 contamination, given that even though it issued acts and ordinances, there was no real effectiveness in safeguarding indigenous peoples, and in fact, according to reports, it even collaborated in the contamination, given that subordinate agents of this division allegedly took the virus to some villages due to a lack of care.

This, coupled with the Federal Government's admittedly denialist management, led to the pandemic taking on bigger proportions, leading to the deaths of hundreds of thousands of Brazilians, including more than a thousand indigenous people, who suffered from a higher rate of contamination than the rest of the population, which, given the more vulnerable condition to diseases that native peoples have, meant that more than half of Brazil's indigenous peoples were infected. This was due to the adoption of public policies based on the false belief in a supposed herd immunity, which would be achieved by contaminating the majority of the population with the virus, so that immunity would be acquired, even at the cost of hundreds of thousands or even millions of lives, thus encouraging contagion, publicising and distributing ineffective medicines for the treatment of Sars-Cov-2, which were sent in large quantities to various indigenous communities.

Faced with government inaction, APIB, the Articulation of Indigenous Peoples of Brazil, a national association of organisations representing Brazil's indigenous peoples, innovated the list of legitimate parties and filed APDF 709, in which the federal government's omission was demonstrated, based on the compilation of several data.

It was with the publication of the sanctioning of Law 14.021 that Jair Bolsonaro once again showed his anti-indigenous stance, as he vetoed around 22 items, including access to drinking water, hygiene materials, hospital materials and mechanical respirators.

Then, more than a year into the pandemic, a new communication to the International Criminal Court was drawn up by APIB, which once again accused the federal government of crimes against humanity, but with a greater focus on the COVID-19 pandemic period, given that the decisions taken and reactions of the government, in the situation in question, proved to be a real proof of all the accusations that the government was acting against indigenous peoples.

There is substantial evidence of actions that directly weakened indigenous communities and imposed numerous barriers to their endurance, indicating a deliberate governmental intent to dismantle these populations. This approach aligns with what Achille Mbembe (2018b) termed *necropolitics*, a framework which the State exercises power to decide who may live and who is condemned to suffer or die. Under this lens, the Bolsonaro administration’s policies toward indigenous peoples reveal a systematic approach to erode their resilience and compromise their survival.

Finally, the COVID-19 pandemic became a vehicle for advancing the anti-indigenous agenda promoted by the Bolsonaro administration. Rather than implementing protective measures for indigenous populations, the government adopted policies that systematically disregarded their unique vulnerabilities. This indifference became evident as health protocols were either delayed or dismissed, contributing to the virus’s spread among these communities. By failing to recognize the pandemic’s grave threat to indigenous lives, the administration demonstrated a profound neglect of its responsibilities to protect these citizens.

This disregard went beyond mere inaction, reflecting a deeper intent to marginalize indigenous groups further. Bolsonaro's government not only neglected necessary health support but also enabled policies that indirectly facilitated harm. These actions exposed indigenous communities to unnecessary risk, undermining their rights and exacerbating the pandemic's effects on some of Brazil's most vulnerable populations.

In this context, the pandemic was effectively weaponized as a means of oppression and marginalization. Through both omission and deliberate action, the Bolsonaro administration's approach to COVID-19 in indigenous areas became a tool for disenfranchisement and harm, with severe, often fatal, consequences. This pattern of disregard was examined in depth in this research, where it was argued that the government's pandemic response may qualify as a Crime Against Humanity given the severe impact on indigenous lives and rights.

NOTES

1. Message from the Secretary General of the UN Permanent Forum published on the occasion of the International Day of the World's Indigenous Peoples, 9 August 2013.
2. *Étude du problème de la discrimination à l'encontre des populations autochtones*, Rapport final (dernière partie), présenté par Monsieur José R. Martinez Cobo, rapporteur spécial, Volume V, *Conclusions, Prospositions et Recommandations*, Nations Unies, New York, 1987. UN document, E/CN.4/Sub.2/1986/7/Add.4., § 379, p. 31.
3. *Ibidem*, § 364, p. 30. In his document, Cobo proposes this definition as only a "working definition", since the representatives of indigenous peoples at the UN were against any definitive definition coming from outside, i.e. not given by themselves.

4. The ILO was the first international organisation to care about the situation of indigenous peoples. It was born alongside the League of Nations in 1919 and therefore predates the UN Human Rights system. The ILO set up a Commission of Experts on Indigenous Labour after observing the precarious conditions of indigenous workers around the world. This Commission achieved several results, including the 1930 Forced Labour Convention (Convention No. 29), which obliged states to abolish indigenous slave labour. In 1950, the ILO's Committee of Experts on Indigenous Labour concluded that "national policies aimed at assimilating indigenous peoples had not been effective in improving the social conditions of these peoples". It identified the need to implement "gradual and regulated integrationist policies to protect indigenous populations against labour exploitation and other forms of oppression. In 1956, the International Labour Conference discussed the text of Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations and Recommendation 104 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations, both adopted by the ILO in 1957. "The text of Convention 107 linked the 'development' of indigenous populations to their 'integration' with the rest of society" (FIGUEROA, 2009, p. 17).
5. "Article 1 - 1. This Convention shall apply a) to members of tribal or semi-tribal populations in independent countries whose social and economic conditions correspond to a stage less advanced than that reached by other sectors of the national community and who are governed, in whole or in part, by customs and traditions peculiar to them by special legislation; b) members of the tribal or semi-tribal populations of independent countries who are considered to be indigenous by virtue of the fact that they are descended from the populations that inhabited the country, or a geographical region to which that country belongs, at the time of conquest or colonisation and who, whatever their legal status, lead a life more in keeping with the social, economic and cultural institutions of that time than with the institutions peculiar to the nation to which they belong." Cf. ILO Convention 107, Geneva, 1957.

6. "For the purposes of this Convention, the term 'semi-tribal' shall cover groups and persons who, although about to lose their tribal characteristics, are not yet integrated into the community." Cf. Preamble, ILO Convention 107
7. "Considering the evolution of international law since 1957 and developments in the situation of indigenous and tribal peoples in all regions of the world, as a result of which it considered it appropriate to adopt new international norms on the matter, with a view to correcting the assimilationist orientation of previous norms (...). Drawing attention to the important contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humanity and to international co-operation and understanding (...)". Cf. ILO Convention 169, Preamble, Geneva, 1989.
8. Document de travail du Président-Rapporteur, Madame Erica-Irene A. Daes, sua notion de "peuple autochtone", UN Commission on Human Rights, Working Group on Indigenous Populations, 14th Session, 29 July to 2 August 1996. UN Document, E/CN.4/Sub.2/AC.4/1996/2, § 10, p. 4-5.
9. "Taking into account the diversity of the peoples it seeks to protect, the Convention uses the terminology including 'indigenous and tribal peoples' and assigns the same set of rights to both groups." Compreender el Convenio sobre pueblos indígenas y tribales, 1989, (número 169). Manual para los mandantes tripartitos de la OIT, Oficina Internacional de Trabajo, documento OIT, Ginebra, 2013, p. 12.
10. "From the point of view of the individual, the autochtone is the person who belongs to an autochtone population by self-identification (group conscience) and who is recognised and accepted by this population as one of its members (acceptance by the group)". UN Document, E/CN.4/Sub.2/1986/7/Add.4., § 381, p. 32.
11. UN Document E/CN.4/Sub.2/1982/2/Add.6 § 210 and § 211, p. 37.
12. UN document, E/CN.4/Sub.2/1986/7/Add.4, § 375, p. 31.
13. "Nous, peuples autochtones présents à la réunion préparatoire des peuples autochtones, tenue le samedi 27 July 1996 at the Oecumenical Council of Churches, we reached a consensus on the question of the definition of self-governing villages and unanimously approved Resolution 1995/32 of the Sous-

Commission. We catégoriquement rejetons toute tentative tendant à ce que les gouvernements définissent les peuples autochtones. Nous approuvons en outre le rapport de M. Martínez Cobo (E/CN.4/Sub.2/1986/7/Add.4) concernant la notion d"autochtone'. Likewise, we note the conclusions and recommendations of the President-Rapporteur, Mrs Erica Daes, set out in her working document on the notion of the self-employed (E/CN.4/Sub.2/AC.4/1996/2)". UN document, E/CN.4/Sub.2/1996/21, § 31, p. 12

14. UN document, E/CN.4/Sub.2/1986/7/Add.4, § 380, p. 31-32.
15. ILO Convention 169, Geneva, 1989.
16. World Bank, OD420, paragraphs 3 and 5, 1991, p. 1.
17. UN Document, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007.
18. UN document, E/CN.4/Sub.2/AC.4/1996/2, § 69, p. 18.
19. “The first of these is the Indigenous Statute, published in 1973 under a totally integrationist paradigm. The indigenous condition would be something harmoniously eliminated through the integration of rights into the national communion." (VITORELLI, 2016, p. 25)
20. On the paternalistic regime that undermines the human rights of indigenous peoples, Daniel Sarmento reads: "This regime, in addition to violating international treaties to which Brazil is a signatory - notably ILO Convention 169 - is frankly unconstitutional, not only because it is irreconcilable with the Constitution's discourse of valuing indigenous cultures and empowering indigenous people and their communities (CF, art. 231, caput and 232), but also because it is ostensibly incompatible with the principle of human dignity, both in terms of autonomy and recognition. As for the latter, it seems unnecessary to emphasise how disrespectful and degrading it is to treat someone as incapable of being part of a culture that is different from the *mainstream*." (Sarmento, 2017, p. 204)
21. Law is allographic because the normative text is not completed in the sense printed on it by the legislator; after all, the completeness of the text is only achieved when the meaning expressed by it is produced, as a new form of expression, by the interpreter (Grau, 2016).

22. PL 2.057/91, known as the "Statute of Indigenous Peoples", has been dragging on in the Chamber of Deputies since 1991. In the Federal Senate, PLS 1G9/201G, also known as the "Statute of Indigenous Peoples", is underway. To date, there has been little discussion of these bills, which demonstrates the Brazilian legislature's disregard for indigenous communities.
23. According to Robério Nunes dos Anjos Filho (2009), the 1988 Federal Constitution adopted a series of guiding principles regarding Indigenous Peoples' Law, including the principle of maximum protection for indigenous, which gave rise to the so-called *in dubio pro indigena* and the recognition that the level of protection achieved does not preclude new measures in favour of indigenous communities.
24. Using the term "silvícola", STJ, AgInt no REsp 1372210/AM, Rapporteur: Min. Regina Helena Costa, First Panel, judged on 1 May 2017. In the same vein, STF, RE G33499 AgR, Reporting Justice Teori Zavascki, Second Panel, judged on 22 September 2015. STJ, AgRg no RHC 79.210/SC, Rapporteur: Justice Antônio Saldanha Palheiro, Sixth Panel, judged on 30 March 2017. Using the term "acculturated" to refer to a particular member of an indigenous community, STJ, REsp 737.285/ PB, Rapporteur: Minister Laurita Vaz, Fifth Panel, judged on 8 November 2005. In the same vein, STF, RHC G4.47G/MG, Reporting Justice Carlos Madeira, Second Panel, judged on 10 July 1986. The words "tribe" and "village" are also found in various judgements of the higher courts.
25. STJ, RMS 30.G75-AM, Reporting Justice Gilson Dipp, judged on 22 November 2011
26. "Expressions such as forest dweller, tribe, village, integrated, non-integrated or in the process of integration should be avoided. It is best to use only the term Indian or indigenous and the designations community or group." (VITORELLI, 2016, p. 27)
27. Art. 2 of Decree 4.887 of 2003 states that "Remnants of quilombo communities are considered to be ethnic-racial groups that, in addition to defining themselves in the context of their own community, have their own historical trajectory, specific territorial relations and a presumption of black ancestry related to resistance to the historical oppression they have suffered."

28. "Having adopted the rules of ILO Convention 1G9, the Brazilian state has formally accepted self-identification as a criterion for identification, so that, for legal purposes, an indigenous person is one who feels, behaves or claims to be such, in accordance with the indigenous customs, organisations, uses, language, beliefs and traditions of the community to which he or she belongs. For his part, the Reporting Justice stated that it is not up to the criminal judge to assess the appellant's civil capacity, since this is a heterogeneous preliminary question that is exclusively examined by the civil court. In the end, the Federal Court's jurisdiction to analyse and judge the case was recognised, given the presence of the federal authority in the case as the indigenous person's assistant." (STJ, RMS 30.G75-AM, Reporting Justice Gilson Dipp, judged on 22 November 2011).
29. Along these lines are the provisions of General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination (UNITED NATIONS, 1996).
30. Art. 231. Indigenous are recognised as having their social organisation, customs, languages, beliefs and traditions, and original rights over the lands they traditionally occupy, and the Union is responsible for demarcating, protecting and ensuring respect for all their property.
31. Regarding the non-recognition of the right of indigenous peoples to secede, Robério Nunes dos Anjos Filho explains: "However, there seems to be no doubt that at the present time the international human rights system, built on the efforts of the United Nations Organisation, does not admit as a general rule the possibility of peoples seceding on the basis of the right to self-determination, prioritising the integrity of the states in which they are inserted [...]" (ANJOS FILHO, 2013, p. 595)
32. On the right to be different, Boaventura de Souza Santos teaches: "We have the right to be equal when difference inferiorises us. We have the right to be different when equality mischaracterises us. People want to be equal, but they want their differences to be respected. In other words, they want to participate, but they also want their differences to be recognised and respected." (SANTOS and NUNES, 2003, p. 56)

33. In these terms, the Inter-American Court of Human Rights has emphasised that "[...] when it comes to large-scale development or investment projects that would have a major impact within Saramaka territory, the State has the obligation not only to consult the Saramaka, but must also obtain their free, prior and informed consent, in accordance with their customs and traditions. The Court considers that the difference between 'consultation' and 'consent' in this context requires further analysis." (CIDH, 2007, § 134).
34. The constitutional hearing aims to protect the territories involved in a given dispute, since these are federal property. On the other hand, the right to consultation aims to protect the interests of indigenous communities and has a procedural iterary that must be strictly followed.
35. "We call social and environmental injustices that fall relentlessly on vulnerable ethnic groups and populations Environmental Racism. Environmental racism does not only occur through actions that have a racist intention, but also through actions that have a "racial" impact, despite the intention that gave rise to them." (Pacheco, 2008)

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