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Guaranis-Kaiowás: socio-environmental refugees on the border between Brazil and Paraguay

Guaranis-kaiowás: refugiados socioambientais na fronteira entre Brasil e Paraguai

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Abstract

This paper aims to discuss the situation of the Guarani-Kaiowá people at the border between Brazil and Paraguay, mainly in what concerns to their situation as socio-environmental refugees. To reach this attempt, at first it has been discussed the history of the Guarani-Kaiowá, especially to show how they got to the actual scenario. After, it has been aborded how the authorities and the major land owners are acting in the intention to destroy this people, by denying access to food, water, enough lands to their 'way of making and living' and by poisoning the surrounding environment where they live. The third part discusses the categorization of the conducts before international public law, and the use of ecocide as tool for promote genocide of the Guarani-Kaiowá. In conclusion, it is emphasized that although they are a tenacious people who are still fighting, if there is no intervention in their favor, they will be annihilated in the coming years.

Keywords: Guarani-Kaiowá; indigenous peoples; socio-environmental refugees; genocide; Brazil-Paraguay border.

Resumo

Este artigo visa discutir a situação do povo Guarani-Kaiowá na fronteira entre o Brasil e o Paraguai, principalmente no que diz respeito à sua situação de refugiados socioambientais. Para alcançar este desiderato, a princípio foi discutida a história do povo Guarani-Kaiowá, especialmente para mostrar como eles chegaram ao cenário atual. Depois, foi abordado como as autoridades e os grandes proprietários de terras estão agindo na intenção de destruir este povo, negando acesso a alimentos, água, terras suficientes para sua "forma de fazer e viver" e envenenando o ambiente que circunda onde vivem. A terceira parte discute a categorização das condutas perante o direito público internacional, e o uso do ecocídio como ferramenta para promover o genocídio dos Guarani-Kaiowá. Em conclusão, é enfatizado que, embora sejam um povo tenaz que ainda está lutando, se não houver intervenção a seu favor, eles serão aniquilados nos próximos anos.

Palavras-chave: *Guarani-Kaiowá; povos indígenas; refugiados socioambientais; genocídio; fronteira Brasil-Paraguai.*

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1. Introduction

For some time now, a tragedy has been announced on the border between Brazil and Paraguay, especially in the region of Mato Grosso do Sul. This tragedy refers to the ongoing genocide of the Guarani-Kaiowá, a traditional people who are being gradually decimated through the omission and commissive behavior of the State and of large landowners.

In order to try to shed light on this issue, we first discuss the history of this people, who were enslaved, persecuted and murdered during colonization. Later, they suffered attempts at absorption by the surrounding population, which was economically and militarily more powerful. And after the new constitutional regimes in Brazil and Paraguay, despite having their rights recognized in a legal norm of the highest stature in a country, they began to suffer accelerated efforts to their destruction.

In a subsequent chapter, the details of these destruction mechanisms were specified, notably the expulsion from ancestral territories, the elimination of access to water and food, the poisoning by agrochemicals and the destruction of the cultural identity of these people.

Finally, the classification of the facts reported was discussed on the perspective of International Public Law, especially regarding the crimes of the Rome Statute, and it was demonstrated that there is a systematic action that employs ecocide as a method to produce the genocide of these populations.

2. Brief history of the Guarani-Kaiowá people

The Guarani people are divided into three groups, the Nhandeva (self-styled Guarani), the Kaiowá and the M'bya. This people can be found in Brazil, Paraguay, Argentina, and Bolivia (SANTOS, 2013, p. 13). Regarding the border between Brazil and Paraguay, it is estimated that they have inhabited the region at least since 1300 AD (CRESPE; SILVESTRE, 2018, p. 142).

The Guarani-Kaiowá villages have some common characteristics that has remained prevalent throughout history, especially regarding their politics, religion and socioeconomic distribution and organization (AZEVEDO et. al., 2008, p. 16).

The Guarani and Kaiowá communities were directly affected over the years and have been witnessing, in a discreet and silent way, the destruction of their culture, in other words, their own cultural genocide (AZEVEDO et. al., 2008, p. 16).

In this article, we will focus on the Guarani-Kaiowá, especially in the border region between Brazil and Paraguay.

2.1. Colonial and Pre-Paraguayan War Period

With the arrival of European settlers to America, several colonies were formed, that with time became independent of their respective 'metropolises' and, thus, the Nation-State was implemented. This Nation-State did not respect the cultural diversity of the indigenous peoples who were forced to live in a standard imposed by the colonizers, and as they were surrounded within imaginary lines, they could not exercise their way of life (SANTOS, 2013, p. 8).

In order to avoid contact with the colonizers and their subjugation, part of the Guarani began to enter the forest. These groups came to be called Ka'agua, where the expression Kaiowá (forest people) came from (CRESPE, SILVESTRE, 2018, p. 142-143).

The territories traditionally occupied by the Guarani and Kaiowá underwent redefinitions, causing deterritorialization and the reordering of new territorialities. In 1754, as a result of the Treaty of Madrid, in order to regulate what was a Portuguese colony and what was a Spanish colony, a work of boundary demarcation took place. There were reports of indigenous presence at that time, but until the beginning of the Paraguayan War (1864) the Kaiowá people of this region had little connection with non-indigenous people (SANTOS, 2013, p. 14).

Between 1822 and 1845 there was no common or centralized imperial indigenous legislation, reason why the regulation of the matter was fragmented. The first Brazilian Constitution, enacted in 1824, did not contain any article that mentioned indigenous peoples (MOTA, 2018, p. 749).

José Bonifácio, after observing the relationship between indigenous peoples and white people at the beginning of the Empire, presented a proposal to the constituent and legislative general assembly in an attempt to 'civilize' the Brazilian indigenous peoples. This proposal consisted of 42 items that demonstrated what would be the means for the 'civilization of the indians'. It contained justice in relation to the expropriation of their lands, leniency when dealing with them and the creation of a provincial court in charge of the government of the missions and villages of the province's indigenous peoples. From the creation of religious villages, in 1845, many of the ideas exposed in Apontamentos by José Bonifácio were applied (MOTA, 2018, p. 749).

José Arouche de Toledo Rendon wrote a memoir about the situation of the villages of São Paulo, published in 1842. He criticized the way priests and general administrators dealt with indigenous populations, as in his understanding it prevented the indigenous from 'civilizing' themselves in order to keep them as slaves. His ideas for change were replicated throughout Brazil (MOTA, 2018, p. 749).

Through decree nº 426/24/07/1845, the imperial government implemented the Missions of Catechesis and Civilization of the Indians Service, which was the mark of the Empire's relations with the indigenous populations (MOTA, 2018, p. 747).

This decree determined the settlement of indigenous populations in certain territories and limited the legal capacity of their individuals. This meant that the possibilities of indigenous peoples were basically to be catechized, to mix with the rest of the population through miscegenation, to adopt the logic of work and commerce of the culture that tried to subjugate them, or to be subjected and extinguished by the superior war power of 'white man' (MOTA, 2018, p. 762).

But the indigenous peoples, including the Guarani-Kaiowá, did not accept the impositions arising from the empire, having developed and implemented policies that allowed them to maintain their territories and their ways of life, reacting to the seizure of their territories, often even taking

up firearms and utilizing and exploiting the Empire's own facilities (MOTA, 2018, p. 763).

2.2. Post-Paraguayan War and pre current constitutional period

Until mid-1864, when the Paraguayan War began, the Guarani and Kaiowá peoples on the Brazil-Paraguay border had little contact with non-indigenous people. However, with the end of the Paraguayan War, the Brazilian State encouraged the internalization of livestock farmers, which generated the displacement of non-indigenous population to the region (SANTOS, 2013, p. 14-15).

After the proclamation of the Republic of Brazil, the unsettled lands, which previously belonged to the Union, passed to the control of the States, when indigenous lands began to be sold to non-indigenous, who in turn began to pressure for the departure of indigenous peoples of land traditionally occupied (SANTOS, 2013, p. 17). The decree nº 520 of 23/06/1890, expanded the boundaries of ownership of Companhia Mate Laranjeira, transforming it into a monopoly in the exploitation of yerba mate throughout the region, which until then was the traditional occupation of the Kaiowá and Guarani (AZEVEDO et. al., 2008, p. 13).

The situation was very similar in Paraguay, since the 1870 Constitution, enacted shortly after the war against the triple alliance. It was instituted in the Constitution discriminatory regulations to the disadvantage of the Guarani-Kaiowá, not recognizing their right to traditionally occupied lands (ACEVEDO, 2018, p. 392). Furthermore, discrimination, acculturation and religious conversion were legitimized under the terms of art. 72 (13) (SZEKUT; EREMITES DE OLIVEIRA, 2019, p. 44).

The whole idea of the post-war occupation in the eastern region of Paraguay was based on a discourse of empty lands that needed to be occupied, all in order to expand Paraguayan agricultural frontiers. However, the lands were already occupied by indigenous peoples, who ended up being subjected to conflicts and expelled (SZEKUT; EREMITES DE OLIVEIRA, 2019, p. 46-47).

On the Brazilian side, from the 1950s onwards, the expansion of agriculture over Guarani and Kaiowá territories caused these populations to be forced out of their lands and relocated in eight reserves demarcated by the SPI (Indian Protection Service), which increased conflict in the region. The Guarani and Kaiowá indigenous peoples often worked on the establishment

of farms, including in the spaces where their old villages were located, and they were important cheap labor in the formation of agricultural enterprises in several regions (AZEVEDO et. al., 2008, p. 14).

With the mechanization of agricultural activities and the increase in confinement in the reserves, the indigenous workforce was directed to the sugar and alcohol production plants, where they were extremely exploited and subjected to precarious working conditions (AZEVEDO et. al., 2008, p. 15).

After the redemocratization, the Kaiowá who stayed in Brazil and also those who fled to Paraguay to escape the reported subjugation claimed their rightful lands, from which they had been expelled in previous decades (SANTOS, 2013, p. 16).

2.3. Brazil's 1988 Constitution and Paraguay's 1992 Constitution – Recognition of the right to difference

The Brazilian Indian Statute, Law nº 6.001, came into force in 1973, and was created under the aegis of the integrationist ideology. Until today, the Statute remains in force, but since 1990, several bills have been processed in the National Congress proposing the revision of the Indian Statute and the regulation of constitutional norms, still without the legal norm of implementation (ARAUJO, 2004, p. 29-32).

Because of this, there is a great dissonance between the teleology of the Indian Statute and the 1988 Constitution, notably because the latter guarantees to the indigenous peoples, among other rights, the recognition of their social organization, customs, languages, beliefs and traditions, as well as their original rights over the lands they traditionally occupy, being the Union's obligation to demarcate them. However, everything that happened in the previous decades generated a great fragmentation of indigenous communities, which generated and still generates great difficulty of organization by indigenous leaders (PEREIRA, 2010, p. 119).

The National Constitution of 1992, in article 64, similarly to the Brazilian Constitution, guarantees the right to community ownership of land (ACEVEDO, 2018, p. 392), 'in extension and quality enough to their conservation and the development of their particular ways of living'. However, also in Paraguay, the policy of expulsion of indigenous peoples

from their lands still prevails, for later resale to colonizing companies, especially Brazilian companies. (NICKSON, 2005, p. 249).

In 1992 and 2002, also, the Convention 169 of the International Labour Organization (ILO) was promulgated, respectively, by Paraguay and Brazil (INTERNATIONAL LABOUR ORGANIZATION, [202-]). The convention protects indigenous peoples, establishing the obligation to recognize and protect the social, cultural, religious and spiritual values and practices of these peoples.

Brazil and Paraguay also voted in favor of adopting the UN Declaration on the Rights of Indigenous Peoples, which is against the forced removal of indigenous peoples from their territories, the right to maintain contact with each other when their territories are divided by international borders, among other rights.

Despite all the legislative developments, the scenario of both countries in relation to indigenous communities continues to present a political and social situation that is reticent to their rights (PEREIRA, 2010, p. 119).

3. The methods for the destruction of the Guarani-Kaiowá people: socio-environmental refugees

As stated above, circumstances imposed upon Latin American indigenous peoples since first contact with Europeans can be narrowed down to three clearly distinct phases that took place in Brazil.

The first phase, domination and decimation, was defined by the Just War Theory, which endorsed slavery and thereupon death of any indigenous persons who showed hostility towards the colonizers.

In the second phase, assimilation and national integration, having indigenous peoples under tutelage, there was an underlying sentiment that there would be no more indigenous in a few years, because they would have been thoroughly assimilated. This is when it was created and set up the 'SPI – Serviço de Proteção ao Índio' (Indian Protection Service), and later on, the 'FUNAI – Fundação Nacional do Índio' (National Indian Foundation) (FUNDAÇÃO NACIONAL DO ÍNDIO, 2020b).

The third phase began in 1988 starting with the enacting of the Federal Constitution, when indigenous peoples began to be acknowledged as subjects of law, attaining the rights to consultative voice, legal standing, and appearing before court in their own name.

Prior to 1988, indigenous peoples were theoretically, and in practice, within quick reach of the sword or at gunpoint, their lives worth little to nothing, evidence for this can be found in the 'Relatório Figueiredo' (Figueiredo Report), a document elaborated in the early 1960s and released in 1967 (BRAZIL, 1967). (ACEVEDO, 2018, p. 392)

The aforesaid report is the product of a nation-wide investigation conducted by the Brazilian government on indigenous communities, under both foreign and domestic pressure, before frequent denunciations of land and goods appropriation, and other atrocities perpetrated on the indigenous.

Allegedly burnt down in a fire at the 'Ministério da Agricultura' (Agriculture Ministry) in the same decade, the report was found in the 'Museu do Índio' (The Museum of the Indian), in Rio de Janeiro, in April of 2013, after being lost for 43 years, with over 7 thousand well-preserved pages.

On the report's pages, accounts for felonies against indigenous peoples and patrimony, such as manslaughter of entire communities, torture, prostitution of indigenous women and girls, forced labor, goods and assets appropriation, ascertained that this state of affairs was widespread over the entire national territory, at least by the end of the 1960s, since the report was released by the end of that decade.

The outcry and backlash from the sustained exposures in this report, at the time, was so overwhelming and the foreign pressure so stark, that the SPI, the agency whose duty was the tutelage of indigenous peoples, was extinct, and its structure repurposed into another entity: the FUNAI, which stands as of today.

The Figueiredo report is an open window to glimpse that the status of lawlessness and terror within the age of the Republic could only hope for change at the outset of refreshed values, emerging from the 'Constituição Federal de 1988' in Brazil and the 'Constitución Nacional' of 1992 in Paraguay.

However, despite the fact that the Brazilian Constitution of 1988 recognizes multiculturalism verbatim and gives traditional peoples the right to speak for themselves, they were so vulnerable and ethnophobia is so rooted in the surrounding society that constitutional guarantees are not yet effective.

Proof of this is that it took almost thirty years for them to reorganize themselves in order to actually be heard, and, until the end of the last decade, they still did not have an actual form or sufficient strength to be heard as a collective, either by the surrounding society in general or by the justice system.

The structural racism embedded in Brazilian society, and especially in the justice system, denied until 2020 indigenous organizations the right to be in court through their organizations, demanding the same form of non-indigenous organizations.

An indelible mark of this judicial turn can be considered the legal representation accepted by the Supremo Tribunal Federal - STF (Supreme Federal Court) exercised by the 'Articulação dos Povos Indígenas do Brasil' (Articulation of the Indigenous Peoples of Brazil) – APIB[1] in the Arguition of Noncompliance with Fundamental Precept (ADPF) 709/2020[2].

In the aforementioned constitutional action, the indigenous peoples report a massacre due to the state's omission regarding the execution of urgent sanitary measures to confront COVID 19, speaking for themselves. The indigenous peoples claim to the Brazilian justice system (BRAZIL, 2020a, p. 2-3):

> (...) among other commissive and/or omissive acts of the Public Power: (i) the non-containment or non-removal of invasions of indigenous lands, by land grabbers, prospectors, deforesters and illegal logging groups, which force contact with the tribes and transmit diseases to them; (ii) deficient actions of the federal government regarding health, including the sending of health teams that do not comply with quarantine or prevention measures before having contact with the populations; (iii) political decision of the National Indian Foundation – FUNAI and the Special Secretariat of Indigenous Health - SESAI to only provide specialized health

[1] The Articulation of the Indigenous Peoples of Brazil (APIB) was created by the Free Land Camp (ATL) of 2005, the national mobilization that is held every year, from 2004, to make visible the situation of indigenous rights and demand from the Brazilian State to meet the demands and demands of indigenous peoples.

[2] The ADPF is one of the actions that are part of the concentrated control of Brazilian constitutionality. The regulation of this action can be found in two normative texts: in the Federal Constitution and in Law 9.882/99. In the Constitution, articles 102, § 1 and 103, § 1 and § 3 provide: 'Art. 102, The Federal Supreme Court is primarily responsible for the custody of the Constitution, and is responsible for: § 1 The allegation of non-compliance with a fundamental precept, arising from this Constitution, will be assessed by the Federal Supreme Court, in accordance with the law; Art. 103, The Law, in turn, outlines how the process and judgment of ADPFs by the STF will take place.

> care to people residing in homologated indigenous lands, referring indigenous people living in the urban environment to the general public healthy system SUS (without expertise to treat indigenous people) and, apparently, leaving other tribes residing in lands pending homologation, unassisted.[3]

By accepting APIB's representation on behalf of all indigenous peoples in Brazil, the Minister Rapporteur acknowledges that (BRAZIL, 2020b, p. 11-12):

> (...) the Constitution assured the indigenous people the judicial and direct representation of their interests (CF, art. 232), as well as respect for their social organization, beliefs and traditions (CF, art. 231 For this reason, I also understand that the fact that APIB is not incorporated as a legal entity is not an impediment to the recognition of its representativeness. Such peoples cannot be supposed to be organized in the same way as we are organized. Ensuring respect for their customs and institutions means respecting the means by which they articulate their representation in the light of their culture.[4]

In a similar situation, the same Minister Rapporteur, in 2014, denied legitimacy to other indigenous organizations and determined the filing of the procedure, for active illegitimacy, because '(...) even if extraordinary legitimacy is considered due to transindividual injury to the honor of the indigenous community, FUNAI would be competent to propose the action (art. 1, sole paragraph, of Law No. 5.371/67)' (BRAZIL, 2014).

[3] In the original: (...)entre outros atos comissivos e/ou omissivos do Poder Público: (i) a não contenção ou não remoção de invasões às terras indígenas, por grileiros, garimpeiros, desmatadores e grupos de extração ilegal de madeira, que forçam contato com as tribos e lhes transmitem doenças; (ii) ações deficientes do governo federal em matéria de saúde, aludindo-se inclusive ao envio de equipes de saúde que não cumprem quarentena ou medidas de prevenção antes de terem contato com as populações; (iii) decisão política da Fundação Nacional do Índio – FUNAI e da Secretaria Especial de Saúde Indígena - SESAI de só prestar assistência especializada de saúde a povos residentes em terras indígenas homologadas, remetendo-se os indígenas que vivem no meio urbano ao SUS geral (sem expertise para trato de indígenas) e, aparentemente, deixando as demais tribos, que residem em terras pendentes de homologação, desassistidos.

[4] In the original: (...) a Constituição assegurou aos indígenas a representação judicial e direta de seus interesses (CF, art. 232), bem como o respeito à sua organização social, crenças e tradições (CF, art. 231). Por essa razão, entendo, ainda, que o fato de a APIB não estar constituída como pessoa jurídica não é impeditivo ao reconhecimento da sua representatividade. Não se pode pretender que tais povos se organizem do mesmo modo que nos organizamos. Assegurar o respeito a seus costumes e instituições significa respeitar os meios pelos quais articulam a sua representação à luz da sua cultura.

In other words, 34 years after the Brazilian Federal Constitution eliminated the stance that afflicted the indigenous people, the Minister of the STF still considered FUNAI as the only body that could speak for the indigenous communities, in direct offense to article 232 of the Brazilian Federal Constitution, which is expressed in ensuring that: 'the Indians, their communities and organizations are legitimate parties to go to court in defense of their rights and interests, intervening the Public Prosecutor's Office in all acts of the process'.

In general, there is a common circumstance between what was reported in the official document of 1967, Figueiredo Report, and the precariousness in the ways of living of these peoples, which is immediately verified in the cause of asking the ADPF, namely: the daily massacre to which they are subjected, because the forms are changed, but the objectives remain.

A situation that occurs to all traditional peoples in Brazil, but particularly cruel, is on the border between Brazil Paraguay, that is, in Mato Grosso do Sul (FIOCRUZ, [201-].):

> The Guarani-Kaiowá currently occupy small villages located on a strip of land of about 150 kilometers on either side of Brazil's border region with Paraguay. (...) the traditional Guarani-Kaiowá territory extended north to the basins of the Apa and Dourados rivers, and south to Maracaju Sierra and the Jejui tributaries, covering an approximate length of 40,000 square kilometers.[5]

The attacks against the existence of these people are permanent and uninterrupted. The first target of attack is the collective, attacking traditions and customs, enslaving them and taking them away from their *tekohas*[6], making their primary languages invisible and imposing a strange language, which for them has no sense of belonging, arresting or killing their leaders.

The second target of attack is the individual, with denials of basic social assistance and health policies, denying them security and justice, inflating

[5] In the original: Os Guarani-Kaiowá ocupam, atualmente, pequenas aldeias situadas em uma faixa de terra de cerca de 150 quilômetros de cada lado da região de fronteira do Brasil com o Paraguai (...)o território tradicional Guarani-Kaiowá estendia-se ao norte até as bacias dos rios Apa e Dourados, e ao sul até a Serra de Maracaju e os afluentes do Jejui, abrangendo uma extensão aproximada de 40 mil quilômetros quadrados.

[6] The word *tekoha* refers both to the place where the ancestors lived and to the way of life of those ancestors.

violence against each other within overpopulated reserves, thereby generating homicides, suicides, drug use, and imprisonment, which is characterized by a denial of an effective due process of law and contradiction, as will be seen below.

3.1. Destruction of identity, life and livelihoods

Under the aegis of the Indian Protection Service – SPI, between 1915 and 1928, small indigenous reserves were created for the Kaiowá and Guarani. The maximum area foreseen for them was 3,600 hectares, however, in most cases the demarcated area was even smaller (BRAND, 1993).

With the gradual advance of the colonizing fronts between the 1940s and 1990s, most of the extended Guarani-Kaiowás families, who were still organized, were forced out of their traditionally occupied lands, being forced to live in the overpopulated indigenous reserves or in other precarious settlements, generically called camps, without conditions to maintain their way of life. In the same time period, the native vegetation of the region was gradually destroyed, giving way to crops and cultivated pastures.

The state of Mato Grosso do Sul alone has around 35 million hectares, an area similar to Germany, of which 35 thousand hectares are occupied by the Guarani and the Kaiowá, which according to SESAI, were 53.202 indigenous people (BRAZIL, 2024, p. 13-18).

According to the Indigenous Missionary Council (CIMI),[7] for the good of indigenous people, it would not be necessary to have more than 900,000 hectares, 2.5% of the state's territory, of non-continuous area (SANTOS; AMADO; PASCA, 2021, p. 6 et seq.), which could even be an ethnic-environmental corridor between the main river basins of this region of the state.

However, the region has been leading the national ranking of murders against indigenous peoples for several years (SOUZA, 2021), precisely as a result of land disputes or due to large population densities without respect for ethnic division or family arrangements within regularized areas.

[7] CIMI is a body linked to the CNBB (National Conference of Bishops of Brazil) that has been working for 45 years in defense of the rights of the indigenous peoples of Brazil.

Investigations of violence against leaders, as a rule, does not even reach perpetrators and let alone the mastermind (CASA NINJA AMAZÔNIA, 2021).

The Kaiowá are preferential victims in the killing of leaders, a mean used to disarticulate communities. In addition to the region absolutely leading numbers of murders of indigenous leaders, it also leads in numbers of burning of prayer houses and persecution of religious leaders and their traditional cults, called *nhaderus* and *nhadesis* in this ethnic group (KUÑANGUE ATY GUASU, 2021).

Religious vandalism and the murder of leaders is a strategy for breaking the spiritual and moral strength of a people so that they remain subjugated, facilitating their extinction.

Finally, the invisibility of the mother tongue for extinction purposes, aims to break the link of indivisibility of a people that the mother tongue ensures, requiring that these people, to have access to public services, manifest themselves in the official language, even to access the justice system or when they are processed, do so in the 'white' language. According to Almeida and Mendes, the 'average prison number reaches 520 prisoners per 100,000 inhabitants in a conservative scenario, estimating a population of 50,000 members of the Kaiowá and Guarani Indigenous Peoples' (ALMEIDA; MENDES, 2019, p. 504).

The same authors state there is a scenario of discrimination demonstrated by the resistance of the Justice System to carry out anthropological reports and appointing interpreters (ALMEIDA; MENDES, 2019, p. 480).

This state of illegality is implicitly recognized for the first time in Brazil in 2019, when the National Council of Justice (CNJ) passed the Resolution No. 287, determining that in criminal proceedings and in criminal execution, judges must respect the indigenous' mother tongue, in addition to their specificities (CONSELHO NACIONAL DE JUSTIÇA, 2019).

Despite this, little or almost nothing has changed in the justice system in relation to the Guarani-Kaiowá people who remain the absolute leaders in numbers of the Brazilian prison system. All detainees in Mato Grosso do Sul, where, despite being 40% of the state's indigenous representation, count for 90% of the indigenous prisoners in the border region (MENDES et. al., 2018).

Considering the difficulty for the Justice System to comply with the Resolution 287/2019, on April 22, 2022, CNJ passed a new Resolution, No. 454, covering all types of proceedings, which in summary, repeated the

guidelines already contained in Resolution 287, rights already guaranteed by articles 231 and 232 of the Federal Constitution, since October 1988 (CONSELHO NACIONAL DE JUSTIÇA, 2022).

3.2. Lack of access to minimum essential goods: water and food

The reaction of the indigenous peoples when they can no longer bear to live in reserves because of the enormous population density, which causes a lot of violence, difficulties in accessing income and the general subversion of their way of life together with their closest relatives, is to retreat to the edge of the highways and remaining there without any decent condition of survival.

While others promote self-demarcation of land through resumption.[8] They thus become refugees within their own nation. Possessory insecurity makes them certain targets of illegal and violent evictions helped by the Military Police (MIOTTO, 2022).

The violence imposed and the precariousness of the lives of these peoples in the border region, especially hunger, is of common knowledge and has already been the subject of research, publications and even denunciations to government agencies (FRANCESCHINI, 2016). It is also cause of action No. 0001975-84.2017.4.03.6000, pending in the 1st Federal Court of Campo Grande, promoted in 2017 by the Federal Public Prosecutor's Office and the Federal Public Defender's Office, in order to guarantee basic food baskets.

Although Brazil is a signatory to ILO Convention 169, which says in its article 13 that spaces indispensable for the exercise of identity rights are recognized as indigenous lands, as well as being recognized as indigenous territory the entire habitat of the regions that these peoples occupy or use in some way, FUNAI determined the interruption of the delivery of basic food baskets in indigenous territories not yet demarcated (FUNDAÇÃO NACIONAL DO ÍNDIO, 2020a).

It turns out that most indigenous lands located in the State of Mato Grosso do Sul are under judicial dispute, and such determination specifically aims to make it impossible for these peoples to remain in the settlements where they are located.

[8]The Guarani and Kaiowá families, in order to claim the territories from which they were expelled, carry out retakes of their lands, with the purpose of claiming demarcations by the Brazilian State.

This set of actions and omissions characterizes forced removal, as understood by the content of the document Fact Sheet No. 25, published by the United Nations, called Forced Evictions and Human Rights, as it considers that the use of physical force is not necessary to characterize forced removal, with other types of coercion being enough (UNITED NATIONS, 2014, p. 5).

In this sense, the mere fact of impeding the supply of food in a place where there is no structure to produce or collect food, as well as hunting or fishing, making the permanence in the place unsustainable, constitutes an attempt at forced removal.

Even with the lawsuit filed in 2017, nowadays almost all indigenous people in reclaimed areas and camps, and most of those who live in legally constituted reserves, are not guaranteed a daily meal, and more than half of these people are children and adolescents. While the Brazilian national average of food insecurity is 22.6%, among the Guarani-Kaiowá it is 100% (MELO; ODS 3, 2016).

The lack of water is also serious. Much of the available water is polluted or contaminated with pesticides, largely by chemical attacks and pesticide spraying, including by air (MONDARDO, 2019). Even for indigenous people who live in areas considered legal, access to drinking water is uncertain (ONU MULHERES BRASIL, 2020). To some extent, as will be demonstrated in the subsequent topic, the lack of access to water and food comes from the very expansion of agribusiness.

3.3. Expansion of agribusiness

The end of the Triple Alliance War (1864-1870) also marked the beginning of more drastic changes in the cross-border landscapes between Brazil and Paraguay.

The Brazilian Government, in payment for the work to demarcate the new borders between Brazil and Paraguay, granted an ally the concession of 5,000,000 hectares of land to explore native yerba mate. Concomitantly, the same person acquired vast tracks of land in the territory of Paraguay at cheap prices for the same purpose. In the face of the misery generated by the recently finished war, the Companhia Matte Laranjeira emerged in 1880 (INSTITUTO NACIONAL DO MATE, [19--], p. 13).

Using political influence and co-opting authorities, at the end of ten years the concession was extended in time and space, reaching five million hectares, only on the Brazilian side (ARRUDA, 1986, p. 218).

When dealing with traditional Guarani-Kaiowá territory, the indigenous people had no alternative but to remain in their ancestral territories, other than working in the yerba mate plantations. They were forbidden to leave the area, those who left were hunted and killed (GOMES, 1986, p. 406). Not to mention that they remained stuck with the company due to debts, as their salaries were paid in goods purchased in the company's own market (BRAND; FERREIRA; ALMEIDA, 2005, p. 5).

Between the late nineteenth and early twentieth centuries, the agropastoral fronts began to show signs of advancement in the region. During this period, the first farms in these areas were installed.

With the arrival of the march to the west, in the region, at the end of the 1930s, the concession for Companhia Matte Laranjeira was extinguished and a kind of agrarian reform was carried out, using the Guarani-Kaiowá lands that were securitized for those who were willing and interested in colonizing the region, such as the Agricultural Colony created in the municipality of Dourados/MS (OLIVEIRA, 2012).

This land titling allowed the new owners, gradually, after using indigenous labour for deforestation and for the cleaning of the areas (FERREIRA; CARMO, 2018, p. 365), to carry out the expulsion of the indigenous peoples, often with the support of the State (BRAND, 1993).

In the following decades (1950 to 1960), the occupation by pioneers from the south and southeast region of Brazil intensified, with the opening of large areas for cattle farming and for the production of soybean monoculture. These large producers and breeders gradually expanded their production fronts and gradually replaced small rural producers with pasture and monocultures of soybeans, corn, cane and eucalyptus (OLIVEIRA, 2012).

In this context, land ownership in the region became a monopoly of a small group, usually representatives of international companies with great economic power and political influence. The region also became an attractive area for the planting and trafficking of drugs both on the Brazilian and on the Paraguayan sides (G1 MS, 2022).

Drug trafficking and the concentration of land in the hands of the powerful, on the other hand, marginalized a large majority of the population that, as an alternative to survival, had to sell its own workforce (CORRÊA. 2006, p. 72).

The level of friction between the developmental model aligned with agribusiness protected by the state, drug trafficking that co-opted

government sectors, in contrast to subsistence agriculture and the form of land use by indigenous people can be evaluated through the conflict maps prepared by the Pastoral Land Commission (CPT), where there were 29 conflict areas in 2021 only in Mato Grosso do Sul, only with indigenous people. The vast majority of these conflicts mapped concerned the Guarani-Kaiowá people, who seek to resume their ancestral lands (COMISSÃO PASTORAL DA TERRA, 2021).

In these disputes, police forces are used against the indigenous people, sometimes without judicial authorization, as occurred in the resumption of Guapoy Mirĩ Tujury, in Amambai-MS and in the attacks suffered by the Kurupi/São Lucas tekoha community in Naviraí (MS), on June 24, 2022, with one indigenous man killed on the spot, and dozens injured, several in serious condition (COMISSÃO GUARANI YVYRUPA, 2022).

IBGE 2020 data released by the Brazilian Ministry of Agriculture, Livestock and Supply, reveals that 14 municipalities in the State of Mato Grosso do Sul are among the 100 (one hundred) richest in Brazilian agribusiness, totaling 17.8 billion in crops (MAIS SOJA, 2022). Of these, most are in traditional territory, a wealth that contrasts with the frequent attacks by public or private force against these communities, as well as with the hunger situation of thousands of Guarani-Kaiowá, among them, children, the elderly and women.

This enormous potential to generate wealth in the lands of the South of Mato Grosso do Sul brings as consequence a permanent dispute and the result is the original population relegated to its own fate, without conditions to maintain its way of life, and without isonomic acceptance of the surroundings, with whom it has to dispute the business and income to insert itself in the way of life of the colonizer. To potentiate these difficulties, they are totally unassisted by the State.

Around the area, an environment that for thousands of years has provided them with subsistence and good living, but today totally impacted by exploitation, no longer maintains reasonable means of hunting, fishing or gathering; the little that remains is contaminated by pesticides.

Mato Grosso do Sul leads together with Goiás, São Paulo and Mato Grosso the use of pesticides in the country, counting 12 to 16 kg of pesticides per hectare. In the European Union for example, they are a maximum of three kg.

Of the pesticides used in Brazil, dozens are banned by the European Union (BOMBARDI, 2017). And the Guarani-Kaiowá population is certainly one of the most contaminated by pesticides in the country (QUIRINO, 2019).

4. Categorization of the conducts before the International Criminal Law

Although there are lots of decisions from Inter-American Human Rights Court condemning the State-parties for not fulfilling their obligations on protecting indigenous rights, American countries unfortunately still insist in not ensuring serious protection mechanisms. About this, Malcolm Shaw states (SHAW, 2017, p. 231):

> The General Comment pointed to the distinction between the rights of persons belonging to minorities on the one hand, and the right to self-determination and the right to equality and non-discrimination on the other. It was emphasised that the rights under article 27 did not prejudice the sovereignty and territorial integrity of states, although certain minority rights, in particular those pertaining to indigenous communities, might consist of a way of life closely associated with territory and the use of its resources, such as fishing, hunting and the right to live in reserves protected by law.
> (...)
> The Inter-American Court of Human Rights discussed the issue of the rights of indigenous peoples to ancestral lands and resources in The Mayagna (Sumo) Awas Tingni Community v. Nicaragua in 2001. The Court emphasised the communitarian tradition regarding a communal form of collective property of the land and consequential close ties of indigenous people with that land, and noted that the customary law of such people had especially to be taken into account so that 'possession of the land should suffice for indigenous communities lacking real title'.

Only as an example, one of the cases involving Guarani-Kaiowá people was filled to the Inter-American Commission on Human Rights, and had precautionary measures granted by Resolution 47/2019 (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2019, p. 5).

Brazil has not obeyed the decision and the attacks on Guarani-Kaiowá continue in Mato Grosso do Sul (FÁBIO, 2020). One of Latin America's biggest problems is the idea that the public budget has no owner, instead of the idea that every citizen is the owner of the public goods. And because of this, international decisions against States does not have the expected impact.

Nevertheless, most of the specific conducts mentioned are crimes of International Law, contained in the Rome Statute. And the individual responsibility maybe could change this framework.

In this chapter, the conducts discussed above will be typified according to the international crimes of International Criminal Court.

Considering that there is an intense campaign intending to cause ecocide, the fifth international crime under the Rome Statute, and bearing in mind that much of the destruction conducts aims to destroy the environment that the Guarani-Kaiowá need to survive in their 'way of doing and living', it will be discussed the use of ecocide as an instrument to achieve genocide.

4.1. International Public Crimes

The homicides of members of the group configures the crime of genocide, as stated in article 6º, 'a', of Rome Statute. They also typify the crime foreseen in article 6º, 'c', of the Statute, mainly because the murder of group members aims to disarticulate the leadership of these groups, what turns easier their destruction over time.

It is also typified as these same crimes the poisoning by agrochemical and the denial of sufficient amount of land for subsistence of these groups, once the number of deaths that arises from bad-nutrition and innutrition are very high in these communities.

It must be noticed that both Brazilian and Paraguay have knowledge of all the mentioned conducts, and they have knowledge that all these practices are organized and systematic among the major landowners of the region, as is acknowledged that their interest is to completely destroy these communities, aiming to take definitive possession of the lands.

These facts typify the conducts of article 7º, 1, 'a', as far as take to homicides of group members. They also typify article 7º, 1, 'd', since some group members, trying to escape from the acts of violence, are forced to abandon the traditionally occupied territories.

The conducts analyzed also configurate persecution of members from indigenous communities, notably because the violence acts are directed against only this parcel of local population and it has racial, ethnic, cultural and religious motivation, configuring the article 7º, 1, 'h', of the Roman Statute.

Nevertheless, the submission of these people to violence, poisoning, the absence of enough territories to ensure the maintenance of the cultural and religious practices and to allow these people to provide their communities, intentionally cause great suffering and affect the mental and physical health of the members of these communities, what configures the crime of article 7º, 1, 'k', of Rome Statute.

The lack of access to essential public services, to food and to potable water, therefore, configurate the crime of genocide, as stated to article 6º, 'b', of the Rome Statute, mostly because it causes deficiencies in physical development of the community members, as well as it submits them to variable health problems.

The purpose of submitting these populations to these conditions is, clearly, to cause the destruction of these communities over time. A short mental exercise leads to conclude that the consequences of State absence will take these people to extermination. This feature the crime of article 6º, 'c', of Rome Statute.

Finally, the State omission configure a systematic and widespread attack against the local indigenous populations and submit them to great suffering, bringing as consequence the causation of various health problems, what clearly configurates the conduct of article 7º, 1, 'k', of Rome Statute.

4.2. Ecocide as a genocide tool

Polly Higgins describes ecocide as 'the extensive damage, destruction to or loss of ecosystems of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished' (HIGGINS, 2012, p. 15).

Although the term 'Ecocide' began being used in the decade of 1970, and was stated by then Swedish Prime-Minister Olof Palme, at Stockholm Conference (1972) stating that this practice required urgent attention of international community (CASLA, 2020, p. 126), until nowadays this kind of conduct has not been clearly typified as an international crime.

Nevertheless, on April 11th, 2024, the European Union approved Directive 2024/1203, which criminalizes certain conducts that can lead to environmental catastrophic results. As said in the paragraph 21 of the preamble, the conducts criminalized are comparable to ecocide. In fact, the conducts described in article 3, paragraphs 2 and 3, are forms of ecocide, in the sense of the Higgins definition. This is not an international criminalization of ecocide, because only the member states of European Union are obliged to incorporate the norms of the Directive. Even so, it puts more pressure on the efforts toward the international criminalization of ecocide.

Trying to fulfil this gap in international rules, the International Criminal Court Prosecutor's Office has published the 'Policy paper on case selection and prioritisation', where it's said that the office will take particular consideration to prosecuting crimes committed through the destruction of the environment. In the footnote, it refers to the articles 8, (2), b, IX and 8, (2), e, IV, both from Rome Statute (INTERNATIONAL CRIMINAL COURT - THE OFFICE OF PROSECUTOR, 2016).

Besides all the respect concerning to that understanding, there are two problems in this kind of approach: the first, is that the texts mentioned does not leave hermeneutic gap that can be fulfilled by 'environment destruction'; second, article 8 refers to war crimes, and in most cases the ecocide conducts don't happen in a context of war crime.

The international crimes courts history shows that many of the crimes of international law were recognized even without any prior statutory norm, as could have been seen from Nuremberg Court, Tokyo Court and more recently from the International Criminal Tribunal for the former Yugoslavia (SHAW, 2017, p. 292).

Even so, is a fact that the recognition of the crimes depends on the international power of the Stakeholders, considering that history shows that usually these crimes go under trial only against who loses the war or armed conflict.

This does not mean that the crime exists or does not exist. As taught by Kelsen, there is a difference between the 'sein' and the 'sollen' and in Public International Law this can be seen very clear (KELSEN, 1979, p. 18).

Even so, being or not being a crime, the conducts of 'ecocide' exist. And in the case of the Guarani-Kaiowá, these conducts are some of the instruments of human being destruction that are being used against these people.

It is common, during the talks to Guarani-Kaiowá people, be mentioned that now they need the help of the government and private individuals, given that there are not enough fish and hunting animals. And when it is noticed that they are surrounded by private crop fields, often grown on higher lands, with rivers in the lower levels of the terrains, it gets easy to figure that the agrochemicals used have contaminated the soil and the water, generating a chain reaction in the local environment.

In a study conducted by Larissa Bombardi, a researcher from Geography Department of São Paulo University, it is shown that the territories were the Guarani-Kaiowá live in Brazil are the places with the majority use of agrochemicals, mainly in the so-called 'south-cone' of the State of Mato Grosso do Sul and in the State of Paraná (BOMBARDI, 2017).

Because of this study, Bombardi got threatened and had to move from Brazil (BRASIL DE FATO, 2021). This is another problem from Brazil, Paraguay and the region where these conflicts happen: it is common for these 'environment defenders' to be threatened and even killed, as can be noticed from the case of the disappearing and murder of Dom Phillips and Bruno Araújo in 2022 (FANTÁSTICO, 2024).

The Guarani-Kaiowá are also 'environment defenders' because of their way of life, and this is another reason why they are threatened and killed. The Escazú Agreement is one of the tools that aims to reduce and terminate the pursuits against the 'environment defenders'.[9] But until now, both Brazil and Paraguay have signed but not ratified this treaty (COMISSÃO ECONÔMICA PARA A AMÉRICA LATINA E O CARIBE, [20--]). It shows that, for these countries, the situation of the 'environment fighters' in general and from the Guarani-Kaiowá in specific is not a priority.

All this situation, mainly the scarcity of food, makes then vulnerable and more dependent of the government aid, that as stated before, is inefficient.

[9] Article 9º: 1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.
2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.
3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

This all leads to an unbearability of life, one of the causes of the high suicide rate among this people (MODARDO, 2019). Also takes to all the health problems caused by hunger, including child malnutrition and high child death rates (MONDARDO, 2014).

It makes clear that the ecocide practiced in these territories has become one more tool of destruction of Guarani-Kaiowá. And the inefficiency of public policies and public aids are intentional, mainly because the people that win the elections in these places usually are those with money for investing in the election campaigns. And those that have that money in these places are people from agribusiness, the same ones that have direct interest in the destruction of the indigenous people because of the land disputes.

5. Conclusion

As can be seen, the origin of the Guarani-Kaiowá was an attempt to survive to another culture, more powerful from military point of view. Only after the arrival of Portuguese and Spanish, they split from the Guaranis and tried to escape to the woods. And their own name (Kaiowá) is 'people from woods'. It looked like they had foreseen what would happen to them and, even so, their escape lasted only a few years, until de colonizers and Christians start to exploit them.

They are a tenacious people and survived until now, despite all attempts to destroy them. But nowadays, the risk is even worse, considering that the use of the land by the agribusiness makes impossible any scaping try.

Each day they get more and more cornered and, although the Constitutions of Brazil and Paraguay impose their protection, the fact is that they are about to be annihilated, in consequence of commission and omission behaviors of the agribusiness and of the State.

As shows, the conducts against the Guarani-Kaiowá are crimes of International Public Law, that are considered the worse crimes that can be committed. Even so, these people are still invisible by the international human rights justice system, and there are no effective measures against Brazil and Paraguay for their preservation.

The future is uncertain for these population. They are still fighting. But until when will they be able to?

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