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THE GENOCIDE OF THE INDIGENOUS POPULATION IN CONTEMPORARY BRAZIL: CRITICAL AND RELATIONAL ASPECTS

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ABSTRACT: The article proposes a critical analysis of the prevailing legal definition of the crime of genocide based on the restrictive technical standard adopted by International Law after 1945, resulting from the consideration of the Holocaust as a restrictive reference for the comprehension of the dynamics that led to genocide. Considering contemporary sociological, anthropological and legal views, but also rescuing the classic view of Raphael Lemkin, author of the term "genocide" (1944), new perspectives are proposed which, given the multicultural cosmological references prevailing in non-European cultures, would better serve the protection of human rights and citizenship of minorities victimized by processes of structural extermination, especially the indigenous cultures. Based on Carl Schmitt, Pedro Estevam Serrano and Giorgio Agamben's reflections, the article identifies exception scenarios in democratic societies that normally precede genocidal structural processes, an essential factor for constructing effectively democratic societies geared to full citizenship.

KEYWORDS: Genocide; Indigenous cultures; multiculturalism.

O GENOCÍDIO DA POPULAÇÃO INDÍGENA NO BRASIL CONTEMPORÂNEO: ASPECTOS CRÍTICOS E RELACIONAIS

RESUMO: O artigo apresenta análise crítica acerca da definição jurídica predominante sobre o crime de genocídio a partir do restritivo modelo técnico-penal adotado pelas leis internacionais após 1945 e decorrente da consideração ao Holocausto enquanto referência única para compreensão das dinâmicas que conduzem ao genocídio. Considerando visões sociológicas, antropológicas e jurídicas contemporâneas, mas também resgatando a visão clássica de Raphael Lemkin, criador do termo "genocídio" (1944), propõe se novas perspectivas que, tendo em vista os referenciais cosmológicos multiculturais vigentes nas culturas não-europeias, atenderiam melhor a proteção dos direitos humanos e da cidadania de minorias vitimadas por processos de extermínios estruturais, especialmente os povos indígenas. O artigo localiza, com fundamento em Carl Schmitt, Pedro Estevam Serrano e Giorgio Agamben, cenários de exceção identificáveis em sociedades democráticas e que normalmente precedem processos

estruturais genocidas, fator imprescindível para a construção de sociedades efetivamente democráticas e voltadas à cidadania plena.

PALAVRAS-CHAVE: Genocídio; povos indígenas; multiculturalismo.

1. Introduction

> "To ignore that within the reserve there is gold - and probably a lot of gold - is foolish. Pretending that the miners are not invading the reserve and coming into contact with the Indians is counterproductive naivety. But giving up the stages of civilization that separate tribal communities from what anthropologists call the surrounding societies would mean exposing the Kayapó, like other Indians, to massacre. Which doesn't always cause bloodshed, but carries a similar connotation. It's not about wrapping them up in a suffocating tutelage, t but rather give them space to protect themselves and enjoy that distance. If that hasn't turned into mere utopia" (PINTO, 1983, *free translation*).

This article analyzes the relationship between the violation and the destruction of the environment and the lethal suppression of the indigenous existential basis in Brazil. The article aims at making it possible to consider the necessity to recognize ecological crimes as another modality of a core crime, where it is possible to identify at least two common elements to international crimes: the "gravity" of the actions as well as the potential capacity to jeopardize international stability through environmental destruction and consequent climate change on the planet; the extermination of indigenous cultures and populations; and, finally, risks of extinction of part or all life on the planet.

For this purpose, the concept of "genocide" proposed by the Jurist Raphael Lenkim is considered, which understands that such concept would not be limited to the physical extermination of a determined social group, nor to the terms accepted by the *Convention of the United Nations for the Prevention and Repression of the Crime of Genocide* (1948) or the *Rome Statute of the International Criminal Court* (1998). Such conceptions excessively restrict the parameters for recognizing the crime of genocide due to the political and historical context prevailing in the period immediately following the post-war period.

One cannot fail to recognize the important normative-civilizational advance from the international criminalization of the so-called "core crimes". Reducing the

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genocidal spectrum – limited to the elements recognized by the 1948 Convention and reiterated by the Rome Statute of 1998 – was a real civilization conquest. However, such elements were inspired by the dynamics of extermination developed by the genocidal regime of Nazism throughout the Holocaust. Thus, such established parameters for the identification of the crime of genocide not infrequently prove to be ineffective for the prevention and repression of distinct dynamics clearly genocidal from the sociological and cultural point of view since the genocides that occurred after the Holocaust did not necessarily observe the same standards implemented by the Hitler regime, most of the time. Not without reason, international jurisprudence has emerged in recent decades as an indispensable factor in the evolution of International Criminal Law, especially after the relevant contributions by the *International Criminal Tribunal for the former Yugoslavia* (ICTY) and the *International Criminal Tribunal for Rwanda* (ICTR), in addition to the *International Criminal Court* (ICC).

The main fundamentals of International Law, as proposed, for example, by the thinkers of the *Iberian School of Peace* (Coimbra, Évora, Salamanca, among others), who defended the consideration of a so-called *universal legal conscience* (*recta ratio*) as an important legal basis since the 16th and 17th centuries, as well as the conditioning of the interpretation of International Law to the protection of human beings and their needs must be taken into consideration when the genocide definition is discussed. In other words, the recognition of the crime of genocide must take into account elements that compose it, however, disregarded by the international norms in force as a result of political options in the post-Second World War period, more focused on the protection of the interests of States and less on the protection of the human being.

In this sense, Antonio Augusto Cançado Trindade, Judge at the International Court of Justice (ICJ), when delivering his dissenting opinion in the case of *Jurisdictional Immunities of the State* (2010), maintained that:

> [...] it was inadmissible and unfounded to suggest - not even on the basis of outdated positivist dogmas - that the crimes of forced and slave labor at the time of the Third Reich were not prohibited. I replied that they were clearly forbidden by human conscience, and that they could not be covered by state immunities; already at the time of Nazi Germany, and even before it, the impossibility of state impunity for crimes against humanity was 'deeply rooted in human consciousness, in universal juridical consciousness, which is, in my understanding, the ultimate material source of all the Law' (paragraph 125) [...] (CALAFATE; LOUREIRO, 2020, p. 23).

Thus, this article proposes the analysis of the Brazilian context under an anti-indigenous political regime that is resistant to environmental preservation as a result of a racialized historical and political process that culminated in the current ethnocide scenario. This new radicalized Brazil is characterized by policies of environmental destruction and by direct and indirect indigenous extermination (through violent actions, invasions of indigenous lands and the dismantling of the protective regulatory and administrative structures).

Nowadays, especially during the spread of the Covid-19 pandemic, the situation of the Brazilian indigenous nations (like the Yanomamis) has become more and more lethal. The invasion of their traditional lands[1] (by around 20.000 illegal gold miners) aggravated the Coronavirus transmission and other diseases, besides direct violence against the Yanomamis, an announced tragedy that led the Articulation of Indigenous Peoples of Brazil (APIB) to denounce President Jair Bolsonaro before the International Criminal Court (ICC) for the crime of genocide and crimes against humanity. This is the first case in human history in which the victimized native peoples themselves provoked the ICC. To worsen, adopting governmental and administrative measures contrary to the safety and preservation of indigenous cultures in Brazil intensified during the coronavirus pandemic.

For example, in July 2020, the then President of Brazil vetoed articles of law requiring the government to provide potable drinking water, disinfectants and a guarantee of hospital beds to indigenous communities (SENADO FEDERAL, 2020). Furthermore, almost two years after the advent of the pandemic (January 2022), the Brazilian government created a committee to combat Covid for indigenous peoples and, even so, by the imposition of the Brazilian Supreme Court (STF, 2020).

To a great extent, the greater vulnerability and higher mortality rates among indigenous peoples caused by Covid-19 among indigenous nations stem from the negligence of American states concerning the preservation of such millenary cultures. As the *United Nations* warned through its *Economic Commission for Latin America and the Caribbean* (ECLAC, 2021) which emphasizes the structural aspects of the Latin, as mentioned earlier, American and also Brazilian context:

1 "Traditional land" means a constitutional category in Brazil under article 231 of the Constitution of the Federative Republic of Brazil on October 5th, 1988. This constitutional expression designates the indigenous land preexisting the Brazilian State itself (BRASIL, 1988).

> The structural inequalities that have affected indigenous peoples in the region's countries for decades are the main factor in their vulnerability to the pandemic. They have a particular impact on women, young people and children. This situation is exacerbated by the general weakness of the State responses outlined above. Indeed, despite the fact that in 11 of the 13 countries analysed there is some specific technical standard or guideline for dealing with Covid-19 among indigenous peoples, in most of them, the measures were established when infections had already spread significantly. In addition, delays were observed in the deadlines for their implementation, as well as deficient coverage, according to reports by indigenous peoples' organizations (ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, 2021).

The Yanomami's situation represents a small fraction of the serious and threatening scenario that the indigenous peoples of Brazil have been facing, especially since 2019 under the anti-indigenous Brazilian government between 2019 and 2022. Therefore, the comprehension of the indigenous constitutional rights in Brazil, as well as the understanding of the causes that led Brazil to an authoritarian and anti-indigenous political regime, is of great importance.

In this sense, the disclosure of the serious humanitarian situation that affects the Yanomami people (at the beginning of 2023) unveils an authentic scenario of a crime of genocide and a crime against humanity in the face of (1) starvation; (2) spread of malaria among the indigenous population; (3) sexual violence against Yanomami girls; (4) water pollution by mercury used by illegal mining; (5) indigenous children deprived of basic medication to combat worms and parasites and undernourished and in a skeletal physical state, are some of the results of a State policy aimed at the extinction of indigenous cultures.

As we have already stated:

> As we have already stated, the Rome Statute defines in article 7 the crime against humanity as the "widespread or systematic attack directed against any civilian population, with knowledge of the attack". Thus, extermination is understood as a modality of crime against humanity, "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population" (STEINER; PEREIRA, 2023).

As Foucault teaches, it is about biopower, the *power to let live and make die*. Genocide, as taught by Raphael Lemkin, can be committed by different techniques of death, not just direct extermination.

2. The Brazilian Constitutional Order of 1988 and the protection of the rights of Indigenous peoples

Due to the Constitution of 1988, Brazil has brought to a halt more than 20 years of authoritarian military regime, which marked the years from 1964 to 1985. From a police state that operated on the margins of the law, the new Brazilian constitutional regime made of democracy and respect for fundamental rights and its axiological pillars. The Constitution of 1988, considered by many as one of the most democratic and sophisticated constitutional texts in the occident, brought to Brazil an extensive array of rights and inalienable fundamental guarantees, as well as a new and virtuous system of control of constitutionality.

Besides such advances, the new Constitution imposed a series of duties to the National State, which should dedicate itself to the realization, in the material plan, of a series of social rights, such as workers' rights, education, health, children and adolescents, the environment and the indigenous peoples (VIEIRA; GLEZER; BARBOSA, 2022), based on a multicultural vision. It means the current Brazilian Constitution recognizes the fundamental right to be different.

It should be mentioned that the new constitutional model, characterized by a constitutionalism of a social type, imposed on the Brazilian authorities the duty to establish such rights, making possible, for this end, a series of judicial and even political measures (MELLO, 2015). As such, article 3 of The Brazilian Constitution (BRASIL, 1988, free translation) defines as the fundamental goals of the Federative Republic of Brazil: (1) "to build a society that is free, fair and solidary"; (2) "to guarantee the national development"; (3) "to eradicate poverty and marginalization and reduce the social and regional inequalities"; (4) "to promote wellness to all, without prejudices of origin, race, gender, color, age and any other forms of discrimination."

Regarding the environmental issue, the Constitution of 1988, in its article 225, imposes both Public Power and collectivity, the duty to defend the ecosystem and the

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biomes, so that all citizens, as well as future generations, make use of an ecologically balanced environment (BRASIL, 1988).[2]

As evident, the Brazilian Constitution (1988) also dealt with the rights of the indigenous peoples, dedicating an exclusive chapter to this topic (article 231). As noted by the Brazilian constitutionalist Virgílio Afonso da Silva (2021, p. 342, free translation), before the promulgation of the 1988 Constitution, the Brazilian State had the political objective of incorporating the Indian into the so-called "national communion", as can be seen from article 1 of the Indian Statute (a Brazilian Act) that reveals its purpose for the Indians to "preserve their culture and integrate them, progressively and harmoniously, into the national community".

According to Virgílio Afonso da Silva:

> Thus, although the pure and simple extermination of indigenous peoples has ceased to be a political objective, 'incorporation into the national community' contains, to a large extent, an exterminating task. Although it is not intended to exterminate individuals or communities, it is intended to eliminate cultures, traditions and languages, among others (2021, p. 342, *free translation*).

In fact, the author (SILVA, 2021, p. 342) states that the Brazilian Federal Constitution of 1988 marks a "moment of inflection in this history", since the new normative text "created conditions so that respect for peoples and traditions is fostered", since the new normative text "created conditions so that respect for peoples and traditions is fostered".

It should not be forgotten that dominant cultures' cultural oppression and absorption constitute *ethnocide*, as proposed by Raphael Lemkin in 1944 (2009, p. 153) and afterward by Pierre Clastres (2014, p. 78).

According to a determination of article 231 of the Brazilian Constitution (STF; 1988, 198), the Federal Union must define and preserve indigenous lands.[3] With this imposition, the Brazilian Constitution seeks to guarantee the social organization,

2 Article 225. Everyone has the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both government and community shall have the duty to defend and preserve it for present and future generations [...] (STF; 2022, 194).

3 Article 231. Indigenous people shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to traditionally occupied lands. The Union is responsible for demarcating such lands, protecting and ensuring respect for their property. [...] (STF; 1988, 198).

customs, languages, creeds, traditions and further rights belonging to the indigenous peoples over lands traditionally occupied by them.

As noted, by protecting the indigenous lands, one also protects, by consequence, the possibility of social and ethnic manifestations of the nations and indigenous communities. In other words: the possibility for these people to live in a genuine fashion is guaranteed, ensuring ways for them to live according to practices and creeds that convey identity to their existence as a determined social group. The constitutional order and the international one recognize them the right to be different with dignity under their cosmologies and beliefs.

Furthermore, article 5, paragraph 2 of the Brazilian Constitution foresaw what came to be called the "openness clause", making it possible the absorption and internal applicability of rights and guarantees predicted in international treaties that Brazil would be a part of. So, we can consider, for example, the International Labour Organization Convention 169 on Indigenous and Tribal Peoples rights, as in force in the Brazilian territory (INTERNATIONAL LABOUR ORGANIZATION, 1989).

Aiming to expand and protect rights even more, paragraph 3 of article 5 established as a fundamental guideline that

> [...] the treaties and international conventions on human rights which are to be approved, in each House of National Congress, in two rounds, by three-fifths of the votes by their respective members, will be equivalent to the constitutional amendments (BRASIL, 2018, *free translation*).

Likewise, in a historical decision made by the Brazilian Constitutional Court – the Federal Supreme Court –, it was established that the treaties and international conventions on human rights, even when not following all the formalities described by the paragraph 3 transcripted above, would have the status of *supra legal*, meaning, a higher hierarchy to the other Brazilian federal laws (BRASIL, 2008).[4]

To the same tune of expansion of rights, Brazil ratified, in the year 2003, convention 169 of the ILO, mentioned above, whose goal was to ensure protection to

4 We refer to Extraordinary Appeal No. 466,343 of 2008. As one of its judges (Gilmar Mendes) stated, "...the Federal Supreme Court has just delivered a historic decision. Brazil now adheres to the understanding already adopted in several other countries in the sense of the supra-legality of international treaties on human rights in the domestic order" (BRASIL, 2008, free translation).

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the indigenous nations and to the more than 370 million indigenous individuals distributed in more than 70 countries (INTERNATIONAL LABOUR ORGANIZATION, 1989). This treaty was internalized in the Brazilian regime by means of Decree nº 5.051/2004, which ensured legal protection to around 894.000 Brazilian natives who live all over the Brazilian territory, shared between 305 different ethnic groups. The number of more than 5 million native individuals and more than one thousand distinct nations, when the Portuguese explorers arrived at the Brazilian coast in 1500, must be considered (PEREIRA, 2018, p. 50-52). This data makes comprehending the dimension of the Brazilian indigenous genocide possible.

3. Emergence of a new authoritarianism and the violation of Indigenous rights in Brazil

However, the reality nowadays in Brazil is far from the vision of society proposed by the Brazilian Constitution of 1988. Indeed, a violent and systematic disrespect to fundamental rights is noticeable.

Since the popular protests that took place in Brazil in June 2013, with different agendas and demands, there has been an exponential growth of populist and radical right-wing discourses that have produced an environment that is politically refractory to the rights of indigenous peoples. All of these rights were historically considered obstacles to development by national and foreign sectors interested in the predatory exploitation of the main Brazilian ecosystems (Amazon, Cerrado and Pantanal) and indigenous lands, such as mining companies, illegal miners, ranchers, cattle ranchers and ranchers interested in enabling the predominance of monocultures, at the expense of the destruction of Brazilian forests.

About the historical-political phenomenon mentioned above, the Brazilian constitutionalist Pedro Estevam Serrano (2016, on press) – based on the lessons of Carl Schmitt and Giorgio Agamben – outlined an important theoretical basis for understanding that phenomenon. According to Serrano, a new type of authoritarianism emerged in Brazil that differed from the authoritarian models of the 20th century, where there was a clear institutional breakdown through a dictatorship. For Serrano, the new authoritarianism was characterized by isolated exception measures, which occasionally violated constitutional rights in a camouflaged way under a false appearance of legality. According to the author, the instrumentalization of Law, especially

criminal law, with authoritarian purposes, constitutes another important consequence given the adoption of the exception mentioned above measures, insofar as the procedural norm began to be manipulated as a means to legitimize abuses and violations of fundamental rights (cf. GARZILLO, 2019).

According to Brazilian political scientist Ilona Szabó (2020), this phenomenon stems from positions linked to the ideological spectrums of the right and left, spreading throughout the world, whether in Western Europe, South and Southeast Asia, the United States, Brazil, India, Poland, Russia, Philippines, Hungary and Venezuela. For the author, "in these places, the respective civil society organizations, the press and scientific and academic institutions have become the target of attacks as part of an explicit political mobilization strategy".

Since 2019, violations of fundamental human rights in Brazil have been constantly intensified, leading the country to unprecedented situations regarding the violations as mentioned earlier and threats to the democratic regime, with frontal threats of a *coup d'état*, even violations of social rights as in the case of public health, data protection, destruction of ecosystems, the dismantling of regulatory and administrative structures that protect indigenous peoples and black populations. Among such violations, the continuous disrespect and degradation of the environment are notable, and as a consequence, the violation to indigenous peoples and nations, considering that the environment, especially indigenous lands and forests, constitute an essential and fundamental basis to the indigenous peoples mentioned in a first stage, and in a second stage the humanity as a whole (VIEIRA; GLEZER; BARBOSA, 2022).

As the anthropologist Darcy Ribeiro pointed out, the disrespect towards nature and the indigenous genocide in Brazil go back to the first contacts of the European colonizers and the native peoples of the Americas. However, such violations continued throughout Brazilian history, going further to different institutionalism and regimes that gave the National Brazilian State form.

The fundamental aspect of the indigenous question in Brazil refers to the demarcation of original indigenous lands, an indispensable minimum basis for the preservation and development of indigenous cultures and their physical and economic existence; Indigenous lands represent the minimum condition for the preservation of such original nations and constituted the main target of the Brazilian government between 2019 and 2022, as well as of some economic sectors that want access to the aforementioned ancestral lands. Not without reason, in February 2018, President Jair

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Bolsonaro declared to his supporters that "...If I become President, there will not be a centimeter more of indigenous land..." (SURVIVAL INTERNATIONAL, 2022).

The Brazilian Parliament, after a long period of investigations by the *Parliamentary Commission of Inquiry* (CPI) about the omissions of the Brazilian federal government in the fight against Covid and, mainly regarding the causes for which indigenous peoples were abandoned, mentions in its final report the Opinion of Professor Álvaro de Azevedo Gonzaga, specialist and indigenous Jurist, in the following terms:

> Against indigenous peoples, there were actions and omissions during the highlighted period of the pandemic, which culminated in a true genocide to reduce not only their rights and lands but also their population through the most varied strategies (BRASIL, 2021).

Since 1500, the indigenous peoples of Brazil have been subjected to a constant genocidal process, at different times and through distinct dynamics of extermination, sometimes direct, such as physical elimination, sometimes indirect, with cases of elimination of the fundamental bases for their existence, by action or omission of the Brazilian State, constantly co-opted by economic sectors and their predatory developmental interests over indigenous lands.

4. The Indigenous genocide in Brazil and the insufficiency of its current legal concept

Considering the genocidal experiences that have marked human history, the Holocaust is certainly among the most terrifying. Among the countless intellectuals who supported Adolf Hitler's regime, the legacy left by the important constitutionalist Carl Schmitt stands out.

Despite being persecuted by the SS in 1936, Schmitt was an important enthusiast of the Nazi movement from the mid-20s of the 20th century, a period in which the author produced a series of works that criticized the Weimar constitutional regime (GARZILLO, 2022). Schmitt openly defended the use of article 48 of the Weimar Constitution as a means of installing an exception regime in Germany. In his work *Political Theology*, the author presents the legal basis for an authoritarian regime, which would be possible through the suspension of the Constitution by the political authority, the sovereign (SCHMITT; 2006, 8-12).

In 1932, Schmitt published *The Concept of the Political*, in which he made his classic distinction between the concepts of *friends* and *enemies* (SCHMITT, 2007, p. 35- 50). For the author, the *state of exception* should be aimed at the physical elimination of the enemy, this being the individual (or group of individuals) who, for cultural, racial, linguistic and social reasons, caused the disintegration of the nation (GARZILLO; 2022, 171-182).

Thus, through the physical elimination of the enemy, Schmitt believed that the nation would be complete and pacified once it reached its stage of homogeneity. As it is clear, Schmitt was opposed to liberal democracy, insofar as it defended the heterogeneity of civil society, naturally composed of individuals from different origins, cultures, customs and regions (SCHMITT, 2007; GARZILLO, 2022; BUENO, 2011).

The idea illustrated here through the thought of Carl Schmitt helps to comprehend, as can be seen, the reality experienced by indigenous people in contemporary Brazil. The destruction of native peoples – whether done directly or through the suppression of their lands and culture – seems to move towards Brazil's cultural and racial homogenization, which does not accept its minorities composed of groups from different ethnic and social formations. The destruction of the biomes that are part of the indigenous lands has, as a consequence, the elimination of the fundamental basis for their existence. As a matter of fact, the destruction of the cultural references as well as the cosmological ones of a given human group motivated by (ethnic) or racial aspects, among others, besides the extermination of the essential relational means that are indispensable to the projection of their identity, cause what can be recognized as a "social death". Damien Short explains:

> [...] Some contemporary writers such as Churchill...concur that where the practice of imposing the 'national pattern' of the colonial oppressor is the result of 'policy', it should indeed be considered genocidal. Jean-Paul Sartre stated that 'Colonialization is...necessarily a cultural genocide'...This view has since been expanded by others such as Card, who describes genocide as a 'social death' [...] (SHORT, 2016, p. 25) .

Consequently, several studies show the relationship between the environment, its degradation and the genocide of the peoples that depend on this environment; actually, the indigenous peoples "are" the land, this land considered as a living being that interacts with its peoples. The process of deterritorialization goes beyond the simple

territorial and physical theft: the deterritorialization is spiritual, moral, legal and obviously, also physical.

According to Raphael Lemkin, the political act aimed at the disappearance of the social elements of a given human group, such as culture, language, customs and other aspects that give form to its identity, can also be considered an act of "genocide". Moreover, the author also points to the concept of "ethnocide", which would be connected to the destruction of the cultural references of a people.[5]

Considering the lessons of Raphael Lemkin, it is demonstrated that it is viable to analyze the figure of the crime of indigenous genocide coming from the destruction of the environment due to the close connection between indigenous cultures and their traditional lands.

As such, the destruction of nature at times promoted by agriculture, mining, lumbering and rubber tapping, all illegal, menaces the delicate relationship of dependency between the indigenous communities and the ecosystems, as well as considering the economic importance of the indigenous territories and its non-predatory and sustainable production does. Indeed, the indigenous lands are essential to strengthening a greener economy (SOUZA; GARCIA, 2021) and are the most preserved areas in Brazil in the last 35 years (MAPBIOMAS, 2022). Add to that scenario, especially under a pandemic that defies the planet and the community of nations, the high mortality rate among natives, including children, by the illegal presence of prospectors, mining companies and land grabbers in the indigenous lands, spreading viruses, in the face of which the original nations do not have an immunological memory, a fact that alludes to a recent past of Brazil, a State that has also practiced bacteriological warfare against such peoples (NEIVA, 2020). It can also be rightly stated that non-indigenous populations do not have immunological memory regarding the coronavirus either. However, even so, proportionally, the number of fatal indigenous victims due to Covid-19 is greater than the number of non-indigenous ones. The explanation can be found in the abandonment, by the Brazilian State, of indigenous public health structures,

5 Explaining Lemkin's concept of "genocide", Martin Shaw (2013, free translation by the author) adds: "[...] Lemkin was seeking a term and a law that would put together a whole class of violent and humiliating actions against members of collectivities. Genocide would not be a specific type of violence, but a general indictment that would emphasise common elements of several actions that, considered separately, would constitute specific crimes. Contrasting with the subsequent interpreters that would also restrict genocide as a specific crime, Lemkin considered not only the organized violence, but also the economic destruction and persecution [...]".

established by the Brazilian Constitution and applicable laws (Indigenous Health Subsystem component of the Unified Health System – SUS), as its obligation.

The act of branding the original peoples of Brazil as obstacles to development can be considered a basic element in the Brazilian historical context for the process of physical and cultural extermination of such peoples, be it by (1) the physical and spiritual deterritorialization; (2) the suppression of the necessary environmental basis for their existence; (3) the dismantling of the constitutional, administrative, budgetary structures and protective policies or; (4) by direct physical extermination, practices that were specially implemented throughout the dictatorial regime of 1964, which leads us to another element: Transition Justice, historical memory and indigenous peoples. Therefore:

> [...] There's one of the legacies cultivated and remade during the dictatorial regime installed in 1964: the indigenous peoples considered as obstacles to the development and the production. This notion conducted the country to the adoption of expansionist policies that are harmful to the environmental diversity, there included the way of life of ancestral peoples, millenary, in Brazilian soil, which generated the crumbling of communities culturally well defined and conducted those to the impoverishment in an extent of misery and, in some cases, to their extinction [...] (PEREIRA; 2018, p. 32, *free translation*).

Hence, the degradation of the environment implies the destruction of the *locus* where the indigenous populations develop themselves, concluding with the consequent destruction of the founding elements of their cultural identity. As we already had the opportunity to emphasize:

> Formulating such a reflection under the scenario of rupture of the environmental conditions on which indigenous peoples depend to live and express their identities, caused by carrying out infrastructure works or by the pure and simple illegal taking of such lands occupied by squatters, extractive companies and agribusiness, including traditional lands in which, for example, old cemeteries where ancestors are buried or cremated and the previous generations of those nations, the conclusion can only be that in such cases there is an evident imposition of conditions of existence that will imply the impossibility of the continuity of collective existence of the respective indigenous peoples. The action on the environment, not always directed directly at indigenous communities and their individuals, is enough to cause them to disappear, both in their cultural expressions and in their physical existence. Direct actions on the natural

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> resources on which indigenous groups, communities and peoples depend, such as food and water poisoning; the destruction of towns and villages; and the carrying out of major infrastructure works on indigenous lands and with irrecoverable impacts on biodiversity, without complying with national and international standards, have been preventing the continuity of the collective life of countless indigenous peoples, as well as their expression in Brazilian society (PEREIRA; 2018, 269, *free translation*).

More than that, it implies the extinction of natural elements considered living, under a biocentric perspective, a notion that has started to gain popularity in some countries, as the case of New Zealand (NEW ZEALAND PARLIAMENT, 2017), Canada (D'AMOURS, 2021), Bangladesh and India, among others, that recognize the legal personality to their sacred rivers (ECKSTEIN; D'ANDREA; MARSHALL; O'DONNELL; TALBOT-JONES; CURRAN; O'BRYAN, 2019).

The question now proposed concerns the fact that the definition proposed by Raphael Lemkin for the crime of genocide was restricted when the *Convention for the Prevention and Suppression of the Crime of Genocide* (1948) was approved by the United Nations. The conditioning of the destruction of a human group, in whole or in part, on account of their nationality, religion, race or ethnicity, as well as the requirement to prove the specific intention, by the perpetrator, of making the aforementioned human group disappear, constitute parameters that largely remove the effectiveness of the 1948 Convention, since it translates the option to prevent and to repress the crime of genocide, however, conceived as such in one of its dynamics, especially based on the Holocaust committed by the Nazi regime (1939-1945).

This vision enshrined in international norms in the period that followed the defeat of Nazi fascism resulted from choices based on the interests of the victorious States in the Second World War, also as a response to the atrocities discovered with the extermination camps in Europe and the Pacific. Nonetheless, without solid justifications, excluded other dynamics that also lead to the extermination of human groups and their expressions, such as, for example, the destruction of human groups for political reasons or even cultural extermination (ethnocide, in the words of Raphael Lemkin, Pierre Clastres and Robert Jaulin).

The requirement of the so-called *dolus specialis* (special intent) imposes great difficulties from a legal point of view for recognizing the crime of genocide since demonstrating the perpetrators' intentions always involves a difficult need to carry out.

Due to this reason, Antonio Augusto Cançado Trindade, in his dissenting opinion in Croatia v. Serbia (2015), in a judgment by the International Court of Justice (ICJ), proposed that the crime of genocide can also be recognized by the objective circumstances of the context in which it was committed when it is impossible to prove the occurrence of the crime of genocide based in the mental plane of the perpetrator. In this sense:

> [...] From a cumulative analysis of the dossier of the *cas cl'e.spéce* as a whole, in my perception the intent to destroy the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proof). The extreme violence in the perpetration of atrocities bears witness of such intent to destroy. The widespread and systematic pattern of destruction across municipalities, encompassing massive killings, torture and beatings, enforced disappearances, rape and other sexual violence crimes, systematic expulsion from homes (with mass exodus), provides the basis for inferring a genocidal plan with the intente to destroy the targeted groups, in whole or in part, in the absence of direct evidence. In effect, to require direct evidence of genocidal intent in all cases is not in line with the jurisprudence of international criminal tribunals...When there is no direct evidence of intent, this latter can be inferred from the facts and circumstances [...] (INTERNATIONAL COURT OF JUSTICE, 2015).

The analysis of the elements currently recognized as necessary for the crime of genocide, since essentially inspired by Eurocentric parameters, especially historical ones, disregards the existing contexts in other continents, previously colonized, regarding the genocidal methods and dynamics most commonly practiced in them.

Thus, formally democratic states, which used to be colonizers, also committed – or still commit – genocide, in addition to totalitarian or dictatorial regimes. The fact is that international norms for the prevention and repression of the crime of genocide are based on political choices, which emphasize certain components to the detriment of others.

As Professor Christopher Powell from the University of Manitoba (Canada) teaches:

> Genocide involves diverse elements: state power, mass murder, victims' defenselessness, collective identity, and so on. Its evil can be accounted for differently through different arrangements of these elements, in which one element figures more prominently than the others or

> a particular arrangement of elements is specified. For example, debates about whether the destruction of Indigenous cultures in the Americas should be counted as genocide often hinge on the importance given, in the definition of "genocide", to destructive practices other than deliberate massacre: forced migration, confinement to inhospitable living conditions, removal of children from the group, and sporadic and disorganized violence by nonstate actors (settlers), as opposed to systematic state-run concentration and extermination of populations (POWELL, 2011).

It is a case of questioning: why cannot the construction of a large hydroelectric plant that will cause the disappearance of a specific indigenous culture, imposed by a democratic State without prior consultation of the affected peoples, be considered an act of genocide, since it would certainly cause serious mental harm to members of the indigenous group or, even, the imposition of living conditions that cause the physical destruction of the affected indigenous community, as described by article 6º of the *Rome Statute of the International Criminal Court*?

In this sense, the International Criminal Courts have been developing new references to identify other possible genocidal dynamics, like the *International Criminal Tribunal for Rwanda* (ICTR), which presented new alternative parameters for proving the intentional element of the crime of genocide (*Nahimana et al. and Kalimanzira cases*).

The ICTR established, for example, in the *Kalimanzira case* (ICTR - 05 - 88), that:

> [...] in the absence of direct evidence, a perpetrator's genocidal intent may be inferred from relevant facts and circumstances that can lead beyond reasonable doubt to the existence of the intent of the evidence, provided that it is the only reasonable inference that can be made from the totality of the evidence. In the light of the Tribunal's jurisprudence, genocidal intent may be inferred from certain facts or indicia, including but not limited to: (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others [...] (ICTR; 2009, 151).

The most up-to-date discussions on the mental element of the crime of genocide (*mens rea*) have been generating important developments toward a greater effectiveness of preventive and repressive norms about this international crime.

Adam Jones, in the classic Genocide: A Comprehensive Introduction, explains well the academic discussion on the subject. According to the author, there are two different positions regarding the discussion on the scientific characterization of the

phenomenon of genocide and its legal definition: one "harder" and the other "softer". In the author's words:

> In genocide scholarship, harder positions are guided by concerns that "genocide" will be rendered banal or meaningless by careless use. Some argue that such slack usage will divert attention from the proclaimed uniqueness of the Holocaust. Softer positions reflect concerns that excessively rigid framings (for example, a focus on the total physical extermination of a group) rule out too many actions that, logically and morally, demand to be included. Their proponents may also wish to see a dynamic and evolving genocide framework, rather than a static and inflexible one (JONES, 2011, pp. 20-21).

5. Conclusion

In fact, the recognition of the crime of genocide has resulted, over the decades, from political choices, without considering the main foundation of International Human Rights Law (universal human conscience – *recta ratio*) nor the specific context that characterize the relational, social, economic and cosmological structures of the indigenous peoples of the Americas. It is, therefore, necessary to recognize legal parameters for the crime of genocide that also respect the sociological and anthropological dynamics of the indigenous peoples of Latin America. Characterizing the crime of genocide should not be restricted to proof of specific intent, that is, what goes on in the perpetrator's mind. It should also consider the existential parameters of the victimized group, their relational structures, their cosmologies and their way of life.

Genocide, as the most serious of crimes – *the crime of crimes* – (SCHABAS; 2008, 4), is not limited to the extermination model verified throughout the experience of the Second World War but can also be identified by the use of elimination techniques based on State policies that promote the rupture of the existential bases of the affected groups. Such a result can be obtained from legislative measures; public policies; omissions in the provision of essential public services such as health; the dismantling of inspection structures that protect the environment and indigenous cultures; discriminatory policies, in addition to direct violence, supported by part of society.

In conclusion, history proves the existence of various genocidal techniques that prove to be effective when considering existential references to victimized peoples and cultures.

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