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Transitional Injustice For Indigenous Peoples From Brazil

A (In)Justiça de Transição para os Povos Indígenas no Brasil

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Abstract

The study thematizes reparations for violations of indigenous peoples' human rights that occurred during the Brazilian dictatorship from 1946 to 1988, a period of time covered by the Amnesty Law (Law number 6.683). The study is intended to answer the following question: before transitional justice, what reparation mechanisms existed for the indigenous peoples in Brazil? In this context of transitional (in)justice and reparation for this minority, questions arise as to what measures should be taken by the Brazilian state, private companies, and/or military agents. The objective of this research is to draw adequate parameters of reparation to the indigenous peoples in Brazil, through the right to truth, memory, justice, and territory. Results indicate that reparatory mechanisms for indigenous peoples are fragile, because many legal limitations have been created to make it impossible to promote an indigenous transitional justice system and seek the right to memory, justice, truth, reparation, and territory.

Keywords: Transitional justice; Indigenous peoples; Dictatorship.

Resumo

O artigo tematiza reparações às violações de direitos humanos dos povos indígenas na ditadura brasileira, no período de 1946 a 1988, lapso temporal da Lei da Anistia (Lei nº 6.683, de 28 de agosto de 1979) e utilizada pela Comissão Nacional da Verdade. Pretende-se responder à seguinte pergunta: no contexto da Justiça de Transição, quais mecanismos de reparação existem para os povos indígenas no Brasil? Neste paradoxo de (in)justiça de transição e medidas de reparação para esta minoria surgem questões relativas a quais medidas devem ser promovidas pelo Estado brasileiro, empresas privadas e/ou agentes militares. O objetivo desta pesquisa é traçar parâmetros adequados de reparação aos povos indígenas no Brasil, por meio do direito à verdade, à memória, à justiça e ao território. Os resultados alcançados indicam que os mecanismos reparatórios para os povos indígenas são frágeis, já que muitas limitações jurídicas têm sido criadas para impossibilitar a promoção de uma justiça de transição indígena e em busca do direito à memória, à justiça, à verdade, à reparação e ao território.

Palavras-chave: Justiça de transição; Povos indígenas; Ditadura.



Introduction

*Was it worth it? Was it worth shouting in several languages and conferences and interviews and countries that civilization is sometimes murderous? [...] Forgotten men using bow and arrow are executed in the name of an integration that disintegrates the root of being and living. [...] Noel, you said: A civilization that sacrifices ancient peoples and cultures is an amoral farce. (ANDRADE, Carlos Drummond de., **Entre Noel e os Índios**, p. 94)*

For centuries, indigenous peoples have been annihilated and forced to integrate into Latin American societies. In Brazil, with the colonization by the Portuguese, these peoples were forced to change their traditions and cultures in the name of the Catholicism imposed by Portugal.

Thus, with the emergence of nation-states and the independence of Latin American countries, new legislation emerged dealing with indigenous peoples, but reiterating the need for integration and the end of socio-cultural practices and traditions (MARÉS, 2001).

With the Brazilian dictatorship that began in 1964, the time period is only a detail for these peoples. As stated by Douglas of the Krenak ethnic group, the dictatorship was for the natives the continuity of something that already existed (BRASIL-2, 2014) and thus should not be understood as a milestone for the beginning of human rights violations.

The Brazilian dictatorship meant the death of at least 8,000 indigenous people (BRASIL-1, 2014) and the beginning of the construction of enterprises that modified the lives of these peoples, such as the construction of the Trans-Amazonian Highway, the idealization of the Belo Monte Hydroelectric Plant, the construction of the Itaipu Hydroelectric Plant, the Perimetral Norte highway, the incarceration and use of indigenous labor, and the sale of indigenous goods, as will be observed in the present study.

In the meantime, transitional justice emerges, a theory responsible for the study of human rights violations that occurred in periods of armed conflicts and/or dictatorships. Transitional justice seeks to articulate mechanisms that offer reparation to all victims of this period through four fundamental axes: the right to memory, the right to the truth, the right to justice, and non-repetition of past events (SOARES, 2017).

The purpose of this article is to draw adequate parameters of reparation to



indigenous peoples in Brazil through four axes, the right to memory, to the truth, to justice, and to territory. With the outline of fulfilling the proposed objective, this research was divided into three stages, which will be briefly described. In the first part, the goal is to briefly analyze historical documents that report human rights violations against indigenous peoples during the Brazilian military dictatorship, from 1946 to 1988, the period of the Amnesty Law (Law 6,683, August 28, 1979), and that were used by the National Truth Commission (CNV).

In the second stage, the insertion of indigenous peoples into the transitional justice system, as well as reparation mechanisms, is studied. As a starting point, the criteria of transitional justice applied to the natives are examined, that is, a transitional justice based on a positive and casual historical justice, since the Brazilian dictatorship did not mean the beginning, and much less the end, of the human rights violations imposed on these peoples. This introduction is followed by the analysis of the fundamental rights of indigenous peoples at the international and national levels, such as Convention 169 of the International Labour Organization and Article 231 of the Federal Constitution of 1988. Next, the indissolubility of the ethnic status of indigenous peoples regarding the crimes of the dictatorship is demonstrated through the concepts of genocide and ethnocide. The following point clarifies the importance of the territory, from which all the rights of cultural traditions and the rights of identity of the indigenous peoples originate. The last stage consists of the search for lawsuits that deal with the institute of the timeframe of occupation.

The scientific method used was predominantly deductive. The procedural method was mono-graphic, with the theoretical analysis of transitional justice for indigenous peoples in Brazil, victims of the military dictatorship. Bibliographical, jurisprudential, and legislative research techniques were used.

I. Indigenous peoples and the Brazilian dictatorship

Under the apex of its developmental, punitive, and national security policies,¹ the

¹ Article 3 of the National Security Law (Decree-Law No. 314 of March 13, 1967) states that "national security essentially comprises measures aimed at preserving external and internal security, including the



Brazilian dictatorship led to the practice of repression, torture, the annulment of political rights, and the restriction of fundamental rights, thus creating a state of emergency that resulted in numerous human rights violations. Today it is unmistakably known that indigenous peoples were among the greatest victims² of this period, having been tortured, imprisoned (in prisons or concentration camps), and used as slave labor³ (BRASIL-1, 2014).

The effects of several projects carried out by the Brazilian dictatorship from 1964 to 1988 (such as the Trans-Amazonian Highway, the Itaipu Hydroelectric Plant, etc.) on the indigenous peoples are still felt today. In this sense, the Trans-Amazonian Highway (BR-230) meant the forced removal of the Juruna peoples from their territories, which were along the route. The construction of that highway would pass through indigenous territories, forcing many ethnic groups into a coerced withdrawal from their *habitats*. Topographic studies at the time showed several villages along the highway, but this was not a reason why the project declined according to Afonso Alves da Cruz (BRASIL-1, 2014). Thus, the Trans-Amazonian would expel 29 ethnic groups, including eleven isolated communities and nine with "intermittent contact" (BRASIL-1, p. 209). In order to carry out such a procedure, *Funai* (the governmental protection agency for indigenous interests and culture) signed an agreement with the Amazonian Development Authority (*Sudam*) to promote the pacification of 30 indigenous ethnic groups. Thus, the indigenous peoples were removed from their lands⁴ (BRASIL-1, 2014).

prevention and repression of psychological warfare, revolutionary war, or subversive war." Given this article, the doctrine of national security has made it possible to legitimize violence against indigenous peoples. In this way, indigenous persons were seen as internal enemies because they were influenced by communist organizations and international interests. CARTA CAPITAL. **Violations of the Rights of Indigenous Peoples.** Available at <<http://www.cartacapital.com.br/sociedade/redemocratizacao-incompleta-perpetua-desigualdades-no-brasil-diz-relatorio-573.html/violacoes-aos-povos-indigenas.pdf-7733.html>>. Accessed on April 1, 2017.

²In this sense, it should be noted that the use of the term "one of the greatest victims of the dictatorship" is justified by the number of indigenous persons killed in this period, according to the Figueiredo Report and the National Truth Commission.

Thus, it is verified that at least 8,000 indigenous persons were killed during the Brazilian dictatorship, meaning that they had suffered more loss of life, a figure that could mean a genocide. (BRASIL-1. **Violation of Human Rights of Indigenous Peoples.**)

Available at <http://www.cnv.gov.br/images/pdf/relatorio/Volume%202%20-%20Texto%205.pdf>. Accessed on April 1, 2017.

³Theologian and philosopher Egydio Schwade, coordinator of the State Committee of Right to the Truth, the Memory, and the Justice of Amazonas states, "They did not realize the suffering of the indigenous people." "Indigenous and vulnerable populations rights activist, founder of the Indigenous Missionary Council (CIMI),



The construction of indigenous prisons is also verified through the reports of the Krenak people in the state of Minas Gerais. Many indigenous peoples of this ethnic group were imprisoned in a reformatory, located in the city of Resplendor (MG). There was also a prison, which was located in the state of Rio de Janeiro, on Ilha das Cobras. In both places, indigenous peoples were tortured and forced to work as slaves. The prison housed 200 people (BRAZIL-2, 2014).⁵

Thus, one can observe the specificity of the persecution, torture, and death of indigenous peoples during the Brazilian dictatorship. It was mainly economic and agrarian interests that threatened these peoples and expelled them from their lands. Proof of this is found in the testimonies contained in the Final Report of the CNV and the Figueiredo Report, which demonstrate the Brazilian state's interest in the use of these territories for agribusiness (BRASIL-1, 2014).

It should be noted that the indigenous peoples were not passive victims of the crimes suffered during the Brazilian military dictatorship. The idea that these peoples experienced a political vacuum and that they were passive communities "are some of the misunderstandings that still persist in the memory of the dictatorship, which must be faced" (LIMA, PACHECO, 222).

Until the 1988 Federal Constitution, Brazil adopted the integrationist regime for indigenous peoples, making it impossible and denying their right to exist and to live collectively. The *indigenous being* was seen as something transitory, which would be surpassed and transformed by the state (LIMA, PACHECO, 2017).

Egydio, 79, considers the Indians, the *quilombolas*, and the farmers who have resisted and resist the projects implemented under the military regime and kept until today as 'persecuted politicians', and he asks for political will to listen to them and develop actions capable of promoting changes that can cease the harm caused." Instituto Humanas Unisinos. **"They did not realize the suffering of the indigenous people," says activist about the CNV report.**

Available at <http://www.ihu.unisinos.br/noticias/540422-nao-se-deram-conta-do-sofrimento-dos-indigenas-diza-Ativista-sobre-relacion-da-cnv>. Accessed on April 1, 2017.

⁴We must highlight Antonio Cotrim's speech on this subject: "I saw in the newspaper that they were opening the Trans-Amazonian Highway. I realized that no one had spoken of the presence of Indians on the way. A deputy from Paraíba asked Minister Costa Cavalcanti and he did not know anything about it. They asked me for a job to report what Indians were there. When we delivered the work with information about the Indians, only then did they give funds to FUNAI. The funds allocated to the Trans-Amazonian Highway Operation [were] greater than [those] of FUNAI itself" (BRAZIL-2, p. 5).

⁵Regarding this, Bonifácio Krenak, an indigenous person, tells the CNV, "They would tie people in a tree trunk, very tight. When I was chosen in the draw to get beat up, I would pass an herb on my body, to be able to stand it longer. There were others that they tied up with a rope from head to toe. We would wake up and see someone dead because they couldn't stand being tied up like that. (To avoid being punished...) we had to do the job very quickly" (BRAZIL-2, page 75).



Indigenous peoples were considered integrated when they experienced all the compulsions, managing to survive and reach "the twentieth century in the midst of the national population, whose economic life had been incorporated as a reserve of manpower or as specialized producers of certain commodities for commerce" (RIBEIRO-B, page 235).

The need for the state to "integrate" these peoples is verified in the legislation of the time, such as the Indian Statute, which had

as an axis a sub-categorization of the natives ("silvícolas") in "isolated", "intermittent contact", "permanent contact" and "integrated". It left its last and true desideratum blank, the *final* subcategory - the "assimilated" Indian, the Indian extinguished as an Indian and turned into a "Brazilian": "caboclo", "ribeirinho", rubber tapper, peasant. In short, the *Indian* that was turned into *poor* (CASTRO, 2017).

In this way, it was necessary to integrate the indigenous peoples so that they could become Brazilian citizens (CLASTRES, 2017). In this sense,

The first proclaims the hierarchy of cultures: there are those that are inferior and those that are superior. As for the second, it affirms the absolute superiority of the Western culture. Therefore, it can only maintain a relationship of denial with others, and in particular with primitive cultures. But it is a positive denial, in the sense that it wants to suppress the inferior while inferior to raise it to the level of the superior. The "indianity" of the Indian is suppressed to make them a Brazilian citizen (CLASTRES, page 57).

Although the Brazilian military dictatorship did not classify the indigenous peoples as "communists," "subversives," or "enemies of the homeland," the CNV states that in certain situations these peoples were considered "rebels," "hindrances," and "obstacles" because they opposed the state's development policy (LIMA, PACHECO, 2017).

Thus, the crimes briefly described in this section allow us to elucidate and illustrate the fate of the indigenous peoples during the Brazilian military dictatorship. Therefore, the next topic is the analysis of the concept of transitional justice and its implementation for indigenous reparation.



II. The insertion of indigenous peoples in transitional justice

Indigenous peoples not only suffered from marginalization, as discussed previously; they were systematically silenced and excluded from the history of the countries. For this reason, most non-indigenous citizens act with indifference and disbelief because they do not know about the historical exploitation and violations suffered by these peoples (ICTJ, 2017).

This article does not intend to deconstruct all the theoretical support for transitional justice, since the right to memory, truth, and justice are fundamental for Brazilian society to be able to repair and overcome all the legacy of human rights violation and authoritarianism. However, as we shall see, it is necessary to include, within the fundamental axes of transitional justice, the territorial right and the necessity of treating the ethnicity of the indigenous peoples as indissoluble as regards the crimes of the dictatorship, in order not to persist in the theoretical negligence that always occurred regarding these studies.

Thus, it is possible to define transitional justice "as the set of approaches, mechanisms (judicial and non-judicial), and strategies to face the legacy of mass violence of the past" (SOARES, 2017). In fact, transitional justice only has latency when it adds the fundamental axes, which are the right to memory, to the truth, and to justice, contributing to a new political and legal experience and to the democratic rule of law. These dimensions are part of the internationalization of human rights, modifying the roles of the state and the national actors (SOARES, 2017).

In effect, transitional justice has four parameters, which are the right to memory, truth, justice, and reparation. In this way, we intend to study the insertion of indigenous transitional justice with the reparatory parameters based on five fundamental axes for indigenous peoples: the right to memory, truth, justice, reparation, and territory.

Its definition can also be said to be related to human rights violations, as it investigates past human rights abuses, mass atrocities, or other forms of serious social traumas, such as genocide or civil war, for the purpose of building a more democratic, just society, or peaceful future (BICKFORD, 2017). It is noted that such human rights violations include genocide and atrocities against any population, ethnic group, or



minority. In addition to these considerations, we verify that transitional justice can be carried out at the judicial and/or administrative level (BICKFORD, 2015).

Among the possible reparation measures for indigenous peoples is apology by the state (as recently occurred in Canada⁶); the creation of a specific truth commission for indigenous issues; a commemorative date for the events that occurred; the creation of museums;⁷ production of didactic and audiovisual material⁸ to be shared in schools, on television, and on the internet; the implementation of actions to preserve the culture of indigenous peoples; delivery of all kinds of documents from the dictatorship to these peoples; and the return of territories taken from them.

From this, other reflections on the realization of this specific form of transitional justice arise, which can frequently mean a context of injustices and paradoxes. Thus, some of these measures often do not take into account their opinion and their right to self-determination, due to the legal and political supremacy of the state over these minority groups⁹ (JUNG, 2017).

The Brazilian Government created the National Truth Commission (CNV) in 2011, which in its report of December 10, 2014, brought countless recommendations regarding the victims of the dictatorship. Specifically, in relation to indigenous peoples, there are thirteen suggestions, such as an apology from the state and the creation of a specific national commission (BRASIL-1, 2014).

Another form of reparation is amnesty, although it should not be understood as oblivion. Amnesty means extinguishing criminal convictions imposed before the act

⁶In this case, Canada is mentioned, whose Prime Minister, Justin Trudeau, calls for reconciliation and forgiveness for the abuses committed against native persons. THE GUARDIAN. **Justin Trudeau Pledges Reconciliation in Canada after Aboriginal Abuse.** Available at <http://www.theguardian.com/world/2015/dec/15/justin-trudeau-pledges-reconciliation-canada-aboriginal-abuse>. Accessed on April 1, 2017.

⁷As an example, the creation of the virtual museum "Armazém da Memória" ("Memory Warehouse"), idealized by Marcelo Zelic, stands out. The "Armazém da Memória" publishes numerous documents about indigenous peoples during the dictatorship. Available at <http://armazemmemoria.com.br>.

⁸The production of the documentary "Guerra sem fim: resistência e luta do povo Krenak" ("Endless War: Resistance and Struggle of the Krenak People"), produced by the MPF, the National Association of Attorneys of the Republic (ANPR), and the video producer Unnova exposes the history of struggle and resistance of the Krenak ethnicity during the Brazilian dictatorship.

⁹It should be noted that the choice of the word "minority" in this work is not related to statistical definitions. "In this conceptual sense, which complexity we have no place to develop here, indigenous ethnic minorities are not simply subsets or socio-cultural subsystems" included in the majority, which political figure *par excellence* is the sovereign nation-state, but collectivities in an incessant process of minorization, of continuous variation, a process properly intolerable by the administrative machinery of the Majority ("who is an Indian, anyway?" "but these guys are not Indians," "now everyone wants to be an Indian in the Amazon," etc.). (CASTRO, 2017).



occurred, and, thus, it can be said that amnesty means legal oblivion (BASTOS, 2009). In Brazil, Article 8 of the Transitional Constitutional Provisions Act¹⁰ deals with the granting of amnesty to those who had been affected by political motivations through state actions. Regulating this article, provisional measure no. 65 of August 28, 2002, states that those who were exclusively politically motivated in the period from September 18, 1946, until October 5, 1988, are considered politically amnestied and punished with a transfer of residence to a location other than where they practiced their professional activities.

In this way, it is possible to extend to the natives the request for amnesty, since many were removed from their lands (like the Krenak people in the state of Minas Gerais). However, it should be noted that although they may be considered amnestied by the legislation, Ministry of Justice Order No. 2,523/2008 requires that the request be made individually. Thus, it is difficult to repair these peoples by means of this Ordinance, since indigenous societies value and organize themselves collectively.

If this information is taken into consideration, it can be affirmed that indigenous transitional justice must be the center of the claim of fundamental rights for these peoples, since there is no possibility for a historical, reparative, and transitional justice, without taking into account the right to territory.

III. Indigenous rights at the international and national levels

As explained earlier, indigenous transitional justice must base its foundations on the recognition of the right to the land and the characterization of the crimes that occurred during the dictatorship inseparably from its ethnic category. However, it should be noted that the fundamental rights provided for in international and national documents are also part of the core of an indigenous transitional justice system.

¹⁰ Art. 8 of the Transitory Constitutional Provisions Act: Amnesty is granted to those who, during the period from September 18, 1946, until the date of the promulgation of the Constitution, had been affected, due to purely political motivation, by institutional or complementary acts of exception to those covered by Legislative Decree No. 18, of December 15, 1961, and those affected by Decree-Law no. 864, of September 12, 1969, ensuring the promotions, during their period of inactivity, to the position, job, or graduation to which they would be entitled if they were in active service, obeying the periods of permanence in activity stated in the current laws and regulations, respecting the characteristics and peculiarities of the careers of civil servants, civilian and military, and observing the respective legal regimes.



As is logically perceptible, all these rights open up a range of possibilities for interpretations and innovations in the defense of indigenous rights (ICJT, 2017). It should be noted that the decisions of the Inter-American Court of Human Rights further corroborate the applicability of these rights by the nation-states.

This foundation, which is essential to provide support for indigenous transitional justice, will be the approach to this topic. In this sense, we intend to examine the theoretical field of indigenous rights, such as the right to self-determination, to the demarcation of territories, to respect for their cultural practices, and to the interpretation issued by the international courts regarding these rights.

In this respect, the extermination of ethnicities, cultures, knowledge, and values in the twentieth century led to the need to protect the rights of minorities and indigenous peoples through international law conventions. Thus, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and in particular against Indigenous Peoples, and the United Nations Declaration on the Rights of Indigenous Peoples were created.

Regarding the protection of indigenous peoples, the most important, updated, and legally binding document on indigenous peoples is Convention 169 of the International Labour Organization (ILO) (ISA, 2016). The first guarantees provided in this document are the right to land, provided for in Article 13, which establishes that the territory is related to the identity of the Indian:

Article 13:

1. In applying the provisions of this Part of the Convention, governments shall respect the special importance of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship, for the cultures and spiritual values of the peoples concerned.

2. The use of the term **lands** in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use. (ILO, 1989)

Indeed, the UN Declaration on the Rights of Indigenous Peoples is in line with Convention 169, guaranteeing even more rights to these peoples, as well as the preservation of socio-cultural, religious, and territorial practices, rights also found in the



Federal Constitution. In addition, states should promote redress measures, including restitution and respect for cultural, intellectual, and religious property that has been violated without consent. In this sense,

Article 11: (...) **States shall provide redress** through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. (UN, 2007) [emphasis added].

We reiterate that the United Nations Declaration on the Rights of Indigenous Peoples is a large and complex document with a preamble and 46 articles. The Declaration recognizes a broad range of basic human rights and fundamental freedoms of indigenous peoples and addresses issues as diverse as the inalienable collective right of indigenous peoples to the ownership, use, and control of their lands, territories, and natural resources; their right to maintain and develop cultural and religious practices; their right to establish and control their educational practices; and their rights to traditional medicine and cultural and traditional knowledge (PULITANO, 2012).

In turn, at the national level, the 1988 Constitution of the Federative Republic of Brazil brings numerous guarantees to indigenous peoples. Through the struggles of indigenous movements, the Brazilian Federal Constitution brought previously non-existent rights regarding material and immaterial cultural rights (COLAÇO, 2003). However, it has been verified that the judicial, executive, and legislative branches are trying to limit these rights, contributing to a transitional injustice.

In the preamble to the Brazilian Constitution, it is clear that one of the pillars of the Federative Republic of Brazil is the right to difference, and especially to pluralism. Thus, the Brazilian Federal Constitution, recognizing the right to cultural, religious, cosmological, and traditional occupation of its lands, broke a paradigm and influenced other Latin American constitutions (MARÉS, 2001).

Likewise, all rights related to indigenous peoples in the Constitution permeate multiculturalism, pluriethnicity, the humanist view, the valuation of material and immaterial goods, and the preservation of biodiversity (SANTILLI, 2005).

This is so much so that Ela Wieckoo Volkmer de Castilho (1993, p. 98) highlights that "the environment and culture have a much broader and richer juridical interface,



which is part of the human rights theme." To the indigenous peoples, the Constitution guarantees a specific chapter that recognizes their social organization, customs, creeds, religion, traditions, and original rights to the lands they traditionally occupy (SANTILLI, 2005).

Article 232 of the Brazilian Federal Constitution recognizes that "Indians shall have their social organization, customs, languages, creeds, and traditions recognized, as well as the original rights to the lands they traditionally occupy" (BRAZIL, 1988). This passage also states that "[t]he Indians, their communities and organizations have standing under the law to sue to defend their rights and interests, the Public Prosecution intervening in all the procedural acts." It can be said that indigenous peoples can file lawsuits without the need to be represented by indigenous organizations, such as *Funai* (SANTILLI, 2005).

Thus, it can be said that indigenous transitional justice considers all the rights mentioned here as fundamental for the reparation of indigenous peoples, and all human rights violations mentioned in the previous chapter are covered in the fundamental human rights under the International Conventions and the Brazilian Federal Constitution.

IV. Genocide and ethnocide

Undoubtedly, the end of the dictatorship did not mean the end of systematic violence against indigenous peoples, considering that democracy did not result in the disruption of state actions toward these peoples. Another factor that deserves to be highlighted is the non-condemnation of the crimes committed in the dictatorship, since "Brazilian Justice has not touched on the impunity of crimes against humanity practiced against the Brazilian Indians" (FERNANDES, 2017).

In this sense, it is necessary to emphasize that these peoples are ethnically inseparable as regards the crimes of the dictatorship to typify them as genocide, and the need to guarantee the right to the land. This is why it is important to critically analyze historical documents, as in the first chapter, so that theoretical legal possibilities may be used to convict the Brazilian state and private agents, thus promoting the right to



justice.

In any case, it should be pointed out that indigenous peoples were the victims of crimes not only in Brazil, but also in other historical and political contexts, in Guatemala, Peru, and Canada (ICTJ, 2017). In Brazil, as highlighted in the first stage of this research, at least 8,000 indigenous people were killed during the dictatorship (BRASIL-1, 2014).

Therefore, it is known that these peoples were historically massacred for petty motives and purely economic interests (CARNEIRO DA CUNHA, 1998). In the Latin American context, it is important to say that the continent was not discovered, but invaded. As a result, it can be affirmed that "ignorance and contempt for indigenous culture" (RIBEIRO, p. 48) made Europeans unable to understand the cultural and functional importance of these peoples (RIBEIRO, 1996). The policy of extermination of indigenous peoples "oscillated between segregationist, integrationist and preservationist" (NEUENSCHWANDER MAGALHÃES, 2017), so much so, that for a long time people asked themselves whether the "Indians" had souls. This was because

From a legal point of view, this was an operation that, in the context of a political-judicial order shaped by Natural Law postulates, required another operation of a philosophical nature: the legitimacy of the conquest required the recognition that the Indians were also carriers of human nature (NEUENSCHWANDER MAGALHÃES, 2017).

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Thus, indigenous persons were considered uncivilized and needed to be catechized to be human (CARNEIRO DA CUNHA, 2012). All this history demonstrates that transitional justice for indigenous peoples requires historical justice, due to the centuries of genocide against these peoples.

The crime of genocide becomes the main actor in the context of Latin American dictatorships, given the number of dead indigenous persons. This raises the possibility of creating initiatives to identify rights violations and discuss why indigenous peoples continue to suffer in the present day (ICTJ, 2017).

In this sense, in the context of the Latin American continent, the main emblematic situations involving these peoples are the armed conflicts, which result in suffering and mass killings. In Guatemala, General Efraín Ríos Montt is accused of having committed genocide against indigenous peoples in 1982 (ICTJ, 2017). Although he still has not been punished, in recent decisions, Guatemalan justice has determined that



Efrain will be prosecuted for the crime of genocide.

Regarding Brazil, although the crime of genocide was promulgated in 1956 by Act No. 2889 of October 1st, the Bertrand Russell Tribunal¹¹ had already obtained a conviction in 1980, although the state repelled the decision so as not to comply with it (FERNANDES, 2017).

It can be observed that the concept and characterization of the crime of genocide can often refer to Eurocentric contexts and the systematic denial (FLAUZINA, 2014) of the possibility of non-European victims. However, as highlighted in the previous sections, it is important to emphasize the significance of transitional justice for indigenous peoples, since until now the genocide and the brutalities that have occurred against them have not been recognized.

In theoretical terms, the word "genocide" was created by the lawyer and Polish Jew Raphael Lemkin, to invoke the memory and crimes of the Holocaust in World War II (FEIERSTEIN, 2017). In his book *"Axis Rule in Occupied Europe,"* Lemkin analyzed the Nazi system in Europe and its crimes against the Jewish people. In the author's words,

New conceptions require new terms. By "genocide" we mean the destruction of a nation or an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as *tyrannicide*, *homicide*, *infanticide*, etc.¹² (LEMKIN, p. 79)

It is noted that the term "genocide" was used by Lemkin to refer to the killing of a collective of people belonging to the same ethnic group and, in the case of World War II, the Jews. His reasoning took into account the historical and political context in Europe. Lemkin considers that

Genocide has two phases: one, destruction of the national pattern of the

¹¹ Russell Tribunal II was created by Bertrand Russell and Jean-Paul Sartre. Its goal was to judge the crimes of genocide worldwide. Brazil was presented in Rome in 1974 for human rights violations that occurred during the dictatorship. (BRASIL **Human rights violation - Russell Tribunal II.** João Pessoa: UFPB, 2014).

¹²In the original, "New conceptions require new terms. By 'genocide' we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as *tyrannicide*, *homicide*, *infanticide*, etc." (LEMKIN, page 79)



oppressed group, the other is the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals (LEMKIN, p. 79).

Within these limitations to the definition of "genocide," political and economic interests are added, such as those of the United States and those of the Soviet Union, which wanted to ensure that their conduct was not specified as a crime of genocide. The inclusion of "cultural genocide" was also under discussion. In comparison with the final document of the convention, the protection of political and social groups was also excluded (FLAUZINA, 2014).

In this sense, the 1952 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as a "crime against the rights of peoples," "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group" (UN, 1951). In Brazil, the Convention was ratified by Law No. 2,889, dated October 1, 1956, defining genocide as

a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group (BRAZIL, 1956).

Thus, some questions arise regarding the crime of genocide. Why have indigenous peoples been and why do they continue to be silenced in this process of being subjects of rights? Why did transitional justice take so long to expose the massive violence against these peoples?

It is noted that this theoretical and legal set regarding the crime of genocide against indigenous peoples has been silenced for centuries. In this perspective, through the action and omission of the Brazilian state, numerous international documents and the Federal Constitution itself (including at the time of those events) were violated. In fact, when dealing with indigenous peoples today, in Brazil, the only legal document of specific protection that one has is the Indian Statute, created during the dictatorship in 1973, which in itself represents how helpless they are.

In the documents of the CNV, we can see the instrumentalization of the policy of



extermination of these peoples during the military dictatorship. Examples are the Cintas-Largas ethnic group, who were killed with pistols and grenades, and the Canela ethnic group, who were killed by farmers (BRASIL-1, 2014).

In all these crimes, the nondiscrimination toward the ethnic status of these peoples and the direct incitement of the state for the removal of “Indians” from their territories, which resulted in the total or partial physical destruction of these ethnic groups, can be observed (CALHEIROS, 2015).

The major effect that can be concluded is that all the crimes mentioned in the first section are punishable, since both individuals and legal entities may be perpetrators of these crimes, according to article 4 of Law No. 2,889 (MPF, 2017).

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by UN General Assembly resolution 2391 on November 26, 1968, regards as imprescriptible the crimes against humanity that occurred in times of war or peace, regardless of the date on which they were perpetrated¹³ (UN, 1968).

Another piece of legislation that deserves to be highlighted again is the United Nations Declaration on the Rights of Indigenous Peoples, which states in article 7 that “[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide” (UN, 2008). Article 8, on the other hand, states that indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture (UN, 2008).

It is also worth highlighting the American Declaration on the Rights of Indigenous Peoples, approved between June 13 and June 15, 2016, which guarantees indigenous people the right not to be subjected to any form of genocide or extermination (OAS 2016). It is also timely to mention the decisions of the Inter-American Court of Human Rights that, as discussed in the current chapter, have been dealing with the massacres and crimes of genocide against indigenous peoples, in particular, the Plán Sánchez case, which verifies the creation of a policy of genocide perpetrated by Guatemala. In thinking that the Court would not have jurisdiction to

¹³ Brazil is not a signatory to this convention; however, it has ratified the Statute of the International Court of Justice of the United Nations Charter, which establishes international custom and general principles as recognized rights and sources of law by civilized nations (MPF, 2017). Thus, “the observance of the humanitarian principles of international law is an *erga omnes* obligation.” (MPF, 2017).



adjudicate cases involving a 1948 convention (Convention on the Prevention and Punishment of the Crime of Genocide), the ruling chamber decided that the state is responsible for violations of rights protected by international documents signed by Guatemala (HDI COURT, 2017).

As mentioned before, the Brazilian state, through action and omission, provoked territorial slander, annihilation through epidemics, the use of slave labor, and many other crimes already mentioned. Therefore, "it is fundamental to emphasize that the State can be held accountable even in cases where the act was not perpetrated by the direct action of its agents. And for that we would not even have to resort to an understanding of international law [...]" (CALHEIROS, 2015).

At the international level, Brazil was convicted only once for crimes of genocide against indigenous peoples during the military regime, in 1980 at the Bertrand Russell Tribunal¹⁴ (now called the Peoples' Tribunal) (FERNANDES, 2015), but on the national level there has not been even one decision concerning the genocide.

Moving forward in this aspect of the crime of genocide, it is necessary to discuss ethnocide. Although they are alike, their meanings are different. The definition of ethnocide came from the work of the French anthropologist Robert Jaulin,

in which the author offers a detailed ethnographic testimony of the process of destruction of the culture and the society of the Bari, an Amerindian people living on the Venezuelan-Colombian border, carried out by the convergent action of religious missions, state organs (Armed Forces), oil corporations, and by the invasions of its territory by members of the surrounding societies (CASTRO, 2017).

Thus, Jaulin understood that ethnocide was characterized by the ends,¹⁵ that is,

¹⁴ "In this sense, the Bertrand Russell Tribunal (now the Peoples' Tribunal) was an international, non-governmental court created from the purpose of the philosopher who lent it the name to try State crimes against human rights. It had no official power over the states, but it had political and ethical legitimacy. Its first edition, in 1967, judged US crimes in the Vietnam War" (SAO PAULO, 2017).

¹⁵ In this regard, Eduardo Viveiro de Castro criticizes this concept: "I understand, however, that Jaulin's distinction between 'means' and 'ends' is specious, since it leaves open the possibility of something like 'culpable ethnocide' before 'intentional'; in other words, it suggests that ethnocidal actions may be committed as an 'unintended result' or 'collateral damage' of government decisions, projects, and initiatives whose primary purpose is not the socio-cultural extinction and ethnic disfiguration of a community, but rather the achievement of 'Development projects' (major infrastructure works such as dams, roads, industrial plants, mining and oil extraction plants) that would ostensibly aim to benefit a whole national population. However, since the planning and decision-making bodies of the states that sanction and implement such projects have an inescapable duty to be fully informed about the local impacts of their



by the death of the lifestyle, be it subsistence techniques, language, community living, traditions, and other similarities of different peoples (CASTRO, 2017).

Ethnocide is a "forced assimilation policy" (CALHEIROS, 2015). In any case, it can be said that the concept of ethnocide approaches that of cultural genocide, defended by Lemkin, already studied in the current section. Moving forward in this regard,

one can consider as "ethnocidal action", with regard to indigenous ethnic minorities located in national territory, any political decision made in default of the bodies of consensus formation of the communities affected by such a decision, which in the long term or immediately entails the destruction of the way of life of the collectivities, or constitutes a serious threat (action with ethnocidal potential) to the continuity of this way of life (CASTRO, 2017). ⁷

Contrary to the crime of genocide, which is provisioned in the national and international legal order, ethnocide only has an anthropological specification of the offense, that is to say, "any project, program and action of the government or of civil organization" that violates the positive rights in the Federal Constitution, in particular, those of Chapter VIII and the kaput of Article 231 (CASTRO, 2017).

From this perspective, in a broader sense, any action that results in violation of any right of the UN Declaration on the Rights of Indigenous Peoples, especially Articles 8 and 10, and of ILO Convention 169, also ratified by Brazil, can be defined as a crime in the moral sense (CASTRO, 2017).

In this regard, the difficulty to establish the crime of ethnocide is due to the lack of consensus regarding the word *ethnos*, which can mean "ethnic group" or "ethnicity." In relation to Brazil, it is indissociable that indigenous people are the ethnic minority. In any case, it is necessary to distinguish between ethnic minority, ethnic group, and indigenous group (CASTRO, 2017).

An ethnic group is a group of people who share the same stories, memories, values, cultural traditions, territory, and a sense of solidarity toward others (CASTRO, 2017).

The indigenous peoples in Brazil are categorized as a minority, whether cultural,

interventions on the environment in which the affected populations live, ethnocide is often a concrete and effective consequence, in spite of the proclaimed intentions of the ethnocidal agent, and thus becomes tacitly admitted, if not indirectly and maliciously stimulated (what constitutes the intention) by supposed actions of 'mitigation' and 'compensation' that, as a rule, have become yet another effective instrument within the process of cultural destruction, in complete contradiction to their stated purpose of protecting 'impacted' ways of life" (CASTRO, 2017).



social, or political. In this case, the fact that they are categorized as minorities does not affect statistical or numerical data, even though their population is small in Brazil. There are other minority populations, but with large numbers, such as blacks and women (CASTRO, 2017).

Thus, it can be said that “minority and majority do not oppose in a quantitative way only. Majority implies a constant, something like a standard meter that serves as an evaluating instrument” (CASTRO, 2017). In Brazil, this pattern would be white, Catholic, male, and heterosexual (CASTRO, 2017).

Both genocide and ethnocide were promoted by the Brazilian state, either through action or omission, so the Brazilian state should be held accountable, even if it is only for the crime of genocide, since there is no legal framework for the crime of ethnocide.

Finally, as is known, at least 8,000 indigenous people died during the Brazilian dictatorship, and the creation of reparatory mechanisms for the benefit of indigenous persons by the Brazilian state is more than urgent, be it by the executive branch, the legislative branch, or the judiciary. Therefore, “it is fundamental to emphasize that the State can be held accountable even in cases where the act was not perpetrated by the direct action of its agents.”

V. Territory and timeframe

In addition to the forms of reparation already mentioned in this article, there is a need to analyze the importance of the territory for indigenous peoples. Within this aspect, when discussing territory, there is an approximation with legal anthropology and the use of collective reparatory instruments. This is because there is a close relationship between the territory and the indigenous persons, which passes through cosmological, spiritual, and religious values (GAVILAN, 2016). Thus,

[...] One should look for the indigenous cosmology and the collective principles of the community, the common law and the orality of indigenous peoples. Indigenous law derives from the belief that legal norms are not only part of human reason but [exist] also for cosmological reasons. Man is not alone in Nature, so he cannot be the omnipotent legislator, while there



are other energies, forces and motives of nature, such as the earth, rivers, mountains, trees, stones, the moon, the sea, the sun and others that also express the rules of human coexistence (GAVILAN, 2016).

Thus, it is observed that indigenous peoples and nature are part of a whole, in which the territory is the indigenous being itself. Understanding the cultural and anthropological significance of the territory's value to indigenous peoples means that transitional justice can deconstruct all of its individual, Eurocentric vision, the basis of Western human rights. It can be affirmed that there are innumerable perspectives on reparatory mechanisms for the indigenous peoples, and the demarcation of lands can be one of them.

In this dimension, the UN Annual Report on the Rights of Indigenous Peoples of 2014 specifies,

Perhaps the clearest manifestation that redress is still needed for indigenous peoples around the world is their continued lack of access to and security over their traditional lands. In that regard, in article 28 of the Declaration, it is stated that "indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent" and that this compensation "shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress". While advances have without a doubt been made over the past several decades in returning lands to indigenous peoples and protecting their existing land bases, more remains to be done nearly everywhere. Obviously, there are several ways in which land restitution can be carried out, such as executive decrees, judicial decisions or out-of-court settlements¹⁶ (UN, 2014).

¹⁶Original: 31. Tal vez la manifestación más clara de que aún se necesita reparación para los pueblos indígenas de todo el mundo es su persistente falta de acceso a sus tierras tradicionales y de seguridad en su tenencia. Al respecto, en el artículo 28 de la Declaración se establece que "los pueblos indígenas tienen derecho a la reparación, por medios que pueden incluir la restitución o, cuando ello no sea posible, una indemnización justa y equitativa por las tierras, los territorios y los recursos que tradicionalmente hayan poseído u ocupado o utilizado y que hayan sido confiscados, tomados, ocupados, utilizados o dañados sin su consentimiento libre, previo e informado" y que esta compensación "consistirá en tierras, territorios y recursos de igual calidad, extensión y condición jurídica o en una indemnización monetaria u otra reparación adecuada". Aunque sin duda ha habido avances en los últimos decenios en la restitución de tierras a los pueblos indígenas y en la protección de sus bases territoriales existentes, aún queda mucho por hacer en casi todas partes. Por supuesto, hay varias maneras en que las restituciones de tierras pueden efectuarse y se han efectuado, como los decretos ejecutivos, las decisiones judiciales o los acuerdos negociados, aunque pueden surgir complicaciones, sobre todo cuando compiten intereses privados opuestos de terceros involucrados (ONU, 2014).



The protection of the indigenous territory is ancient and has existed since the colonial period. Numerous permits, royal charters, and other authorizations of the Portuguese monarchist regime have provided for indigenous ownership. As examples, we can mention the Royal Charter, dated July 30, 1611,¹⁷ the Permit of April 1, 1680,¹⁸ and the Law of June 6, 1775.¹⁹ The latter recognized the right of indigenous persons, as primary and natural, to the lands they occupied (SILVA et al., 2016).

The first constitutional protection of the indigenous peoples was the Brazilian Federal Constitution of 1934, under the Getúlio Vargas administration (SILVA, 2016). Article 129 stated that "the possession of lands by natives which are permanently located therein must be respected, but they shall not alienate them."

With the military coup of 1964, the 1967 Constitution added new rights to indigenous peoples, such as the usufruct of natural resources (SILVA, 2016). However, with the National Integration Plan in the 1970s, what was observed in practice was the invasion of the territories and the expulsion of the indigenous persons.

In fact, the Brazilian Federal Constitution of 1988 tried to change all this history of indigenous slaughter, bringing new rights such as the protection of their territories, their cultures, and customs, expressed in numerous articles, and, in particular, article 231. The second paragraph specifies that "the lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein" (BRAZIL, 1988). Article 21 says that indigenous territories are union assets and, therefore, inalienable and unavailable (BRAZIL, 1988).

¹⁷"And the aforementioned Gentiles [natives] will be lords of their farms in the villages, just as they are in the Mountains, without their lands being taken or any harm or injustice done upon them; nor shall they be moved against their will from the Captaincies and places designated to them, except when they freely want" (BRAZIL, 1611).

¹⁸"I, the Prince, as regent and governor of the Kingdoms of Portugal and Algarves, would like to inform those who see this permit that I pay much attention to the service of God and that I apply all the most efficient means for the conversion of the Gentile of Maranhao, and for the just reasons that move me and that moved my predecessors the Kings to employ in this occupation the religious men of the Company" (BRASIL, 1680).

¹⁹"In the preamble to the Law of June 6, 1755, King José I, after hearing a unanimous vote of his Council and other ministers, affirmed that the cause of the dispersion of the Indians constituted and still consists in not having efficiently supported the said Indians in liberty, which was declared in their favor by the Supreme Pontiffs and the Kings my predecessors." (MENDES, p. 33) The law also contained an annex of other legislation that guaranteed freedom to use the territory.



However, in recent judicial decisions, the lack of respect for national and international documents dealing with the protection of the territories of these peoples has been observed (SILVA, 2016). Especially with the case of the Terra Indígena Raposa Serra do Sol of the Macuxi, Wapixana, Ingariko, Patamona, and Taurepang of Roraima (2009), the Supreme Federal Court placed obstacles in the way of the demarcation of the territory, such as the timeframe and the nineteen constraints (SILVA, 2016).

In the aforementioned case, Justice Carlos Britto listed four grounds for the characterization of an indigenous territory, which are as follows: a) the mark of the traditional occupation, b) the timeframe of the occupation, c) the mark of the concrete land cover and the practical purpose of the traditional occupation, and d) the mark of the principle of proportionality (PEGORARI, 2017).

The first thesis states that "indigenous communities must demonstrate the enduring character of their relationship with the land, in a psychic sense of ethnographic continuity, with the use of land for the exercise of traditions, customs and subsistence" (PEGORARI, p. 248). The criterion established in this thesis is in accordance with article 231, paragraph 1 of the Federal Constitution, which establishes as a requirement for the recognition of lands traditionally occupied by indigenous peoples,

[...] those inhabited by them on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions (BRAZIL, 1988).

The second thesis, which is the timeframe of the occupation, addresses the need for indigenous communities to be in those territories on the day of the promulgation of the Federal Constitution (October 5, 1988), according to the decision.

The occupation's timeframe. The Federal Constitution worked with a precise date - the date of its promulgation (October 5, 1988) - as an irreplaceable referential for the date of the occupation of a certain geographical space by this or that Aboriginal ethnic group; that is to say, for the recognition of the original rights of the Indians over the lands that they traditionally occupy. [emphasis added] 11.2. The Mark of the Traditional Occupation. It is necessary that this being collectively situated in a certain land space also bears the character of perdurability, in the psychic sense of ethnographic continuity. The tradition of native ownership, however, is not lost where, at the time of the enactment of the 1988 Constitution, reoccupation did not



occur only as a result of reiterated disseisin by non-Indians (Petition 3388 of Roraima - Supreme Federal Court).

Regarding the mark of the concrete land cover and the practical purpose of the traditional occupation, there is an appreciation of the parameter of ancestry and of the "practical utility to which the traditionally occupied land should serve" (PEGORARI, 248). Finally, the principle of proportionality must be taken into account in the context of indigenous rights, ensuring an extensive character to it (PEGORARI, 2017).

In this sense, it is observed that the Supreme Federal Court adopted the thesis of the timeframe of the occupation, since it determined that these peoples should have been occupying those lands on the day of the promulgation of the Constitution as a criterion for the demarcation of indigenous lands (SILVA, 2017).

That is, the Supreme Federal Court created limits to indigenous transitional justice, while most ethnic groups had to leave their territories in a coercive way. For that reason, it is possible to state that

The fact that since the Constitution of 1934, and in all that followed, the rights of the Indians to the permanent possession of their lands was assured has been ignored. And a history of violence and disseisin is ignored. The 1988 Constitution inaugurated among the plundered Guarani Indians the hope that they were now living in a "time of the rule of law" (CARNEIRO DA CUNHA, 2017).

If we take into account all the investigations carried out by the CNV, the timeframe and the use of reiterated disseisin made all the thirteen recommendations of the Commission unattainable. Among these recommendations, there is the demarcation and reparation of these territories, since large enterprises have forced many ethnic groups to leave the lands (SILVA et al., 2016).

It is important to reiterate that indigenous peoples traditionally occupied²⁰ the territories before the existence of constitutional recognition, because there was no judicial relief at that time. In this way, it can be affirmed that they must be considered

²⁰From this perspective, "at the core of this discussion, it is important to emphasize that the meaning of the expression "traditionally occupies" (Art. 231) and "lands traditionally occupied by Indians" (Art. 20, XI) gives content to the existence of the ethnic group. The constituent legislator, when disposing of verbs in the present, did not refer to the date of the promulgation of the Constitution, but to the contemporary existence of indigenous peoples" (SILVA, pp. 18–19).



natural rights, since it was only after the Federal Constitution of 1934 that the protection of their territories was guaranteed (SILVA et al., 2016).

In this dimension, it is important to discuss indigenous ownership, which differs from that of civil law. João Mendes Júnior, a professor at the University of São Paulo (USP), was the "first Brazilian jurist to study a justification of the territorial rights of the Indians, seeking to locate them within the juridical system in Brazil" (LIMA, 2016); it was called "teoria do indigenato" (LIMA, RESENDE, 2016).

The theory consists of the idea that the indigenous persons possess the positive *sedum*, which consists of grounds for possession according to the classical theory of Roman law. However, besides possession (*jus possessionis*), the indigenous persons also hold the *jus possidendi*, given that the legitimization of this possession has been preliminarily recognized since the Permit of April 1, 1680, which considered it as a congenital right (MENDES, 1912). To the native, "it is better to apply the text of the jurist Paulo: - *quia naturaliter tenetur ab eo qui insistit*" (MENDES, p. 59).

In this way,

The *occupation*, as a title of acquisition, can only apply to objects that never had [an] owner, or that were abandoned by [their] former owner. The occupation is *apprehensio rei nullis or rei derelictae*. [...] Well, the lands of Indians, congenitally appropriated, cannot be considered either as *res nullius* or *res derelictae*; and more, it is not conceived that the Indians had acquired by simple occupation, which is congenital and primary, so that, with respect to the established Indians, there is no simple possession, there is an immediate title of dominion, therefore there is no possession to be legitimized, there is the domain to be recognized and the original and preliminarily reserved right [emphasis added] (MENDES, p. 59)

That is, it is necessary to draw a distinction for the characterization of land ownership between indigenous and classic civil law, because, as noted, indigenous ownership is a congenital right. It can be said that the right of the indigenous persons who occupy the lands is a natural right, and a law is not necessary to legitimize this possession. This right was incorporated in the first permits and is provided for in the current Constitution (LIMA, RESENDE, 2016).

In this dimension, it can be said that the possession of indigenous territory is not equal to that regulated by civil law and even that regulated by agrarian law. This is because there is not necessarily a possession relationship with habitual residence, work,



and production, and, therefore, "indigenous possession" is said to refer to these peoples (LIMA, RESENDE, 2016).

All this change brought limitations to indigenous rights and, consequently, to the right to reparation, memory, truth, and justice. Consequently, the timeframe has been reflected in other decisions of the Supreme Federal Court, as in the Indigenous Land Guyraroká, in the State of Mato Grosso do Sul.

Thus, without the right to the territory, we cannot identify an expected agent of the right to memory, truth, and justice in Brazil. In addition, there is an immense risk of ethnic groups disappearing, since the value of the territory for the indigenous person is different from its value to non-indigenous societies, as examined in this section.

Thus, the next section is intended to analyze the Supreme Federal Court judicial precedents regarding the timeframe institute, a mechanism that limits access to the indigenous territories invaded by the military regime. Without the right to the territory, there is no possibility of fulfilling indigenous transitional justice.

VI. The Supreme Federal Court and the timeframe

The last stage of this research begins here, the purpose of which is the quest for judicial precedents in the Supreme Federal Court dealing with the institute of the timeframe. The scope of applicability of this topic is quite extensive, so it was decided to study the lawsuits and requests for amnesty conducted by the Public Prosecution (MPF), through the Working Group "Violations of the Rights of Indigenous Peoples and Military Regime."

Thus, the decisions of the Supreme Court regarding the interpretation of the timeframe are examined observing two different moments. The first cycle constituted the guarantee of indigenous rights and especially the right to the territory, and the second cycle (after the 1990s) consisted of the creation of legal limits to configure the possession of these territories.

Thus, "it was expected that the Judiciary would do some form of mediation between "law" and "normative reality" (NEUENSCHWANDER MAGALHÃES, 2017), considering the systematic violations of human rights through action and omission of



the Brazilian state (NEUENSCHWANDER MAGALHÃES, 2017) during the Brazilian dictatorship. However, what the judicial precedents have shown is the opposite, granting amnesty to torturers and the legitimization of the crimes that occurred at that time.

Thus, in 1969, the Superior Court of Justice (STJ) ruled in favor of the Kadiweus ethnic group, guaranteeing them the right to the territory. Although the judicial decision did not end the socioenvironmental conflict, as farmers continued to invade these territories, it should be highlighted that it was an important decision on indigenous rights (NEUENSCHWANDER MAGALHÃES, 2017).

In this way, these decisions that made possible the guarantee of the right to the territory "remained in the 1980s, in the 1990s, already under the aegis of the Constitution" (MAGALHÃES, 2017). In this sense, the vote of Justice Francisco Rezek in 1993 on the Krenak and Pojixá peoples deserves to be highlighted.

The evidence speaks of the poignant drama that the KRENAK and POJIXÁ Indians have experienced and still do because of the unbridled ambition of "civilized" men who, protected and with the participation of the Government of Minas Gerais, insist on taking their lands and, consequently, their hope, health, food, water, life. (BRASIL – D, 1993).

Therefore, the claim made by the State of Minas Gerais that the Krenak people had abandoned their territory was refuted by the rapporteur and the other Justices of the Supreme Federal Court, since those ethnic groups were brutally transferred between 1950 and 1970. It should be noted that the Supreme Federal Court considered null all "property titles granted to the defendants by the State of Minas Gerais" (NEUENSCHWANDER MAGALHÃES, 2017). Furthermore, "the case of the Krenak, who had their rights granted in the aforementioned decision, was mentioned in the National Truth Commission (CNV) Report" (NEUENSCHWANDER MAGALHÃES, 2017), as examined in the first chapter and as will be discussed in the following section.

In particular, this judgment stands out as a historical decision related to indigenous rights, since the Supreme Federal Court accepted the thesis of the Attorney General on the constitutionality of the possession of indigenous lands, since these peoples were arbitrarily expelled from their territories (NEUENSCHWANDER MAGALHÃES, 2017).

However, years later, with the decision of "Extraordinary Appeal No. 219983-



3/98, the Supreme Federal Court decided a similar question in a completely different way" (NEUENSCHWANDER MAGALHÃES, 2017). At this moment, the second cycle of interpretation in the Supreme Federal Court is observed, creating legal limitations for the characterization of indigenous possession. Thus, for the first time, the Supreme Federal Court established the timeframe as a basic requisite for the recognition of land rights for indigenous peoples (NEUENSCHWANDER MAGALHÃES, 2017). It is worth highlighting the vote of the rapporteur, Justice Marco Aurélio:

Therefore, the conclusion is that the rule defining the domain of items I and XI of article 20 of the Constitution of 1988, considered the sequential regency of the matter under the constitutional prism, does not harbor situations such as the case in which, in memorable times, the lands were occupied by Indians. A different conclusion would imply, for example, that the entirety of Rio de Janeiro constitutes Union land, which would be a true nonsense (BRASIL - E, 1998).

Thus, the Supreme Federal Court broke with the rights of this ethnic group and all indigenous peoples in Brazil, and also granted amnesty for all crimes committed during the period of the Brazilian military dictatorship. In this sense,

[t]he aberrant ethnocentrism of this thesis, which violates the rights of origin and internationally recognized cultural rights, presupposes that the Indians: a) had wide access to justice, which, in sociological terms, is absurd: there is still a profound disparity between conflicts in forests and conflicts in cities; b) they could freely propose actions in their own name, which implies a deep ignorance of the positive law of the time, in view of the protection established by the Indian Statute; c) they preferred to use the official mechanisms of the Brazilian State for the resolution of conflicts when, due to their own cultural identity, they had their own mechanisms, and because of their historical knowledge they had every reason not to rely on official mechanisms, including the Brazilian Judiciary System, whose judicial precedents are historically ethnocentric; d) the requirement that they were still physically resisting in 1988 completely ignores the balance of forces in the Brazilian countryside and the massacres committed against indigenous peoples (FERNANDES, 2017).

Thus, it is possible to observe that from the timeframe of the Federal Constitution of 1988 (NEUENSCHWANDER MAGALHÃES, 2017), the Supreme Federal Court broke with all the rights and parameters of indigenous transitional justice. In this way, it can be said that

the Supreme Federal Court broke both with its own tradition and with that of Brazilian constitutionalism, respecting the series of Brazilian constitutions



since 1934 to the present day, including those authoritarian ones, which recognized the rights of the Indians to the lands where they lived (NEUENSCHWANDER MAGALHÃES, 2017).

Of equal nature, the Supreme Federal Court in 2010 issued Precedent 650/2010 considering that "items I and XI of art. 20 of the Federal Constitution do not reach lands of extinct settlements, although occupied by Indians in the remote past." Thus,

[t]he possibility that the peoples exterminated or expropriated during the military dictatorship can recover their original right to the lands where they lived until they were expelled and persecuted by the regime is excluded.... This impediment therefore goes against the inherent rights of a Transitional Justice, such as the right to memory and truth, but also to reparation and accountability (NEUENSCHWANDER MAGALHÃES, 2017).

From the above, we observe that the Supreme Federal Court is legitimizing the crimes of the dictatorship and, consequently, making it impossible to promote an indigenous transitional justice. Another difficulty in the promotion of reparation to these peoples is the fact that no indigenous person was ever a member of the Supreme Federal Court (FERNANDES, 2017). As far as the 1998 decision is concerned, there is a limitation of the right to the land, since historical reasons are not taken into account, such as the forced withdrawal of these peoples from their territories. Thus,

[i]f the Brazilian Judiciary, in the middle of the XXI century, carries out this radical denial of the human rights of indigenous peoples, both in terms of material and procedural law, withdrawing rights from them without even hearing them judicially, what is to be thought about the bizarre requirement, not provided for in the Constitution, that the indigenous peoples had to be discussing their rights in court in October 1988 so that they could have the demarcation of the lands from where they were expelled, whether by action or omission of the Brazilian State? (FERNANDES, 2017).

It is verified that the conditions of the case "Terra Indígena Raposa do Sol," as examined in the second chapter, have been used in other decisions involving the possession of indigenous territories, such as in the Indigenous Land Guyraroká (RMS 29087 DF) and in the Indigenous Land Limão Verde (ARE 803.462-AgR / MS), both in the State of Mato Grosso do Sul (FERNANDES, 2017). Regarding this jurisprudence perception, "the aberrant ethnocentrism of this thesis" (FERNANDES, 2017) elucidates



that the judiciary goes against human and indigenous rights.

It should be noted that no lawsuits criminalize the conduct of the Brazilian state as a crime of genocide, except that of the Bertrand Russell Tribunal in 1980 (FERNANDES, 2017), discussed in the previous section. Moreover, the National Truth Commission Report does not mention this crime in the "conceptual section on serious violations of human rights" (FERNANDES, p. 1).

In any case, the following table highlights the main lawsuits and requests for political amnesty involving indigenous peoples and especially those dealing with the institute of the timeframe:

Table 1 - Main lawsuits involving indigenous peoples and reparatory parameters of transitional justice (1979 to 2015)²¹

Lawsuit:	Justice Rapporteur or Judge:	Date:	Note:
ACO 323-7 MG (STF)	Francisco Rezek	09/08/1994	Historical decision granting the territorial right to the Krenak ethnic group.
RE 219.983-3 SP (STF)	Marco Aurelio	12/9/1998	It establishes the timeframe for the possession of indigenous lands, refuting the indigenous theory proposed by João Mendes.
Initial Petition 3.388- 4 - Roraima (STF)	Carlos Britto	07/01/2010	Case of Terra Indígena Raposa do Sol. It established as timeframe for the natives the promulgation of the Federal Constitution of 1988; that is, the Indians

²¹ Table adapted from the Public Prosecution website. Available at <http://www.mpf.mp.br/atuacao-tematica/ccr6/documentos-e-publicacoes/biblioteca/docs/docs_memoria/pesquisa_feitos.pdf> Accessed on February 2, 2017.



			were supposed to be in the territory on October 5, 1988.
ACP - Case No 0000243-88.2014.4.01.3200 (1st Federal Court of TRF of the 1st Region (AM))	Judge Maria Pinto Fraxe	01/15/2014 (in progress)	Case of the Tenharim and Jihai peoples, victims of the Trans-Amazonian Highway. Preliminary injunction granted in part. The judge accepted the request for measures to protect the sacred places and for doctors in the health center.
RMS 29087 DF (STF)	Ricardo Lewandowski	9/16/2014	Appeal for the demarcation of land for the Guarani Kaiowá ethnic group, in the state of MS. The decision invokes the timeframe of the occupation, which is the promulgation of the Constitution of 1988.
Request for political amnesty	Ministry of Justice / Amnesty Commission	9/19/2014	Case that granted political amnesty to the indigenous Aikewara people, residents of Aldeia Sororró, in the Indigenous Land Aikewara.
ARE 803,462-AgR / MS	Teori Zavascki	02/12/2015	Decision on the Indigenous Land "Limão Verde." As in previous decisions, "the date of the promulgation of the Constitution, on October 5, 1988, was established as the timeframe for the occupation of land by the Indians, for the purpose of its recognition as indigenous land" (STF, 2015).



Request for political amnesty		03/24/2015 (in progress)	Request for the grant of political amnesty to the Krenak people due to violations of their human rights during the military dictatorship.
ACP - Case No. 644839520154013800 (JF MG)	Judge Anna Cristina Rocha Gonçalves	12/14/2015 (in progress)	Case involving the Krenak people and human rights violations during the military dictatorship. First lawsuit involving indigenous people and J.T. that has as defendant a natural person, the military man Manoel dos Santos Pinheiro [emphasis added]. Preliminary injunction partially granted on December 2016: - to promote free consultation of the Krenak ethnic group; a) to translate the Federal Constitution into the native language of this people; b) to give to this town all the governmental documents regarding them; c) National publication on violations of human rights of indigenous peoples during the military dictatorship and, in particular, related to the Krenak Reformatory.

Thus, it is observed that the Supreme Federal Court opted for the thesis of the timeframe of the occupation, restricting indigenous peoples' access to their lands. As



seen in this work, many members of ethnic groups were brutally murdered and expelled from their territories, which prevented these peoples from being there on the day of the promulgation of the Federal Constitution. In addition, for indigenous peoples, the date of the promulgation of a legal document is of little importance; what they are looking for is the possibility of having these territories recognized as theirs by the state, so that they can continue to survive, whether biologically, culturally, or socially.

Final considerations

It can be affirmed that indigenous peoples in Brazil from colonial to democratic times are secondary citizens living at the margins of public and social policies. Proof of this was the disrespect and intolerance toward indigenous culture perpetrated by the colonizers who, in the sixteenth century, raised doubts as to whether “the Indians” had souls or not. In this sense, the theory defended by John Major considered the indigenous peoples as slaves by nature. The problem was only solved with the papal bull of Pope Paul III, when he affirmed that indigenous persons had souls. In the course of this process of silencing that began with the invasion of the American continent, human rights violations were not restricted to historical periods or political contexts, given, for example, that the military dictatorship was for indigenous peoples the continuation of something that already existed (BRAZIL-2, 2014); thus, it should not be understood as a timeframe for the beginning of human rights violations.

In fact, the Brazilian military dictatorship meant the beginning of the construction of enterprises that changed the lives of these peoples, such as the construction of the Trans-Amazonian Highway that violated the rights of the Tenharim, Jiahui, Arara, and Prakanã ethnic groups or the North Perimetral Highway, bringing socio-cultural consequences for the life of the Yanomami community; the incarceration and use of indigenous labor of the Krenak people; the Cintas-Larga massacre triggered by territorial conflicts, including with the use of heavy weapons such as .45 pistols, machine guns, and hand grenades; the expulsion of the Kadiweus ethnic group from their territory and their coerced prostitution; the extermination of 36% of the population of the ethnic groups living in the Xingu River; the proliferation of epidemics



(influenza, malaria, and pneumonia) among the Carajás ethnic group; child malnutrition and lack of social assistance for the Kanayurá people; the construction of prisons without proper sanitary and humanitarian facilities to torture the Kaingang community; and many other cases of human rights violations not mentioned in this thesis due to methodological limitations. All these examples were meant to illustrate that the Brazilian military dictatorship meant the death of at least 8,000 indigenous people (BRASIL-1, 2014).

In the meantime, transitional justice arises, a study the purpose of which is to promote judicial and non-judicial mechanisms to repair the victims of dictatorial periods and/or armed conflicts. Its latency occurs through three axes: the right to memory, truth, and justice, preventing the repetition of past events. As seen, the applicability of this type of justice has caused the relationship between states and national actors to change. The product of this theory can be perceived in the creation of the National Truth Commission, the foundation of virtual museums (such as the “Armazém da Memória”), the production of documentaries (such as “Povo Krenak: guerra sem fim”), and the release of secret documents from the military dictatorship (such as the Figueiredo Report).

When transitional justice is taken to the field of indigenous peoples, there are difficulties in responding to human rights violations, since these victims find no place on the agenda of the right to memory, truth, and justice. Faced with this provocation, the research did not intend to dismantle all existing theoretical support, considering that the axes mentioned here are fundamental for the reparation of all the victims of the military dictatorship, including the indigenous peoples. In order to structure the possibility of inserting these peoples into the transitional justice framework, it was chosen to include the need to recognize the right to the territory and the inseparability of the ethnicity of these peoples in the framework of the crimes that occurred during the dictatorship.

Thus, the recognition of the right to the territory is a fundamental parameter for indigenous transitional justice, since the land carries cosmological and hereditary meanings to these peoples. We reiterate that the theory of the substitution of the land for a similar one is not being used, since these peoples see themselves as part of this territory, along with nature. In this sense, it is worth mentioning the aspect of the differentiation between reparation and redress, which in the perspective of transitional



justice should not be understood as one and the same. While the first means rebuilding, going back to the previous state, the second means replacing it with something similar. In this sense, considering the importance of the territory to the natives, one should not use the redress of the territory, but the reparation, which makes possible the restitution of the land in which these people have lived before the forced withdrawal.

Emphasis is given to the need for indigenous transitional justice to consider that all human rights violations set forth in the first chapter are inseparable from the ethnic context of these peoples, specifying those offenses as crimes of genocide, provided for in law 2,889 of 1956. This perspective allows the Brazilian state and military agents to be convicted of killing members of certain groups, causing serious bodily or mental harm to group members, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group (BRAZIL, 1956). Anthropologically, these crimes can be considered ethnocide, since they are actions that in the long term or immediately entail the destruction of the way of life of the collectivities, or constitute a serious threat (action with ethnocidal potential) to the continuity of this way of life (CASTRO, 2017).

Aside from these specific aspects for the realization of an indigenous transitional justice, there are also impediments to political amnesty for these peoples, given that Ministerial Order 2,523/2008 of the Ministry of Justice establishes that the amnesty request should be carried out individually, contrary to the form of organization of indigenous societies, which are structured collectively. Similarly, it is worth highlighting the difficulties for reparation to indigenous peoples through the right to prior consent, as provided for in ILO Convention 169, because many ethnic groups do not want to be compensated for the rights violations that occurred during the dictatorship.

In view of the above, it is emphasized that without obedience of national and international legal systems, circumstances of transitional injustice are created. Moreover, it can be seen that the reparatory mechanisms that exist in the Brazilian legal system for indigenous peoples are fragile, because many legal and political limitations have been created to make it impossible to promote an indigenous transitional justice and a search for the right to memory, justice, truth, reparation, and territory.



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