



Pandemic and crimes against humanity: the "inhuman character" of health catastrophe management in Brazil

Pandemia e crimes contra a humanidade: o "caráter desumano" da gestão da catástrofe sanitária no Brasil

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Resumo

Quais seriam os critérios para aferição do caráter desumano de atos praticados por governos contra a população civil durante uma pandemia? Para responder a esta pergunta, o presente ensaio, situado na interface entre o direito internacional penal e a saúde global, resgata um passado de práticas delituosas no campo sanitário para apontar, no presente, a determinação política e ideológica das respostas nacionais à Covid-19. A seguir, recorre ao pensamento de Hannah Arendt e Mireille Delmas-Marty para tratar do caráter evolutivo dos crimes contra a humanidade, como base para a análise de um caso paradigmático: a resposta brasileira à pandemia de Covid-19, cujas condutas governamentais são apresentadas à luz de elementos como contexto, *actus reus* e *mens rea*.

Palavras-chave: Pandemia, Crimes contra a humanidade, Saúde global

Abstract

What are the criteria for assessing the inhumane character of acts committed by governments against the civilian population during a pandemic? To answer this question, this essay, situated at the interface between international criminal law and global health, recalls a past of criminal practices in the health field to point out, in the present, the political and ideological determinants of national responses to Covid-19. Next, it draws on the thought of Hannah Arendt and Mireille Delmas-Marty to address the evolving nature of crimes against humanity, as a basis for the analysis of a paradigmatic case: the Brazilian response to the Covid-19 pandemic, whose governmental conducts are presented in the light of elements such as context, *actus reus* and *mens rea*.

Keywords: Pandemic, Crimes against humanity, Global health



1. Introduction

On April 22, 2020, probably for the first time, a renowned International Law expert pinpointed that certain practices by political leaders during the Covid-19 pandemic could be considered as crimes against humanity¹. The remark came from no one less than the American ambassador David Scheffer, one of the main negotiators to the Statute of Rome (RS, 1998), which established the International Criminal Court (ICC)². Less than three months after the World Health Organization had declared the international emergency to tackle Covid-19³, Scheffer claimed:

Public health malpractice could rise to the level of a crime against humanity, as defined in the Rome Statute of the International Criminal Court: an 'inhumane act ... intentionally causing great suffering, or serious injury to body or to mental or physical health' that is 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. With the death toll due to COVID-19 still rising at alarming rates in many countries, including the United States, the notion is not so far-fetched. For example, political leaders could be tagged as perpetrators of a crime against humanity resulting in tens of thousands of deaths because they *intentionally* failed to provide timely and widespread testing for the virus, or failed to acquire personal protective equipment for health workers, or failed to order critical social-distancing measures (our emphasis)⁴

By referring to "public health malpractice", Scheffer suggests that the notion of "medical malpractice" could well be extended to the field of public health, in order to determine if a certain initiative to protect or promote health represents a "discretionary power"⁵, or if it corresponds to an obligation to act, based on the Constitution or on the

¹ SCHEFFER, David. "Is It a Crime to Mishandle a Public Health Response?". Council of Foreign Relations, 22 abr. 2020. Disponível em: <<https://www.cfr.org/article/it-crime-mishandle-public-health-response>>. Acesso em: 10 ago. 2021.

² Although the United States has not ratified the RS, "it actively participated in the negotiations to create the ICC and mostly determined the results of the final text"; President Bill Clinton signed the RS, but did not recommend its ratification and the subsequent government "started a strong opposition policy against the instrument", MAIA, Marrielle. O TPI na grande estratégia norte-americana (1990-2008). Brasília: FUNAG, 2012, p.18. See also the accounts of the ambassador himself in, for example, SCHEFFER, David. "The United States and the International Criminal Court". American Journal of International Law, v.93, n.1, 1999, p.12-22.

³ One must not confuse the WHO declaration, on January 30 2020, that Covid-19 was an *Public Health Emergency of International Concern -- PHEIC* (a juridical category forged by the International Health Regulations, in force since 2007 in 196 States) with the recognition, on March 11 2020, that Covid-19 had become a pandemic. Out of the six PHEICs declared by WHO until today, only two of them were pandemic: besides Covid-19, the AH1N1 flu (2009-2010).

⁴ SCHEFFER, David, op. cit., n.p.

⁵ Discretionary power tends to be understood as a "certain margin of freedom of evaluation or decision" granted to the official, "according to criteria of convenience and opportunity" formulated by the administration itself, aiming at the public interest and within the limits of law, see BANDEIRA DE MELLO, Celso Antônio. Curso de Direito Administrativo, 32a ed. São Paulo: Malheiros, 2015, p.438.



social contract⁶. If the latter is true, the elements making up the responsibility of a health professional for medical malpractice would allow to assess the accountability of officials for "public health malpractice": the existence of a legal obligation to care, the violation of such duty by action or undue omission, the demonstration of an indemnifiable harm and the evidence of a cause-effect nexus between the practice and the harm. By reclaiming such thesis in the context of the pandemic, Scheffer calls the conduct of the political class in the United States into question, parallel to a secondary debate on the contingent responsibility of the Chinese government⁷.

Since the publication of the aforementioned article, the harm caused by Covid-19 has been dramatically extended, including in the US. According to WHO, there have been more than 202.6 million confirmed cases of the disease in the world, which resulted in 4.2 million deaths⁸. Concentrating nearly half of this death toll, the four countries with the highest numbers -- United States, 611,504; Brazil, 562,752; India, 428,309; and Mexico, 244,248 -- have had uncoordinated responses to the emergency, by downplaying science, denying the potential impact of the pandemic, stalling the organization of a comprehensive response and seeding the mistrust that undermined the efforts to contain the disease⁹. A high level of cases and deaths persists in many countries, although contention mechanisms to the disease are thoroughly known. The variants of coronavirus¹⁰ and the imminence of new waves of international dissemination jeopardize the lives and health of millions of people. Worldwide, it becomes clearer that some governments dispose of the material and human means to promote an efficient response, yet consciously and deliberately choose not to do it.

The aim of this essay is to contribute to the technical and theoretical deepening of the debate about the alleged commission of crimes against humanity by public officials during the Covid-19 pandemic, in the realm of state responses to the health emergency.

⁶ RYAN, Kevin et al. "Public health 'malpractice' and the obesity epidemic". *Public Health Rep.* 2007;122(3):414-416.

⁷ SCHEFFER, David, op. cit., n.p.

⁸ On August 10 2021, WHO. "Coronavirus (COVID-19) Dashboard". Available at: <<https://covid19.who.int/>>. Retrieved on Aug 10 2021.

⁹ These four aspects were indicated by the independent commission, created within WHO, that assessed the national responses and that of WHO to Covid-19 as typical of countries that reached the worst results in the face of the pandemic, see INDEPENDENT PANEL FOR PANDEMICS PREPAREDNESS & RESPONSE. "Make it the last pandemic". Available at: <https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf>. Retrieved on Aug 10 2021

¹⁰ See WHO. "Tracking SARS-CoV-2 variants". Available at: <<https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/>>. Retrieved on Aug 10 2021.



The essay is an original piece, which responds to a question on a well-defined theme, whose relevance and originality must be founded on a dialogue with the "state of the art" literature on the topic, supported by the theoretical references and published empirical pieces¹¹. Specifically, within legal disciplines, due to their interrogative function and speculative character, the essay may "establish bridges between the law from a positivist standpoint and other worlds"¹². As Antonio Cassese has pointed out, a formalist approach to the most serious international crimes, under the excuse to avoid "the formulation of value judgements", may result in "an obstacle to the evolution of law", besides providing a "moral license for prominent scholars to be subservient to authoritarian regimes, assuming that jurists must only interpret the law, whatever its content"¹³. At this point, it is worth highlighting that, among the different legal perspectives of the topic, we stand as internationalists and human rights advocates.

The definition of the guiding question on this essay aims to displace the Brazilian debate around the topic, which consists mostly of probabilistic estimates about the admission of complaints before the ICC, or the unfoldings resulting from the work at the Parliamentary Committee of Inquiry related to Covid-19, the "Pandemic PCI", established in the Federal Senate in April 2021¹⁴. We understand that, regardless of what the international and national jurisdictions will be able or willing to do with regard to such complaints, it is a duty of the Brazilian society and particularly its academic community, to advance the studies on the practices which have made the pandemic an instrument of unparalleled efficiency to cause hundreds of thousands of avoidable deaths, in such a short period of time, under the veil of fatality, among other excuses; as well as to ponder on the meaning to be attributed to the upcoming legitimization, impunity and precedents related to such practices. On the other hand, the scholarship in the field of public health, both historical and technical, is essential to correctly verify the elements of the crimes under scrutiny. Therefore, we intend to build on the issue raised by Scheffer – to know whether certain acts and omissions by political leaders may constitute crimes against

¹¹ CADERNOS DE SAÚDE PÚBLICA. "Ensaio" [verbete]. Available at: <http://cadernos.ensp.fiocruz.br/static/arquivo/ensaio-pt_4915.html>. Retrieved on Aug 10 2021.

¹² GAUDREAU-DESBIENS, Jean-François. "De l'essai en droit, ou du droit à l'essai dans la doctrine?". *Revue interdisciplinaire d'études juridiques*, v. 65, n. 2, 2010, p.177.

¹³ CASSESE, Antonio. *Five Masters of International Law Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter*, Oxford: Hart, 2011, p.vii-viii.

¹⁴ See full documentation of the PCI on SENADO FEDERAL. "CPIPANDEMIA - CPI da Pandemia". Available at: <<https://legis.senado.leg.br/comissoes/comissao?codcol=2441>>. Retrieved on Aug 10 2021.



humanity, on grounds of the Art. 7.1 k RS, that is, whether they represent "other inhumane acts – adding the following question: *what are the criteria to assess the "inhumane" during a pandemic?*

The answers to the questions have been organized in six sections. The two first bring insights from the realm of public health, such as the historical recurrence of crimes through public health (2) and the political and ideological determination of the response to Covid-19 (3). Further, based on the ideas of Hannah Arendt and Mireille Delmas-Marty, we present the evolving character of the crimes against humanity (4), and underline that national jurisdictions are natural and primary when it comes to crimes against humanity (5). We then go on to explore a paradigmatic case, which is the Brazilian response to the pandemic, as an exercise to assess the elements of a crime against humanity as typified in Article 7.1RS (6).

Although the commission of such crimes is also debated in other countries¹⁵, the selection of the Brazilian case is based on three elements. Firstly, the international repercussion of the Brazilian response, which has been deemed a humanitarian catastrophe¹⁶ and the worst worldwide¹⁷. The President Jair Bolsonaro has already been referred to as a "threat to global health"¹⁸. Brazil, named "a pandemic pariah"¹⁹, has been repeatedly called upon by international organizations, among which WHO and the United

¹⁵ Besides the United States, see for example, India (ROY, Arundhati. "We are witnessing a crime against humanity". The Guardian, April 28 2021. Available at <<https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe>>. Retrieved on Aug 10 2021) e México (SÁENS, Salazar. "El gobierno de AMLO está cometiendo crímenes de lesa humanidad en materia de salud". PAN Grupo Parlamentario, 8 mar. 2021. Available at <<https://www.pan.senado.gob.mx/2021/03/el-gobierno-de-amlo-esta-cometiendo-crimenes-de-lesa-humanidad-en-materia-de-salud-salazar-saenz/>>. Retrieved on Aug 10 2021).

¹⁶ MÉDICOS SEM FRONTEIRAS. "Falhas na resposta à COVID-19 levam Brasil a catástrofe humanitária". April 15 2021. Available at: <<https://www.msf.org.br/noticias/falhas-na-resposta-covid-19-levam-brasil-catastrofe-humanitaria>>. Retrieved on Aug 10 2021

¹⁷ Among others, LOWY INSTITUTE. "Covid Performance Index". Disponível em: <<https://interactives.lowyinstitute.org/features/covid-performance/#country-compare>>. Retrieved on Aug 10 2021; and MÉDICOS SEM FRONTEIRAS. "Brazil's Covid-19 response is worst in the world, says MSF". The Guardian, April 15 2021. Available at <<https://www.theguardian.com/world/2021/apr/15/brazil-coronavirus-medecins-sans-frontieres-bolsonaro>>. Retrieved on Aug 10 2021.

¹⁸ MUGGAH, Robert. "Brazil's President Is A Global Health Threat". NPR, March 4 2021. Available at <<https://www.npr.org/2021/03/04/973662184/opinion-brazils-president-is-a-global-health-threat>>. Retrieved on Aug 10 2021.

¹⁹ OSBORN, Catherine. "Bolsonaro Made Brazil a Pandemic Pariah Can Local Leaders Restore the Country's Reputation for Health Leadership?". Foreign Affairs, July 7, 2020. Available at: <<https://www.foreignaffairs.com/articles/brazil/2020-07-07/bolsonaro-made-brazil-pandemic-pariah>>. Retrieved on Aug 10 2021.



Nations Human Rights High Commissioner (UNHRC)²⁰, besides receiving three precautionary measures by the Inter-American Commission on Human Rights²¹.

Secondly, the prominence of Brazil in this realm. In the words of the Brazilian Bar Association Commission on Covid-19, presided over by the former Supreme Court Minister Carlos Ayres Brito, "by means of systematic acts and omissions, the Bolsonaro administration ended up taking hold of the pandemic, had it under control, and used it deliberately as an instrument of attack (biological weapon) and submission of the whole population", so much so that there are "grounded and enough reasons for President Bolsonaro to be held accountable, on the international level, for a crime against humanity²².

The Rapporteur to the Pandemic PCI, Senator Renan Calheiros, as of the establishment of such a committee, declared: "it was not by chance or godsent curse we have come to this situation. There are people responsible for it, of course. There are culprits, for action, omission, neglect or incompetence. (...) crimes against humanity do not ever expire and are transnational"²³. Thirdly, the existence of a study carried out by the Center for Research and Studies in Health Law (CEPEDISA), at the University of Sao Paulo (USP), recently updated at the request of the Pandemic PCI, which systematized more than two hundred pieces of evidence of an intentional plan to disseminate the disease²⁴.

We start off by recalling that the deliberate practice of atrocities against the civil population during epidemics is not a historical novelty.

²⁰ See, for example., CHADE, Jamil. "Representante da ONU ataca gestão da pandemia por Bolsonaro". UOL, 9 dez. 2020. Available at: <<https://noticias.uol.com.br/colunas/jamil-chade/2020/12/09/representante-da-onu-ataca-gestao-da-pandemia-por-bolsonaro-devastador.htm?cmpid=copiaecola>>; and O GLOBO; G1. "Diretor da OMS diz que Brasil vive 'tragédia' e alerta que país já está há muito tempo com alta transmissão da Covid-19". O Globo, February 26, 2021. Available at <<https://oglobo.globo.com/saude/coronavirus/diretor-da-oms-diz-que-brasil-vive-tragedia-alerta-que-pais-ja-esta-ha-muito-tempo-com-alta-transmissao-da-covid-19-24901454>>. Retrieved on Aug 10, 2021.

²¹ MARTIN-CHENUT, Kathia et al. "Commission interaméricaine des droits de l'homme: mesures conservatoires liées à la crise sanitaire de la covid-19 (2020)". *Revue de Science Criminelle et de Droit Pénal Comparé*, Paris, Dalloz, n.2, 2021, p.487.

²² COMISSÃO ESPECIAL PARA ANÁLISE E SUGESTÕES DE MEDIDAS AO ENFRENTAMENTO DA PANDEMIA DO CORONAVÍRUS. "Parecer - Estruturas de responsabilização criminal do Presidente da República", s.d., p.22-23. Available at <https://www.migalhas.com.br/arquivos/2021/4/F32F729F19BB15_parecercomissaoab.pdf>. Retrieved on Aug 10 2021.

²³ MAIA, Gustavo. "Leia a íntegra do discurso de abertura do relator da CPI da Covid-19". *Veja*, 27 abr. 2021. Available at <<https://veja.abril.com.br/blog/radar/leia-a-integra-do-discurso-de-abertura-do-relator-da-cpi-da-covid-19/>>. Retrieved on Aug 10 2021.

²⁴ VENTURA, Deisy, AITH, Fernando, REIS, Rossana et al. "The timeline of the federal government's strategy to spread Covid-19". São Paulo: CEPEDISA/USP, 2021, p.16.



2. Crime and public health: past and present

Over the centuries, sanitary crises have proved to be conducive to the promotion of serious human rights violations. Among the crimes burgeoning at these occasions, the selection and persecution of scapegoats stands out particularly. From the 14th century through to the 18th century in Europe, the accounts on the bubonic plague record the slaughter of thousands of Jews, who were burned alive in bonfires or at home, after being falsely accused of spreading the disease²⁵. Other groups were also chased after, such as Muslims or people suffering from leprosy, because "the potential culprits, against whom the collective aggressiveness may turn to, are primarily foreigners, wanderers, the outsiders and all those who are not well incorporated by the community"²⁶.

Epidemics themselves have been used as "deadly weapons". in the course of the conquest of the American continent, for instance, smallpox, measles and flu outbreaks were promoted by the conquerors, and the colonial British government went as far as suggesting its soldiers to distribute smallpox-ridden blankets among the natives²⁷. Similar accounts are present in almost all of the Americas, including Brazil, which may be illustrated by the famous reference by Saint-Hilaire to the indigenous people of Rio Doce, who were granted trinkets infected with the smallpox virus" in the 18th century²⁸. This persisted for so long that Darcy Ribeiro included "the discarding of clothes belonging to smallpox victims where they could be picked-up by indigenous people" among the "old colonial techniques" of territory occupation, citing episodes from the 19th and 20th centuries²⁹.

²⁵ SINGERIST, Henry. *Civilização e doença*. São Paulo: Hucitec-Sobravime; Campinas: SindiMed, 2011, p.125.

²⁶ This is what Jean Delumeau teaches in his "typology of the collective behaviors in times of plague", which is impressively present, DELUMEAU, Jean. *La Peur en Occident (XIVe-XVIIIe siècles) - Une cité assiégée*. Paris: Fayard, 1978, p.131. It is to notice that the search for culprits in relation to the plague is already present in the ancient times, see TUCÍDIDES. *História da Guerra do Peloponeso*. 4a ed. Brasília: UnB; São Paulo: Imprensa Oficial do Estado de São Paulo, 2001, p.115.

²⁷ GARCIA CACERES, Uriel. "La implantación de la viruela en los Andes, la historia de un holocausto". *Rev. Perú. med. exp. salud pública*, Lima, v. 20, n. 1, mar. 2003, p.44.

²⁸ SAINT-HILAIRE, Auguste de. *Segunda viagem ao interior do Brasil – Espírito Santo*. São Paulo: Companhia Editora Nacional, 1936, p.213-4.

²⁹ RIBEIRO, Darcy. *Os índios e a civilização: a integração das populações indígenas no Brasil moderno*. Petrópolis, Vozes, 1977. Ailton Krenak, based on oral history, today claims about the Botocudos: "the most clever would always try to stay naked, because they were afraid of the clothes given by white people" , "Genocídio e resgate dos 'Botocudo', Entrevista com Ailton Krenak". *Estudos Avançados*, v. 23, n. 65, 2009, p.195.



Presented as a science at the service of perfecting the "human race", eugenics is an essential ideological element to understand the potential role of public health as a vehicle of criminal practices. The use of the term dates back to the 19th century and finds one of its most outstanding expressions in Nazism. After the forced sterilization of over 400 thousand Germans between 1934 and 1939³⁰, the National-Socialist regime fostered, under the false designation of "euthanasia", the murder of people deemed as "mentally and physically disabled", including children; the legitimization of eugenics as a medical doctrine, supported by the law and health systems, aimed to polish the massive killing as a "legitimate scientific event"³¹.

From January 1940 to August 1941, more than 70 thousand German and Austrian inmates of health facilities were killed in gas chambers by force of the program Aktion T4, which composed a broader project to kill between 250 thousand to 300 thousand Germans deemed as "outsiders to the people's community"³². These killings do not correspond to the traditional definitions of euthanasia³³, since the victims were not on the verge of death, but rather to a value judgement about which lives were "worth living", by which the collective purpose to perfect the race would take precedence over the individual or family perspective³⁴. This program was considered a standard for the extension of the massive murder of "racially inferior" groups, such as Jews, homosexuals, gypsies and other selected opponents of the regime. It is also worth recalling the much better-known atrocities by the Nazis in cruel scientific experiments imposed to regime prisoners, from 1942 onwards, ascertained mainly during the famous "Doctors Trial", held in Nuremberg³⁵.

It would be a serious misconception, nevertheless, to reduce eugenics to Nazism: it was broadly applied, for instance, in Latin America, in previous periods,

³⁰ TERNON, Yves. "L'Aktion T4". *Revue d'Histoire de la Shoah*, v. 199, n. 2, 2013, p.40.

³¹ GRECO, Dirceu; WELSH, James. "Direitos humanos, ética e prática médica". *Revista Bioética*, v. 24, n. 3, 2016, pp. 443-451.

³² TERNON, Yves, *op.cit.*, p.46.

³³ As the "soft death", or the action that "accelerates" or causes the "death of an incurable sick person, in order to free him from the extreme sufferings he bears", SIQUEIRA-BATISTA, Rodrigo; SCHRAMM, Fermin. "Eutanásia: pelas veredas da morte e da autonomia". *Ciência & Saúde Coletiva*, v. 9, n. 1, 2004, p.34.

³⁴ SILVESTRI, Erika. "Lebensunwertes Leben: Roots and Memory of Aktion T4". *Conatus Journal of Philosophy*, v. 4, n. 2, 2019, pp.65-82.

³⁵ Whose result, in 1947, besides the sentencing of sixteen Nazi physicians, was the elaboration of the harbinger to the Code of Bioethics and Research Ethics. HALIOUA, Bruno. *Le procès des médecins de Nuremberg - L'irruption de l'éthique médicale moderne*. Toulouse: Érès, 2017.



including Brazil³⁶. It emerged during the Vaccine Revolt, which took place in 1904 in Rio de Janeiro, the national capital city at the time, where a smallpox epidemic was raging. However, the government ruling to make the vaccination against smallpox compulsory sparked popular outrage and was widely taken advantage of by opposition sectors, which had long articulated a coup and bred an insurrection. The violent repression to the upheaval, for its turn, set the ground for the implementation of the urbanization and sanitation project in the city, which catered for important economic and political interests. In the words of Nicolau Sevcenko, moved by a "homicidal and genocidal impulse", policymakers promoted the "removal of the human rubble" that dwelled the then Brazilian capital city; there was the massive banning towards the hinterlands of the Amazon -- in inhumane travelling conditions to which many did not survive -- of those who were not necessarily participants of the uprising, but rather of those extremely poor, deprived of shelter, employment or papers, who made up thousands of inhabitants of Rio de Janeiro back then³⁷.

Although brief, this historical digression is crucial to grasp the current moment. We add the warning that, well beyond the events deemed at present as "atrocities", it is by the essence of public health that political decisions by the governments have the potential to entail the massive sickening and death, which could otherwise be avoided by different measures³⁸. Yet, not all government acts affecting health are perceived by society as voluntary ones, due to many reasons, among which the biomedical approach of diseases, the focusing on individual behavior in detriment of the collective awareness of health issues, the limited access to data related to the public health policy assessments and the hermetic expert jargon. That is the case of, for example, the contemporary fiscal austerity policies, whose nefarious impact on the health indicators has been objectively

³⁶ Ver STEPAN, Nancy. "Eugenia no Brasil, 1917-1940". In: HOCHMAN, Gilberto; ARMUS, Diego, orgs. *Cuidar, controlar, curar: ensaios históricos sobre saúde e doença na América Latina e Caribe*. Rio de Janeiro: Editora Fiocruz, 2004, pp. 330-391.

³⁷ SEVCENKO, Nicolau. *A Revolta da Vacina*. São Paulo: Cosac Naify, 2010, part. pp.98-99 e 102-104.

³⁸ The collective management of health and disease, by becoming life government, constitutes the domain of public health due to a doubly political evolution: on the one hand, there is the relationship between the physical body and the social body, which is constantly redefined; on the other hand, there is the intervention of political institutions, beginning with the State, FASSIN, Didier. *L'espace politique de la santé, Essai de généalogie*. Paris: Presses Universitaires de France, 1996, p.3-4; See also Id. *Faire de la santé publique*. 2a ed. Paris: Presses de l'EHESP, 2008. The decisive character of politics also marks the emerging field of global health, defined as an anarchy of open codes, with actors and agendas reflecting particularly unequal interests and depths, although they seem to have the same goals, see BIEHL, João; PETRYNA, Adriana. "Critical Global Health". In: Id. *When People Come First: Critical Studies in Global Health*. Princeton: Princeton University Press, 2013, p.1-22.



and widely accounted for³⁹, even in relation to the scale attained by Covid-19⁴⁰, which does not deter the persistence of such policies in many countries and allows fiscal austerity to be featured, against all available scientific evidence, as beneficial to States all the same.

In that sense, the political dimension of the response to international health crises has been for long scrutinized by several studies, in particular those referring to the HIV-Aids pandemic⁴¹, the AH1N1-flu pandemic (2009-2010)⁴², the Ebola epidemics (in Western Africa in 2014-2015⁴³, in the Democratic Republic of Congo in 2019-2020⁴⁴) and the Zika-related Congenital Syndrome emergency (Brazil, 2016)⁴⁵. Despite the remarkable scientific progress over the last few decades and the unprecedented availability of pharmaceutical and non-pharmaceutical technologies to tackle the diseases, such studies endorse an old lesson from the history of epidemics: "in the face of crisis, the variations of preemptive or prophylactic strategies by the States are the pure result of politics, which stem from the nature of the regimes in power, as much as, if not more than, the circumstances surrounding the progress of the epidemic itself"⁴⁶. As we shall further claim, Covid-19 provides the continuity of such a historical trend.

3. Political and ideological determination of the responses to the pandemic

By monitoring the Covid-19 evolution in countries at the top of rankings of the most prepared States to events of this type, such as the United States, the United Kingdom and

³⁹ See, for example, STUCKLER, David; BASU, Sanjay. *A economia desumana: porque mata a austeridade*. Lisboa: Bizâncio, 2014.

⁴⁰ See, for example, NUNES, João. "A pandemia de COVID-19: securitização, crise neoliberal e a vulnerabilização global". *Cad. Saúde Pública*, Rio de Janeiro, v. 36, n. 5, mar. 2020, e00063120.

⁴¹ See, for example, PIOT, Peter et al. "Good politics, bad politics: the experience of AIDS." *American journal of public health*, v. 97, n. 11, 2007, pp. 1934-6.

⁴² See, for example, LEACH, Melissa; TADROS, Mariz. "Epidemics and the politics of knowledge: Contested narratives in Egypt's H1N1 response". *Medical Anthropology*, v. 33, n. 3, 2014, pp.240–254.

⁴³ See, for example, BIEHL, João. "Theorizing Global Health". *Medicine Anthropology Theory*, v. 3, n. 2, pp.127–142.

⁴⁴ See, for example, ECCLESTON-TURNER, Mark; KAMRADT-SCOTT, Adam. "Transparency in IHR emergency committee decision making: the case for reform". *BMJ Global Health*, v.4, n. 2, 2019, e001618.

⁴⁵ VENTURA, Deisy; RACHED, Danielle; MARTINS, James et al. "A rights-based approach to public health emergencies: The case of the 'More Rights, Less Zika' campaign in Brazil". *Global Public Health*, 2020. Available at: <<https://doi.org/10.1080/17441692.2020.1830425>>. Retrieved on Aug 10, 2021.

⁴⁶ ZYLBERMAN, Patrick. "Crises sanitaires, crises politiques". *Les Tribunes de la santé*, v. 34, n. 1, 2012, p.37.



the Netherlands⁴⁷, experts consensually recognized a major takeaway from the ongoing pandemic: misguided political decisions in the face of the crisis may overwhelm the qualities of the national healthcare systems and decades of preparation of the sector to respond to emergencies⁴⁸. The field of global health, from the standpoint of various disciplines, has explored this phenomenon, starting from the US response, during the Trump administration. As early as in the first few months of the pandemic, Trump was perceived by experts as a "political determinant" of the disease dissemination, in particular due to his explicit encouragement of an armed insurrection against state governments adopting quarantines and the relentless spread of fake news, such as the recommendation to ingest disinfectant to heal Covid-19, among other follies⁴⁹.

Martin McKee et al. specifically assessed the role of populist leaders in the spread of Covid-19, referring to Brazil, the United States, India, the United Kingdom, Russia, Turkey and Venezuela⁵⁰. The authors outlined four mechanisms through which populisms -- self-declared on the left or the right side of the political spectrum -- contribute to the dissemination of the disease: 1) to blame outsiders or the victims, 2) to despise or undermine the democratic institutions, 3) promote denialism and 4) cast suspicion on the "elites", alleged "enemies of the people", in particular the press and experts. They have also identified a vicious cycle: just as the populisms feed on the dissemination of Covid-19, the pandemic fosters the populisms, insofar as the emergency boosts the elements that are traditionally exploited by this type of leadership, such as the economic crisis and misinformation⁵¹. Other studies on populism reinforce these conclusions⁵².

⁴⁷ NUCLEAR THREAT INITIATIVE; THE JOHNS HOPKINS CENTER FOR HEALTH SECURITY. "Global Health Security Index 2019", p. 20. Available at <<https://www.ghsindex.org/wp-content/uploads/2020/04/2019-Global-Health-Security-Index.pdf>>. Retrieved on Aug 10, 2021.

⁴⁸ See, for example, BOLLYKY, Thomas; KICKBUSCH, Ilona. "Preparing democracies for pandemics". *British Medical Journal*, v. 371, 2020, m4088; NICOLA, Maria et al. "Health policy and leadership models during the COVID-19 pandemic: A review". *International journal of surgery*, v. 81, 2020, p.122-129; FLAXMAN, Seth et al. "Estimating the effects of non-pharmaceutical interventions on COVID-19 in Europe". *Nature*, v. 584, 2020, pp.257-261; HALE, Thomas et al. "Government responses and COVID-19 deaths: Global evidence across multiple pandemic waves". *PLoS One*, v. 16, n. 7, 2021, e0253116.

⁴⁹ YAMEY, Gavin; GONSALVES, Gregg. "Donald Trump: a political determinant of covid-19". *British Medical Journal*, v. 369, 2020, m1643. In the international sphere, despite the undeniable US protagonism in previous health crises, Trump tried to obstruct the global response to Covid-19 and even formulated the US withdrawal from WHO, which was overturned by President Joe Biden on his inauguration day.

⁵⁰ MCKEE, Martin et al. "Are Populist Leaders Creating the Conditions for the Spread of COVID-19?". *International Journal of Health Policy and Management*, v. 10, n. 8, 2021, pp.511-515.

⁵¹ *Ibid.*, pp.513-4.

⁵² See, for example, a study in Mexico that identified the "downsizing populism" or "State flattening", which strengthen agendas of administrative or political reform and boosted antagonism against public servants



Besides the electoral motivations and agendas from specific sectors, which may vary from country to country, there are deeper ideological alignments between the governments that chose to allow the disease to follow its natural course. By deploying slogans such as "the State cannot take care of everybody" or "the suspension of economic activities kills more than the virus", they stood for a minimal state intervention during the pandemic, mostly focusing on the assistance to the infected people and rarely on preventing the infection in the first place. In the public health field, this strategy corresponds to the false argument for the "collective immunity by transmission" or "herd immunity by contagion". Other than the immunity resulting from vaccination, which is evidence-based and recognized by WHO⁵³, such belief advocates that the massive contamination of the population would entail the development of antibodies by the individuals and the ultimate control of the disease without the need for quarantines, reducing economic activities and restraining individual rights, besides preventing expenses on disease prevention. According to WHO, however, the argument for the herd immunity by contagion is not to be considered, for a two-folded reason: it is unethical, due to the indisputably avoidable number of serious cases and deaths it entails; and from the scientific standpoint, it is false, for the length and extension of the immunity due to contagion by Sars-CoV-2 are unknown⁵⁴. It did not take long before this could be ascertained by the record of cases of reinfection and the emergence of new variants, which is facilitated by the infection of large population groups.

The "ideological filter" is a more plausible hypothesis to explain that a false and unethical argument is considered as a feasible public health policy in certain countries.

during the pandemic (RENTERIA, Cesar; ARELLANO-GAULT, David. "How does a populist government interpret and face a health crisis? Evidence from the Mexican populist response to COVID-19". *Revista de Administração Pública*, v. 55, n. 1, 2021, pp. 180-196); the article exploring the non-compliance with international norms and WHO recommendations from the prism of populisms, taking as examples Brazil, the United States and the United Kingdom (WILSON, Kumanan et al. "The International Health Regulations (2005), the threat of populism and the COVID-19 pandemic". *Globalization and Health*, v. 16, n. 70, 2020); the comparative study between the role performed by the Presidents of Brazil, the United States and the Philippines during the crisis (LASCO, Gideon. "Medical populism and the COVID-19 pandemic". *Global Public Health*, 2020. Available at <<https://doi.org/10.1080/17441692.2020.1807581>>. Retrieved on Aug 10 2021); and the study on the alliance of far-right leaders around hydroxychloroquine (CASARÕES, Guilherme; MAGALHÃES, David. "The hydroxychloroquine alliance: how far-right leaders and alt-science preachers came together to promote a miracle drug". *Revista de Administração Pública*, v. 55, n. 1, 2021, pp.197-214).

⁵³ WHO. "Inmunidad colectiva, confinamientos y Covid-19". Available at: <<https://www.who.int/es/news-room/q-a-detail/herd-immunity-lockdowns-and-Covid-19>>. Retrieved on Aug 10 2021.

⁵⁴ WHO. "Alocución de apertura del Director General de la OMS en la conferencia de prensa sobre la COVID-19 del 12 de octubre de 2020". Available at: <<https://www.who.int/es/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-Covid-19---12-october-2020>>. Retrieved on Aug 10, 2021.



Under such filter, the pandemic is perceived as an expression of "natural selection", capable of "purifying" the human race thanks to the "survival of the fittest"⁵⁵, an ideology commonly described as "social darwinism"⁵⁶. Widely pervasive in the last decades, it tends to legitimize the staggering social inequalities, as though the differences between human beings were due to the victory of talent, natural and even spiritual capacities of individuals, and the sacrifice of the most vulnerable were necessary, for the benefit of the whole society. The "natural selection", which in the past resulted from wars and plagues, would now derive from the current economic competition. In sum, social darwinism and neoliberalism overlap in order to impose "a hierarchy of values which prioritizes the economy over the human life, or at least that of the weakest"⁵⁷. Therefore, the false argument for the herd immunity by contagion has been called the "epidemiological neoliberalism": similarly to the unconditional belief in the free market, it assumes that the best strategy to tackle the pandemic is to allow it to advance without restraints, and just as the economic neoliberalism, to inflict extreme violence against the most vulnerable, which comprises physical and mental harm and potential after-effects and death⁵⁸. When we correlate the Sars-CoV-2 transmission capacity and its mortality rates⁵⁹ and lethality⁶⁰, and the population groups it may reach in case there is no contention in certain countries, we conclude that the "herd immunity is just another word for mass murder"⁶¹.

Without any further question on the political responsibility of certain governments for the absence of contention or for the dissemination of the disease in their territories, it was natural that debates on the means to thwart their practices emerged in the international arena. WHO provides the international community with the best

⁵⁵ SALLES-DJELIC, Marie-Laure. "Quand l'idéologie avance masquée. Immunité collective, néolibéralisme et darwinisme social". In: LAZAR, Marc, ed. *Le monde d'aujourd'hui - Les sciences sociales au temps de la Covid*. Paris: Presses de Sciences Po, 2020, p.293-307.

⁵⁶ The reference to darwinism is a vulgar exploitation of the evolution theory by Charles Darwin, by streams ranging from extreme liberalism to ultra-interventionist eugenics, having in common the search for the biologization of politics, see TORT, Patrick. *Darwin et le darwinisme*. Paris: Presses Universitaires de France, 2017, part. pp.68-87.

⁵⁷ SALLES-DJELIC, op.cit., p.304.

⁵⁸ FREY, Isabel. "Herd immunity" is epidemiological neoliberalism". *The Quarantimes*, 19 mar. 2020. Available at <<https://thequarantimes.wordpress.com/2020/03/19/herd-immunity-is-epidemiological-neoliberalism/>>. Retrieved on Aug 10, 2021.

⁵⁹ Number of deaths due to a disease and total number of people in the considered population.

⁶⁰ Number of people who die from a disease in ratio to the number of those who are infected.

⁶¹ In the words of William Haseltine, president of ACCESS Health International, CNN Health's, "'Herd immunity is another word for mass murder' expert says". Available at <https://edition.cnn.com/world/live-news/coronavirus-pandemic-10-14-20-intl/h_571c71aa21a9a2a0d0aadd95af67a022>. Retrieved on July 22, 2021.



available scientific evidence and formulates recommendations that have been followed by the most successful States at containing the pandemic, yet it does not wield powers to enforce them on its 194 Member-States. Hence, the main commissions in charge of assessing the worldwide responses to the pandemic have put forward proposals to reform the international system, including that of WHO, which increase the State duty to be held accountable for the compliance with international obligations in the field of public health⁶². Still in the realm of State responsibilities, the Inter-American Commission on Human Rights defined the obligations of State-Parties, grounded on the Inter-American Law, by means of resolutions dealing with the national responses to Covid-19; the rights of the infected people, their families and caregivers; and the access to vaccines⁶³. Such regulation will be paramount to the exam of human rights violations related to the pandemic that make their way to the Commission, as well as to the Inter-American Court of Human Rights.

Nevertheless, beyond the case of State responsibility, the difference between, on the one hand, the failure of those who lead a disease contention strategy and, on the other, the intention to disseminate a virus jeopardizing the life and health of millions of people becomes ever more evident, which raises the topic of individual criminal responsibility. When "politicians willfully neglect scientific advice, international and historical experience, and their own alarming statistics and modelling" only because to act "goes against their political strategy or ideology", could such behavior be found lawful?⁶⁴ Resuming the previous argument by Scheffer, we come to face its most common objection, which is that crimes committed in the context of the Covid-19 response would elude the definition and the nature of the most serious international crimes.

⁶² Among other proposals, there is the creation of a periodic universal review, probably within WHO, similar to the existing one within the UN Human Council, besides the adoption of an international treaty on the response to pandemics, which clearly define the State responsibilities in terms of prevention and preparation, see for example GLOBAL PREPAREDNESS MONITORING BOARD. "A world in disorder", 2020. Available at <https://apps.who.int/gpmb/assets/annual_report/GPMB_AR_2020_EN.pdf>. Retrieved on Aug 10 2021; INDEPENDENT PANEL FOR PANDEMIC PREPAREDNESS..., op. cit.; e OMS. "WHO's work in health emergencies. Report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 response". Available at <https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_9Add1-en.pdf>. Retrieved on Aug 10 2021.

⁶³ Inter-American Commission on Human Rights. Resolution n. 1/2020 – Pandemic and Human Rights in the Americas, April 10, 2020; Resolution n. 4/2020 – Human Rights of Persons with Covid-19, April, 27 2020; and Resolution n. 1/2021 – Covid-19 vaccines and Inter-American Human Rights Obligations, April 6, 2021.

⁶⁴ ABBASI, Kamran. "Covid-19: Social murder, they wrote - elected, unaccountable, and unrepentant". British Medical Journal, v. 372, 2021, n314.



4. The evolving character of the crimes against humanity in broad terms

In the late 1960s, Hannah Arendt and Karl Jaspers debated on the trial of Adolf Eichmann, which would shortly begin in Jerusalem. He was the Nazi official who, "without ever touching a hair of a Jew" and neither directly taking part of the "selection of those to be sent to death", was in charge of the logistics provided for the deportation and massive slaughter of the Jewish people during the Second World War⁶⁵. In a letter to Arendt, Jaspers expressed his concern about the possible unfoldings of Eichmann's trial by the State of Israel, among other reasons because the deeds of the offender "lie beyond what is human and morally imaginable": it is something "other, out of law -- and express it in juridical categories is a mistake"⁶⁶. In reply to Jaspers, despite also being a critic to the upcoming trial, Arendt claims to be "less pessimistic" regarding the legal aspects of the trial and ponders:

It seems to me to be of the nature of this case that the only instruments we dispose of are those from the law, to judge and sentence what not even the legal concepts nor the political categories allow to represent adequately. It is precisely this that makes this trial so compelling. The question to pose is the following: *would it be different if we had laws against the hostis humani generis [enemies of the humankind] and not only against the murderers and other criminals of any type?*⁶⁷.

After over sixty years from then, it is undeniable that international criminal law and several national criminal laws substantiate today the normative standard the philosopher would come to recognize as "laws against the *hostis humani generis*".

The international community has gone beyond that. In the same correspondence, Arendt criticized the Nuremberg Tribunal⁶⁸ for being a "victors court", and advocated for the deployment, in the Hague, of a permanent court "for the enemies of the humankind, competent to judge such individuals, regardless of their nationality", an idea that seemed

⁶⁵ ARENDT, Hannah. "Hannah Arendt à Karl Jaspers", 23 de dezembro de 1960 [Correspondances et dossier critique]. In: BOURETZ, Pierre, ed. Hannah Arendt, Les origines du totalitarisme - Eichmann à Jérusalem. Quarto. Paris: Gallimard, 2012, p.1322-1323.

⁶⁶ JASPERS, Karl. "Karl Jaspers à Hannah Arendt", 14 de dezembro de 1960 [Correspondances et dossier critique]. In: BOURETZ, Pierre, ed., op.cit., p.1316.

⁶⁷Our emphasis. Ibid., p.1322-1323.

⁶⁸ Military International Tribunal, created in 1945 by the Agreement of London, signed by the United States, the United Kingdom, France and the Soviet Union, to judge war criminals, see ORGANIZAÇÃO DAS NAÇÕES UNIDAS (ONU), Le statut e le jugement du Tribunal de Nuremberg - Historique et analyse. Nova York: ONU, 1949.



to be blocked in the United Nations system⁶⁹. One had to wait until 1998 for the establishment of the ICC⁷⁰, as a permanent institution endowed with the jurisdiction over people accountable for the most serious crimes and international concern (Article 1 RS), with the purpose to put an end to the impunity of "unimaginable atrocities that deeply shock the conscience of humanity" and the crimes "of concern to the international community as a whole" (Preamble RS)⁷¹.

The RS brought forward the typification of such crimes: genocide, crime against humanity and war crime; in 2010, an amendment to the statute typified the crime of aggression as well⁷². Therefore, in the positive and applicable international criminal law, genocide and crime against humanity are different from war crimes and might occur in the absence or armed conflicts; they are equally distinct from each other and are defined by Articles 6 and 7 of the RS respectively⁷³. The main differences between the two are the occurrence of *dolus specialis* or "specific intent" in genocide, that is, the intent to destroy in the whole or in part a targeted group, by means of discriminatory criteria such as nationality, ethnicity, race or religion; and the formal assumption that crimes against humanity are committed in the context of a widespread or systematic attack, against any civilian population in knowledge of the attack⁷⁴. Nonetheless, despite the existence of two distinct criminal types, genocide is still referred to as the most serious among the crimes against humanity in other disciplines and an expressive part of the legal doctrine. Hence, the "form of the crime against humanity turns out to be particularly complex, insofar as it at the same time refers to an autonomous category of international crimes [Art.7 RS], and

⁶⁹ ARENDT, Hannah. "Hannah Arendt à Karl Jaspers", op. cit., p.1321-2.

⁷⁰ On the history of the criminal jurisdiction preceding the ICC, see PERRONE-MOISÉS, Cláudia. "Antecedentes históricos do estabelecimento do Tribunal Penal Internacional". Revista da Faculdade de Direito, Universidade De São Paulo, v. 98, 2003, pp.573-579.

⁷¹ BRASIL. Decreto n.4.388, de 25/09/2002. Promulga o Estatuto de Roma do Tribunal Penal Internacional. Available at <http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm>. Retrieved on Aug 10 2021.

⁷² Embora previsto pelo Estatuto de Roma, o crime de agressão só veio a ser definido na Conferência de Kampala, Uganda, em 2010, v. AMBOS, Kai. "The Crime of Aggression after Kampala". German Yearbook of International Law, v. 53, 2010, pp.463-510.

⁷³ The Convention on the Prevention of the Crime of Genocide, 1948, had already defined it as an autonomous crime, both in times of war and peace; its definition as a crime was resumed in the statute of international criminal courts and lies on an essential criterium: the "selective destruction", based on national, ethnic, racial or religious discrimination, DELMAS-MARTY, Mireille. "Humanité, espèce humaine et droit pénal". Revue de science criminelle et de droit pénal comparé, v. 3, n. 3, 2012, p.498.

⁷⁴ SCHABAS, William. An introduction to the International Criminal Court. 4a ed. Cambridge University Press, 2011, p.102-103.



a general category comprising other autonomous international, such as genocide, the apartheid and the enforced disappearance⁷⁵.

This article does not intend to describe the complex historical evolution of the typification of crimes against humanity⁷⁶, which has been described as a "disorderly history" due to its fragmentation, with inputs from customary law, the International Law Commission and jurisprudence, among others⁷⁷. For the purpose of this essay, we confine it to the observation of the statutes of the main international courts up to the present. The list of practices that may amount to a crime against humanity finds its starting point in a single paragraph of the Nuremberg Tribunal Charter, of 1945, whose criminal type *comprises any inhumane acts committed against any civilian population*, given the evidence, after the discovery of the death fields, that the extermination methods could be varied and unpredictable⁷⁸. Coming through the nine paragraphs in the statutes of the international criminal courts for the former Yugoslavia⁷⁹ and Rwanda⁸⁰, we reach the current eleven paragraphs of the RS, an evolution Mireille Delmas-Marty described as "an ever-resumed list", since the role of Law is to "provide instruments to spell out the

⁷⁵ FOUCHARD, Isabelle. "La formation du crime contre l'humanité en droit international". In: DELMAS-MARTY, Mireille et al. *Crime contre l'humanité*. 3a ed. Paris: Presses Universitaires de France, 2018, p.10. Genocide and apartheid, considered the most infamous of crimes, would be special crimes against humanity for they take the criminal intent to an extreme: in genocide, the extreme of extermination; in apartheid, the extreme of persecution, JUROVICS, Yann. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: LGDJ, 2002.

⁷⁶ See BASSIOUNI, Cherif. *Crimes Against Humanity: Historical Evolution and Contemporary Application*. Nova York: Cambridge University Press, 2011; and JARDIM, Tarciso Dal Maso. "A contribuição da justiça internacional penal: formação de paradigmas". *Revista Anistia Política e Justiça de Transição*, Ministério da Justiça, n. 9, 2014, p.150-186.

⁷⁷ DeGUZMAN, Margaret. "Crimes against humanity". In: SCHABAS, William; BERNAZ, Nadia, eds. *Routledge Handbook of International Criminal Law*. Nova York: Routledge, 2011, p.121.

⁷⁸ According to the Article 6c of the Charter, crimes against humanity are "murder, extermination, slavery, deportation and other inhumane acts committed against any civilian populations, before or after the war, or persecution based on political, racial or religious motivation in execution or connection with any crimes under the jurisdiction of the Tribunal", ONU, *Le Statut...*, op.cit., p.101. There is no reference to the word genocide, which was object of the Convention on the Prevention of the Crime of Genocide, adopted in 1948 and ratified in Brazil in 1952.

⁷⁹ Created in 1993 by Resolution n. 827 of the UN Security Council to prosecute the responsible for grave violations of the international humanitarian law committed in the former Yugoslavia since 1991, see ONU, "International Criminal Tribunal for the former Yugoslavia". Available at <<https://www.icty.org/>>. Retrieved on Aug 10 2021.

⁸⁰ Created in 1994 by Resolution n.955 of the UN Security Council to prosecute those responsible for grave violations of the international humanitarian law committed in Rwanda between January and December 1994, as well as Rwandan citizens responsible for the same violations in neighboring territories, see ONU. "Legacy website of the International Criminal Tribunal for Rwanda". Available at <<https://unictr.irmct.org/>>. Retrieved on Aug 10 2021. Although the nine paragraphs of Article 5 of the Court Statute for the former Yugoslavia are identical to those of Article 3 for Rwanda there is a relevant difference in the contextual element in the caput: for the former Yugoslavia, the commission during an armed conflict and for Rwanda Rwanda in the context of a generalized and systematic attack against a civilian population, due to its national, political, ethnic, racial or religious belonging.



prohibition of the inhumane"⁸¹, challenged to describe "that which not even the legal concepts nor the political categories allow to adequately represent", in Arendt's phrasing⁸². Such a task is hindered by the fact that the statutes never define what is "inhumane", an "ever-expanding and unfulfilled content"⁸³. That explains that the Article 7RS contains a generic category, that of the "other inhumane acts" (k), whose relevance lies in the fact it allows the Court to judge crimes unforeseen by the Statute, but that may occur in the further on"⁸⁴.

Hannah Arendt already distinguished the logical impossibility of a comprehensive definition of such violations. Attending to the first few weeks of Eichmann's trial as a reporter, she published an indispensable work on the topic⁸⁵, which caused a scandal at the time⁸⁶ and even nowadays is heavily criticized⁸⁷. Unfortunately, the way such controversy is often presented "is not accurate either historically, or in terms of the author's writings or the statements by Eichmann himself"⁸⁸. At the limits of this essay, we highlight only two aspects of her acknowledged contribution to the matter⁸⁹: the collective dimension of the violation and the innovative character of the criminal practice, underlining that, in the author's writing, the notion of crimes against humanity comprises genocide.

Firstly, according to Arendt, the attempt to wipe out the Jews, implemented by the Nazi regime and its collaborators, constitute a "crime against the human condition" or "against the very human essence", although perpetrated "on the body of the Jewish people", insofar as it advances an "attack against the human diversity as such, that is, against a trait of the 'human condition', without which the terms 'humanity' and 'humankind' would not bear any sense"⁹⁰. Unlike common crimes, including homicide,

⁸¹ DELMAS-MARTY, Mireille. Les forces imaginantes du droit IV - Vers une communauté de valeurs? Paris: Seuil, 2011, p.81, 84 e 87.

⁸² ARENDT, Hannah. "Hannah Arendt à Karl Jaspers", op. cit., p.1322.

⁸³ DELMAS-MARTY, Mireille. Les forces imaginantes du droit IV - Vers... op.cit., p.84 e 93.

⁸⁴ BOURDON, William. La Cour Pénale Internationale - Le Statut de Rome. Paris: Seuil, 2000, p.57.

⁸⁵ ARENDT, Hannah. Eichmann à Jérusalem. In: BOURETZ, Pierre, ed., op.cit., pp.977-1306.

⁸⁶ Ver, por ex., YOUNG-BRUEHL, Elisabeth. Hannah Arendt - For Love of the World. Yale University Press, 1977, pp.347-378.

⁸⁷ Ver, por ex., DELPLA, Isabelle. Le mal en procès. Eichmann et les théodicées modernes. Paris, Hermann, 2011.

⁸⁸ GROS, Frédéric. Désobéir. Paris: Albin Michel/Flammarion, 2017, p.121.

⁸⁹ See, among many others,, BENHABIB, Seyla. "Identity, Perspective and Narrative in Hannah Arendt's 'Eichmann in Jerusalem'", History and Memory, v. 8, n. 2, 1996, pp. 35-59; e OSIEL Mark. Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War. New Haven: Yale University Press, 2001.

⁹⁰ ARENDT, Hannah. Eichmann à Jerusalém In: BOURETZ, Pierre, ed., op. cit., p.1277.



such offenses were part of a "policy" consisting of "the refusal of sharing the Earth" with certain human groups, as though Eichmann and his supervisors "had the right to decide who should and who should not inhabit the world"⁹¹. Such a crime, therefore, seriously jeopardizes the human community; when it is committed, beyond the harm to the victims, the law of this community is violated and the political body must be repaired, for the general public order has been disturbed and must be restored⁹².

The notion of transcendence of the victim's identity, from the individual to humanity, is largely acknowledged at present, even by the jurisprudence of international criminal courts. Engaging with Hannah Arendt's work, David Luban argues, in his theory of the crimes against humanity, that a group must not be attacked for the mere fact that it exists, nor an individual for the mere fact they belong to a group, since the word "humanity" implies both the condition of human beings (humanness) and the whole of all human beings (humankind)⁹³. As a matter of fact, this criminalization aims to protect exactly the "indivisible unit of the human species", as the individual is the expression of the humankind⁹⁴.

It follows that, although a human being feels the need to belong to a group, they cannot be reduced to the condition of a member of his group, without losing his statute within humanity⁹⁵. Therefore, crimes against humanity comprise several behaviors leaning towards either the violation of the *singularity* principle, through exclusion and violence against individuals reduced to a racial or ethnical category, for instance; or the violation of the principle of *equal belonging to the human community*, through discriminatory practices that might even lead to apartheid⁹⁶.

The second input by Arendt we underline is the remark that the Nuremberg Tribunal, a harbinger to the principle of individual criminal responsibility, by typifying the crime against humanity, defined a whole new crime to the international law in its statute⁹⁷, overcoming the well-known war crimes. This innovative aspect sparked

⁹¹ Ibid., p.1287.

⁹² Ibid., p.1270.

⁹³ LUBAN, David. "A Theory of Crimes Against Humanity". Georgetown Law Faculty Publications, 1004, p. 86-87 e 90. Available at <<https://scholarship.law.georgetown.edu/facpub/146>>. Retrieved on Aug 10 2021.

⁹⁴ JUOVICS, Yann. "Le crime contre l'humanité, définition et contexte". Les Cahiers de la Justice, v. 1, n. 1, 2011, p. 47.

⁹⁵ DELMAS-MARTY, Mireille. Les forces imaginantes du droit IV - Vers..., op. cit., p.96.

⁹⁶ DELMAS-MARTY, Mireille. Les forces imaginantes du droit – Le relatif et l'universel. Paris: Seuil, 2004, p.85.

⁹⁷ Although expressions such as "crime against humanity and the civilization", "laws of humanity" and "crimes of lesa humanity" were previously present in the diplomatic jargon, including international conventions



objections - raised both before the Nuremberg Tribunal and the Israeli jurisdiction on the Eichmann case -- that the deeds taking place before the Nuremberg Charter ought not to be judged under its aegis, for it would represent the retroactivity of the incriminating norm and the resulting violation of the principle of anteriority of criminal law (*nullum crimen, nulla poena sine lege*). It is not surprising that criminal jurists hold a restrictive stance in international law, which reveals a conceptual framework strongly affected by the legal logic inherent to the structure of national orders⁹⁸.

Arendt further ponders that retroactivity might violate the form, but never the content of such principle, "since this applies meaningfully only to acts known to the legislator"; thus, if a crime previously unknown "suddenly makes its appearance, justice itself demands a judgment according to a new law"⁹⁹. And she predicts: "It is essentially for this reason: that the unprecedented may become a precedent for the future, that all trials touching upon 'crimes against humanity' must be judged according to a standard that is today still an 'ideal'"¹⁰⁰. Hence, the typification of the gravest crimes must constitute a progress in the protection of humanity, not an insurmountable formal limit hindering justice, because criminal deeds "vary according to the nefarious imagination of perpetrators"¹⁰¹.

The crime against humanity is therefore, by its own nature, an "open qualification, prone to comprise any human behavior of serious concern within the realm of a generalized or systematic attack targeting any civilian population and ultimately an eminently evolving international criminal charge"¹⁰². The path to tackle this formal unpredictability is not the constant "listing of the current fears", but rather the progress towards the setting of the paradigm of "humanity as a value" underlying the deterrence of the most serious crimes¹⁰³.

The evolving character of this issue also emerges in the jurisprudence of the Inter-American Court of Human Rights on the fight against the impunity of grave and massive human rights violations -- whose pioneering work has in a way inspired the European

⁹⁸ FOUCHARD, Isabelle. Crimes internationaux: entre internationalisation du droit pénal et pénalisation du droit international. Bruxelles: Bruylant, 2014.

⁹⁹ ARENDT, Hannah. Eichmann à Jérusalem In: BOURETZ, Pierre, ed., op. cit., p.1264.

¹⁰⁰ Ibid., p.1281.

¹⁰¹ BASSIOUNI, Cherif, op. cit., p.411.

¹⁰² FOUCHARD, Isabelle. La formation..., op.cit., p.10.

¹⁰³ DELMAS-MARTY, Mireille. Les forces imaginantes du droit IV - Vers..., op.cit., p. 93 e 96.



Court of Human Rights. It is well illustrated by the Inter-American jurisprudence on the strengthening of the positive State obligations in criminal matters¹⁰⁴.

Although the evolving character of the crimes against humanity is enshrined in the correlated jurisprudence, we understand that certain criminal practices during the pandemic correspond, on a formal level, to criminal types defined by the RS, without the need of innovative or extensive interpretations of the norm in force, or even jurisprudential twists. This is what we aim to further showcase, after a short caveat on the dialectic of complementarity between the international and national legal orders.

5. National jurisdiction as natural and primary

The political and legal controversies the international criminal law is conducive to elicit are not new, along with potential major geopolitical implications. Although local criminal matters may entail passionate reactions and famous technical disputes, the international criminal sphere provides for an additional complexity layer, by clashing with the relentless inquiry about the legitimacy and lawfulness of its precepts in the light of the principle of state sovereignty. There is a breeding ground for criticism and misunderstanding of the international dimension, which is often stereotyped both by its advocates and its detractors. The recent imposition of sanctions on ICC members by the US gave rise to serious strain, during the Trump administration, as a retaliation against the inquiries on alleged crimes committed in Afghanistan and Palestine¹⁰⁵. Well before that, the ICC had been criticized for its "ineffectiveness", "sluggishness" and "high costs"¹⁰⁶, as well as the exclusive sentencing of African citizens, which led to it being stigmatized as the "African Criminal Court"¹⁰⁷.

¹⁰⁴ MARTIN-CHENUT, Kathia. "Droits de l'Homme. Le renforcement des obligations positives de nature pénale dans la jurisprudence interaméricaine: l'exemple des graves violations des droits de l'Homme commises pendant les dictatures du Cône Sud". *Revue de science criminelle et de droit pénal comparé*, v. 3, n. 3, 2012, pp. 706.

¹⁰⁵ HUMAN RIGHTS WATCH. "US Sanctions on the International Criminal Court", Dec 14 2020. Available at <<https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court>>. Retrieved on Aug 10 2021.

¹⁰⁶ COTTE, Bruno. "La Cour pénale internationale. L'expérience d'un magistrat français". *La Revue des droits de l'homme*, n. 11, 2017. Available at <<https://journals.openedition.org/revdh/2776?lang=es>>. Retrieved on Aug 10 2021.

¹⁰⁷ See, for example, AMBOS, Kai. "Expanding the Focus of the 'African Criminal Court'". In: McDERMOTT et al., eds. *Ashgate Research Companion to International Criminal Law: Critical Perspectives*. Aldershot: Ashgate,



Way less often in the public debate, however, comes the reference to the fact that, despite the existence of an international criminal jurisdiction, the primary jurisdiction to apply the RS is the national one. As the ICC is complementary to the national criminal jurisdictions, it is a duty of every State-Party to exert their respective criminal jurisdiction in relation to the referred crimes. According to Article 17 of the RS, which enshrines the principle of complementarity, the ICC shall exert its competence *if and when a national legal system does not exert its primary jurisdiction either due to the State being "unwilling or unable genuinely to carry out the investigation or prosecution"*. A State may thus, by its own initiative, bring a case before the ICC¹⁰⁸, yet mainly the court must, as a condition to the admissibility of the case, determine whether there is willingness or capability on the part of the national jurisdiction to address it.

Although Article 17 RS is a norm of "variable content", that is, subject to the interpretation of the court according to each concrete case, such mechanism offers some limits to the appreciation margin of the international jurisdiction, by setting criteria such as the "intention to protect the suspect", the "unjustifiable delay" of the proceedings, the "collapse of the national system" or the gravity of a situation"¹⁰⁹.

The fact remains that not all national jurisdictions have enough independence and impartiality to judge high state authorities having orchestrated crimes against their own population¹¹⁰. However, considering the power one must wield to carry out large-scale acts, without equivalent restraint, it is all too common that alleged perpetrators still fully exert their public powers while their deeds are under way or being investigated, including in civilian or military positions, and at times they count on the support of political movements in their territories and funding from both the public and the private sectors.

2012; VILMER, Jean-Baptiste. "Introduction: Union africaine versus Cour pénale internationale: répondre aux objections et sortir de la crise". *Études internationales*, v. 45, n. 1, 2014, pp.5-26; e SSENYONJO, Manisuli. "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia". *Crim Law Forum*, v. 29, 2018, pp.63-119.

¹⁰⁸ As the Democratic Republic of Congo did in 2003, recognizing the limits of its jurisdictional capacities in the face of the local political instability, among other numerous factors, see KAZADI MPIANA, Joseph. "La CPI et la RDC: 10 ans après. Étude de l'impact du statut de la CPI en droit interne congolais". *Revue internationale de droit comparé*, v. 65, n. 2, 2013, part. p.252 e ss.

¹⁰⁹ PERRONE-MOISÉS, Cláudia. "O princípio de complementaridade no Estatuto do Tribunal Penal Internacional e a soberania contemporânea", INB-Blog [Instituto Norberto Bobbio], Nov 15, 2009. Available at <<https://norbertobobbio.wordpress.com/2009/11/15/o-principio-de-complementaridade-no-estatuto-do-tribunal-penal-internacional-e-a-soberania-contemporanea/>>. Retrieved on 10 ago. 2021.

¹¹⁰ FOUCHARD, Isabelle. *La formation...*, op.cit., p.42.



Both the RS and the jurisprudence on the matter are crystal clear on the irrelevance of the "official capacity" of the alleged offender¹¹¹. If a State, in the realm of the duties it acquired through the RS, is not able to fulfill its competence, it should accordingly, admit the competence of the ICC, which does not correspond to an interference, but rather, to an activity which, in the "dialectic relation of complementarity" established between the two orders, becomes necessary for the preservation of the international order¹¹².

Therefore, the potential practice of crimes typified by the RS is far from a debate on the likelihood of a criminal's trial by the ICC. Instead, debating whether some practices might be considered a genocide or a crime against humanity or not is the duty of each national jurisdiction. This is why *any judgment on that likelihood should turn, not to the Hague, and rather to each society and State assumingly committed to the prevention and deterrence of such crimes*. In that aspect, Brazil faces enormous challenges, which we will now address.

6. Elements of crimes against humanity in a strict sense: the Brazilian case

The potential commission of a crime against humanity, as of any other offense, may only be addressed on a case-to-case basis. The selection of the following case and the object of the present essay have been discussed in the Introduction. The only issue left is to clarify that the choice to study the paragraph k of Article 7.1 of the RS, namely, the practice of "other inhumane acts" during the pandemic, corresponds to a mere academic framing, and does not mean we refuse any other argument related to the practice of genocide or other crimes against humanity in the same context. On the contrary, we subscribe the idea that the debate on the genocide of indigenous people, although previous to the pandemic, has been raised to a "higher level", through new measures of

¹¹¹ Consistent with Article 27.1 RS, the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence". Article 27.2 adds that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"

¹¹² PERRONE-MOISÉS, Cláudia. "O princípio de complementaridade ...", op. cit., n.p.



"legalization and legitimation of policies aiming the physical, symbolic and cultural death of indigenous communities"¹¹³. On that topic, there is at least one communication under preliminary jurisdiction assessment by the ICC, brought forth by the "Coletivo Advocacia em Direitos Humanos (CADHu)" and the Arns Commission. Moreover, we recognize the appropriateness of the debate on the genocide of the black population in Brazil¹¹⁴.

We approach henceforth, the elements of the crime under exam, the material ones -- context (6.1) and *actus reus* (6.2) – and subjective ones (*mens rea*, 6.3), and their potential attesting in the Brazilian case.

6.1. Context: generalized or systematic attack against any civilian population

The categorical statement that there is no generalized or systematic attack against the Brazilian civilian population in the context of the Covid-19 pandemic is normally grounded on a double misunderstanding: that of the concept of attack from the international criminal law standpoint and of the Brazilian response to the pandemic. According to the Article 7.1 RS, a crime against humanity is defined as any one of the acts listed, "when committed as part of a widespread or systematic attack directed against any civilian population".

A "policy which has a civilian population as the object of the attack would be implemented by State or organizational action"; such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack¹¹⁵. Indeed, it is the binding with a policy stemming from criminal ambitions that an individual indeed overcomes the boundaries of a common crime; in the context of a policy, the act deduces from the policy the criminal character causing harm to the humankind¹¹⁶.

¹¹³ ALMEIDA, Eloisa M.; SANTOS, Juliana; TERENA, Luiz Eloy. "Direitos indígenas e meio ambiente. Apresentação". In: BRENDA, Tadeu. Bolsonaro Genocida. São Paulo: Elefante, 2021, p. 20. See also the recent communication by the "Articulação dos Povos Indígenas Brasileiros (APIB)" to the ICC. Available at <<https://apiboficial.org/2021/08/09/inedito-apib-denuncia-bolsonaro-em-haia-por-genocidio-indigena/>>. Retrieved on Aug 10 2021.

¹¹⁴ See, for example, MARINHO, Fátima et al. "Disparidades raciais no excesso de mortalidade em tempos de Covid-19 em São Paulo". Informativos Desigualdades Raciais e Covid19, AFRO-CEBRAP, n. 8, 2021.

¹¹⁵ TPI. Elements of crimes. Haia: TPI, 2013, p.3. Available at <<https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf>>. Retrieved on Aug 10 2021. Provided by Article 9 RS, this document was adopted by the Assembly of the ICC State Parties to assist the court in the interpretation and application of Articles 6, 7 and 8 of the RS.

¹¹⁶ JUROVICS, Yann. Réflexions sur la spécificité du crime contre l'humanité. Paris: LGDJ, 2002.



It is indisputable that the attack against the civilian population *does not necessarily imply a military attack*¹¹⁷. According to the international jurisprudence, *non-violent acts in nature*, including the "exercise of public pressure on a population to act a certain way may be covered by the term "attack", as long as they are exerted in a massive scale or in a systematic manner¹¹⁸. The generalized character of the attack "refers to the large scale and the number of victims it produced", or the fact it was "massive, frequent, collectively driven, of considerable gravity and addressed against a large number of victims", whereas the qualification of systematic corresponds to the organized fashion of the violent acts and the "deliberate and regular repetition of similar criminal behaviors"¹¹⁹. The multiple practice of the acts must be demonstrated, in the sense of a "a series or a global sequence of events in contrast to a mere combination of fortuitous events", even if such acts have not been aimed at the whole population of the corresponding geographical entity¹²⁰.

In the Brazilian case, the aforementioned study by CEPEDISA/USP argues that the federal government has been promoting an institutional strategy to disseminate COvid-19 since March 2020, made up of three axes: *legal acts* adopted at the federal level, including the issuance of norms by federal organs and authorities and presidential vetoes; *government acts*, comprising the active hindrance to contention measures to the disease largely adopted by state and municipal governments and omissions related to the pandemic management at the federal level; and *acts of propaganda against public health*, defined as "the political discourse that employs economic, ideological, and moral arguments, in addition to fake news and technical information without scientific verification, with the purpose of discrediting health authorities, weakening popular adherence to science-based recommendations, and to promote political activism against the public health measures required to contain the spread of Covid-19"¹²¹.

Important evidence of the plan is the *collective handling* of actors involved. As evident as the leadership of the President may be, the plan extended to other organs of

¹¹⁷ ICC. Elements of crimes, op. cit., p.3.

¹¹⁸ See for example, ICC for Rwanda. First Chamber. The Prosecutor versus Jean-Paul Akayesu, Case ICTR-96-4-T, 2 set. 1998, §581.

¹¹⁹ FOUCHARD, Isabelle. La formation..., op.cit., p.28-29.

¹²⁰ It is important to demonstrate that a high enough number of individuals was the specific target of an attack, and not "a limited and random number of people", and that this population is essentially made up of, but not exclusively, of civilians, with military among them, according to international jurisprudence, Ibid.

¹²¹ VENTURA, Deisy, AITH, Fernando, REIS, Rossana et al., op.cit., p.16.



the Federal Executive branch in May 2020, for which the Health Minister was dismissed, and his successor was led to resign¹²². Furthermore, there are indications of the systematic dismissal of those officials who showed some opposition to the plans in course¹²³. Among countless instances of coordination, the Secretary of Economic Policy at the Ministry of Economics, Alfredo Sachsida, claimed in November 2020 (that is, before the start of vaccination) that "the studies we have show that many States have reached herd immunity. Honestly, I find a second wave to be very unlikely in Brazil", and that herd immunity by contagion would be attained "once 20% of the population in a State is infected by the virus"¹²⁴.

Besides members of the federal government, the propaganda in favor of herd immunity by contagion was systematically driven by the government supporters. At the request of the leader of the government in the Lower Chamber, Deputy Ricardo Barros, a meeting at the Commission handling Covid-19 at the Deputies Chamber addressed the topic "herd immunity by transmission in the Covid-19 pandemic", enthusiastically championed by Mr. Barros and invited experts¹²⁵. The practices to implement the strategy were ostensible, such as the lawsuits filed by the President before the Supreme Court against the Covid-19 contention measures adopted by the state level¹²⁶, or rather discrete, as in the case of the withdrawal of a decree enforcing the civil, administrative and criminal accountability of those who infringed public health measures such as social distancing and the quarantines¹²⁷.

Unlike other countries, which swiftly corrected government measures due to the rising number of Covid-19-related deaths, in Brazil, the regular and deliberate repetition of practices was not altered, even in the face of the generalized overstrain of the health system, including its collapse in specific locations; neither in the face of the

¹²² Ibid. §§ 35 e 54.

¹²³ In the Federal Senate, the case of the expert who started her work as extraordinary Secretary for Response to Covid-19 at the Ministry of Health, but was allegedly dismissed for her opposition to the prescription of the false early treatment, COSTA, Anna. "Luana Araújo, infectologista que ficou apenas 10 dias na Saúde, depõe à CPI". CNN Brasil, June 2 2021. Available at <<https://www.cnnbrasil.com.br/politica/2021/06/02/luana-araujo-infectologista-que-ficou-10-dias-na-saude-presta-depoimento-a-cpi>>. Retrieved on Aug 10 2021.

¹²⁴ VENTURA, Deisy, AITH, Fernando, REIS, Rossana et al., op.cit., § 126.

¹²⁵ Ibid. § 118.

¹²⁶ Ibid. § 203 e 249.

¹²⁷ Interministerial Decree n.5, issued in March by the then Ministers of Justice Sergio Moro and Health Henrique Mandetta, and withdrawn when both were dismissed in May 2020, Ibid. § 10 e 62.



opposition from other social institutions, including international ones, as previously mentioned.

As for the *generalized* character of the plan in its scale, it is undeniable that it aimed at the whole of the civilian population. With regard to the number of victims, experts indicate that about 400 thousand death could have been prevented until June 2021, that is to say, one in every five deaths, in case Brazil had sustained the world average Covid-19-related mortality¹²⁸. Studies based on other criteria confirm that at least 120 thousand deaths could have been avoided by adopting prevention measures¹²⁹.

The *gravity* of the exerted pressure on the population to be exposed to infection by the new coronavirus stands out from the technical knowledge on the issue, obtained after decades of experience in disease control. *In public health, words kill*. Risk communication during emergencies is crucial for the progress of an epidemic, whose control depends largely on the behavior of individuals and groups¹³⁰. The reiterated refusal to resort to communication techniques favoring the disease contention was underlined by a court ruling enforcing the federal government to promote the prevention campaign, which only took place in April 2021¹³¹. Some research has showcased the impact of the federal propaganda on the dissemination of the disease in Brazil¹³², adding to consistent international studies on the effects of denialism¹³³.

¹²⁸ MATTOS, Marcela et al. “‘Excesso de mortes’: pesquisadores pedem à CPI responsabilização do governo”. G1, June 24 2021. Available at <<https://g1.globo.com/politica/cpi-da-covid/noticia/2021/06/24/excesso-de-mortes-pesquisadores-pedem-a-cpi-responsabilizacao-do-governo.ghtml>>. Retrieved on Aug 10 2021.

¹²⁹ WERNECK, Guilherme et al. “120 mil mortes teriam sido evitadas com medidas preventivas”, jun. 2021. Available at <<https://www.inesc.org.br/wp-content/uploads/2021/06/Mortes-Evitaveis-por-Covid-19-no-Brasil-para-Internet.pdf>>. Retrieved on Aug 10 2021. This study, presented by entities such as the International Amnesty, Oxfam, OAB Nacional, the Brazilian Society for the Advancement of Science, among others, concludes: “We indicate that a real genocide of the poorest is under way, insofar as the pandemic advances in the peripheries and favelas, in the elderly homes, in the indigenous villages, in the traditional communities and in prisons”, p.54.

¹³⁰ OMS. “Comunicação de riscos em emergências de saúde pública: um guia da OMS para políticas e práticas em comunicação de risco de emergência”. Geneva: OMS, 2018. Available at <<http://apps.who.int/iris/bitstream/handle/10665/259807/9789248550201-por.pdf?ua=1>>. Retrieved on Aug 10 2021.

¹³¹ By initiative of the Public Prosecutor's Office, see VENTURA, AITH, REIS et al., op. cit., § 229.

¹³² See for example, AJZENMAN, Nicolás et al. “More Than Words: Leaders’ Speech and Risky Behavior during a Pandemic”, SSRN, 22 abr. 20 Available at: <<https://ssrn.com/abstract=3582908>>. Retrieved on Aug 10, 2021; e FERNANDES, Ivan et al. Blame Avoidance: The Costs of Weak Accountability in a Health Disaster”, SSRN, Feb 22 2021. Available at <<https://ssrn.com/abstract=3790705>>. Retrieved on Aug 10 2021.

¹³³ See, for example, MELKI et al. “Mitigating infodemics: The relationship between news exposure and trust and belief in COVID-19 fake news and social media spreading”. PLoS One, v. 16, n. 6, 2021, e0252830; e JAKOVljeVIC et al. “COVID-19 Infodemic and Public Trust from the Perspective of Public and Global Mental Health”. Psychiatr Danub., v. 32, n. 3-4, 2020, pp.449-457.



The scholarship in public health is invaluable to understand that *the healthcare measures adopted by the federal government in response to the Covid-19 pandemic do not contradict the existence of a strategy to disseminate the virus*. From a logical standpoint, *granting assistance to infected people does not overlap the promotion of public health measures aiming to curb massive infection*, even if the referred assistance were granted ineffectively, which is open to debate, as we further discuss.

6.2. Actus reus (actions and omissions): short inventory of inhumane practices during the health catastrophe

In accordance with the aim of this essay, as defined by Article 7.1k RS, we discuss the practice of "other inhumane acts of a similar character [of those listed in the previous paragraphs¹³⁴] intentionally causing great suffering, or serious injury to body or to mental or physical health". The *similar* character is reckoned by the nature and *gravity* of the practice, which should be equivalent to those foreseen in the preceding paragraphs¹³⁵. Despite that limit, the judges dispose of considerable discretion to ascertain the acts defined as "other inhumane acts"¹³⁶, which raises most objections to this paragraph related to the lawfulness of the principle, in particular from the standpoint of positivist systems¹³⁷. In the criminal realm, according to Nilo Batista, the rule of law principle fulfills four purposes: to disallow the retroactivity of the criminal law; the making of new crimes and penalties by custom; the deployment of analogies to conceive other crimes, justify or intensify penalties, and vague or unspecified indictments¹³⁸. The concern to protect the individuals from the abuses by authoritarian regimes in the criminal field is evident, as the author illustrates with several examples, among which the forged indictment by the German national-socialist regime and the Brazilian military dictatorship

¹³⁴ These are (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid;

¹³⁵ TPI. Elements of crimes, op. cit., p.8.

¹³⁶ DeGUZMAN, Margaret, op.cit., p.134.

¹³⁷ BASSIOUNI, Cherif, op. cit., p.411.

¹³⁸ BATISTA, Nilo. Introdução crítica ao direito penal brasileiro. 11a ed. Rio de Janeiro: Revan, 2007, p.65-83.



from 1964 to 1985. Batista also cites countless human rights international agreements to support the principle. We consider, nonetheless, that the rule of law principle, as a guardian to the predictability of the State criminal powers and the sense of legal security, does not collide with the indictment of "other inhumane acts" in the terms of the RS.

As Eugenio Zaffaroni signals, crimes in mass are often committed by those in charge of the State punitive power: "the agencies of the punitive power themselves commit the most serious offenses when they operate without restraint"¹³⁹. The author goes on: "the criminal sciences have no choice but to detach from their remarkable aseptic intention, in case they actually intend to face the most serious crimes, for they can only achieve that if they proceed to criticize the ideologies" that claim rational superiority, the hierarchization of human beings, the destruction of the Rule of Law, the legitimization of torture etc., whose result is knowingly the justification and preparation for massive murder¹⁴⁰. The indictment of the inhumane would therefore aim, among other purposes, to become a stream of criminal law fit to hold accountable those who use the State monopoly of legitimate violence, in variable and impossibly foreseeable forms, violate the most fundamental principle of the Rule of Law.

Human rights emerge then as an instrument of interpretation to the paragraph k under exam. According to the international jurisprudence, "more precise parameter to interpret the phrase 'other inhumane acts' may be found in international norms related to human rights"; so "drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity"¹⁴¹. As a result, the confirmation of human rights violations, assured in norms applicable at the time of the commission of acts, when coupled with other crime elements, would delegitimize any possible claim of unpredictability or legal insecurity in favor of the alleged offender.

International courts have in fact admitted as "other inhumane acts" practices such as forced marriage, the pillage of assets, imprisonment in inhumane conditions and

¹³⁹ ZAFFARONI, Eugenio Raúl. *Crímenes de masa*. 2 ed. Buenos Aires: Ediciones Plaza de Mayo, 2012, p.31.

¹⁴⁰ *Ibid.*, p.87-88.

¹⁴¹ International Court for the former Yugoslavia, Case No.: IT-95-16-T PROSECUTOR v. Zoran KUPRE[KI] et al. Trial Judgement. 14 Jan. 2000, § 566.



mutilation¹⁴², obviously taking into account the other elements related to each concrete case brought to appreciation.

Resuming the Brazilian case, before listing any practices, we must elude the common sense that a pandemic would inexorably cause the harm Covid-19 has brought about, usually explained by the "bad press" the Unified Health System (SUS) often displays, which is the result of "the systematic criticism and media opposition"¹⁴³. Despite the undeniable SUS malfunctions, stemming from its chronicle underfunding, among other factors, *the Brazilian response could have been different*, in the sense that the federal government *largely counted on the human and material resources to promote a different response*. SUS, as a worldwide reference in terms of universal health coverage, was considered a "fortress to tackle the Covid-19 pandemic", among others, due to the successful emergency response chain "in the handling of epidemics like H1N1, dengue and zika, in natural catastrophes and the support to major sports events, such as the World Cup and the Olympics", besides being "internationally renowned for the success of programs that broadened the healthcare network, the access to services and improved health indicators"¹⁴⁴.

There is no question about the extraordinary capacity of SUS to promote measures to contain the disease¹⁴⁵, due to its remarkable capillarity and network experience. However, the federal sanitary response has focused on the care of patients, by increasing the number of ICU beds and ventilators, as well the immunization program. Such measures have been implemented in a flawed, insufficient, erratic and belated manner, as sadly illustrated by the collapse of the health system in the city of Manaus,

¹⁴² KEARNEY, Diana. "Food Deprivations as Crimes Against Humanity". *New York University Journal of International Law and Politics*, v. 46, 2013, p. 283.

¹⁴³ PAIM, Jairnilson. "SUS aos 30 anos". *Ciência & Saúde Coletiva*, v. 23, n. 6, 2018, p.1725.

¹⁴⁴ MASSUDA et al. "A resiliência do Sistema Único de Saúde frente à COVID-19". Available at <<https://fpabramo.org.br/observabr/wp-content/uploads/sites/9/2021/03/vecina.pdf>>. Retrieved on Aug 10 2021.

¹⁴⁵ Ver, por ex., MEDINA, Maria G.; GIOVANELLA, Ligia; BOUSQUAT, Aylene et al. "Atenção primária à saúde em tempos de COVID-19: o que fazer?". *Cadernos de Saúde Pública*, v. 36, n. 8, 2020, e00149720; e LOTTA, Gabriela; WENHAM, Clare; NUNES, João et al. "Community health workers reveal COVID-19 disaster in Brazil". *The Lancet*, 2020. Available at <[https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)31521-X.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)31521-X.pdf)>. Retrieved on Aug 10 2021.



state of Amazonas, in January 2021¹⁴⁶. Regarding the epidemiological surveillance, there have been alarming failures in terms of the massive testing¹⁴⁷.

From the legal perspective, it is important to explain that most measures taken by the federal government as actions of response to the pandemic correspond to the fulfillment of constitutional duties and not to its political intent¹⁴⁸. In the case of the publicized fund transfer to other federative entities, for example, there are important signs of non-compliance of such duties, as indicated by the Federal Audit Court, the Federal Public Prosecutor's Office, the National Health Council, governors and mayors, as well as a specific study on the issue suggesting that federal resources have been distributed according to electoral interests¹⁴⁹. Some other achievements by other stakeholders have been presented as belonging to the Executive branch of government, such as the emergency financial aid program, pushed forward by the legislative branch and sluggishly implemented by the federal government, besides being discontinued at a serious moment of the crisis¹⁵⁰.

After such clearances, according to the aforementioned study by CEPEDISA/USP, the hypothesis of the existence of strategy to disseminate the disease by the federal government may be confirmed, in sum, by the following evidence on acts and omissions:

- Defense of the theory of herd (or collective) immunity by infection (or transmission) as a response to Covid-19, spreading the belief that the “natural immunity” resulting from the virus infection would protect individuals and

¹⁴⁶ See, among countless pieces of evidence, the process for administrative misconduct led by the Federal Public Prosecutor's Office against the former Minister of Health and other federal authorities, which indicates omission “in the fulfillment of their duties, by not granting the state with the proper technical cooperation on the input control, delaying the decision to transfer patients waiting for beds to other states, exerting pressure to enforce the use of the 'early treatment' of dubious efficacy in Amazonas”. Available at <<https://static.poder360.com.br/2021/04/Acao-improbidade-administrativa-pazuello-mpf.pdf>>. Retrieved on Aug 10 2021.

¹⁴⁷ BARBERIA, Lorena et al. “A ausência de estratégia de testagem da COVID-19 no Brasil”. Nota técnica n. 3. Rede Brasileira de Mulheres Cientistas. Available at <<https://mulherescientistas.org/wp-content/uploads/2021/05/Nota-Tecnica-n.3-Testagem.pdf>>. Retrieved on Aug 10 2021. Likewise for the genome sequencing of the virus: in August 2021, only “0,059% of the nearly 15 million cases of confirmed cases in Brazil for the new coronavirus, recorded until May 20, had their genome sequenced and entered the platform Gisaïd, the main international for data sharing on the genetic code and mutations of the virus”, AFFONSO, Alexandre. “Foco no genoma”. Revista da FAPESP, n. 304, jun. 2021. Available at <<https://revistapesquisa.fapesp.br/foco-no-codigo-genetico/>>. Retrieved on Aug 10 2021.

¹⁴⁸ Ver, por ex., as competências da União relativas à Política Nacional de Vigilância em Saúde, cf. AITH, Fernando. Manual de direito sanitário com enfoque em vigilância em saúde. Brasília: CONASEMS, 2019.

¹⁴⁹ PINTO, Élica Graziane. Execução orçamentária do SUS no enfrentamento à pandemia da Covid-19. São Paulo, July 5 2021. Available at <<http://www.mpc.sp.gov.br/procuradora-do-mpc-sp-envia-relatorio-sobre-execucao-orcamentaria-no-ambito-do-sus-a-cpi-da-pandemia/>>. Retrieved on Aug 10 2021..

¹⁵⁰ Moreover, by presidential veto, the aid was denied to groups that, had they been benefited, would have drastically reduced people's circulation in the peaks of the crisis, VENTURA, AITH, REIS et al., op. cit., §27.



lead to the control of the pandemic, in addition to unfounded estimates of the number of deaths and the end date of the pandemic;

- Constant encouragement to exposure of the population to the virus and non-compliance with preventive health measures, based on denying the seriousness of the disease as an act of courage and the supposed existence of an “early treatment” for Covid-19, converted into a public policy;
- Trivialization of deaths and damage caused by the disease, remaining silent about the protection of the family members of victims and survivors, promoting the idea that only elderly people or people with comorbidities, or people who did not have access to “early treatment” would die;
- Systematic obstruction of containment measures promoted by governors and mayors, justified by the supposed opposition between health protection and the protection of the economy, which includes spreading the idea that quarantine measures cause more damage than the virus, and that they - and not the pandemic - would cause hunger and unemployment;
- Focus on assistance measures and abstention from disease prevention measures, often adopting measures only when prompted by other institutions, especially the National Congress and the Judiciary Branch;
- Attacks on critics of the federal response, the press and professional journalism, questioning especially the scale of the disease in the country; and
- Awareness of the irregularity of specific conduct, especially by the President who, for example, referred to “what I showed to the nandu”, instead of explicitly mentioning chloroquine, whereas other authorities also denoted such awareness, such as the then Ministry of Health who referred to “early care” instead of “early treatment”¹⁵¹.

After the conclusion of the referred study, the investigations in the realm of the Pandemic PCI made significant progress at least in two fronts of major concern: regarding vaccination, it has raised evidence on the federal lack of interest to procure the vaccines, which proved to come late and in short supply¹⁵², while some transactions are suspected to have been corrupted¹⁵³; regarding the early treatment to Covid-19, there are clues of an orchestrated action involving financial interests¹⁵⁴.

We find it unnecessary to demonstrate the great suffering and serious effect on the physical integrity and mental health of the Brazilian population due to the pandemic. However, the causal nexus between such effects and the conduct of federal authorities

¹⁵¹ Ibid. p.18-19.

¹⁵² CRUZ, Isabela. “Como derrubar a falsa tese de que não dava para vacinar antes”. Nexo, June 11, 2021. Available at <<https://www.nexojournal.com.br/expresso/2021/06/11/Como-derrubar-a-falsa-tese-de-que-n%C3%A3o-dava-para-vacinar-antes>>. Retrieved on Aug 10 2021.

¹⁵³ “Bolsonaro acobertou corrupção com vacinas”, acusa Omar Aziz ao Correio”, Correio Braziliense, 1 ago. 2021. Available at <<https://www.correiobraziliense.com.br/bolsonaro-acobertou-corrupcao-com-vacinas-acusa-omar-aziz-ao-correio.html>>. Retrieved on Aug 10 2021.

¹⁵⁴ Agência Senado. “Fabricante de ivermectina lucrou à custa de vidas, acusam senadores da CPI”, Aug 11, 2021. Available at <<https://www12.senado.leg.br/noticias/materias/2021/08/11/fabricante-de-ivermectina-lucrou-a-custa-de-vidas-acusam-senadores-da-cpi>>. Retrieved on Aug 10 2021.



has been often identified by epidemiological studies on the spread of the disease¹⁵⁵. It is also worth recalling that the causal relation in a single case would suffice to, from the criminal point of view, to invoke accountability. In that sense, there is a swarm of accounts of fatal victims' family members that highlight the link between the compliance with the federal propaganda and the refusal of elementary prevention measures conducive of deaths¹⁵⁶. The late creation of associations of Covid-19 victims' family members is likely to favor the collection and systematization of these testimonies¹⁵⁷.

The immunization may become an additional result of the investigation on the causal relation between the government propaganda and the avoidable deaths. The campaign against the CoronaVac vaccine, an issue of electoral and ideological dispute (since the governor of the state of São Paulo is likely to become a presidential candidate and the vaccine is the result of a partnership between the Butantan Institute and the biopharmaceutical company Sinovac) has consequences evidenced by testimonies¹⁵⁸ and may be objectively assessed, as the surveys by the National Confederation of Cities demonstrate¹⁵⁹.

We may then inquire whether, in the Brazilian case, the previously described practices share the nature and gravity of the paragraphs of Article 7.1k and go on to identify parameters to measure the "inhumane" during a health catastrophe. Aiming to contribute to this debate, we further present some criteria which, from our viewpoint, could be considered in the exegesis of the paragraph k, specifically in relation to the Covid-19 pandemic, not only in the case of Brazil.

¹⁵⁵ Ver, por ex., CASTRO, Marcia et al. "Spatiotemporal pattern of COVID-19 spread in Brazil". *Science*, v. 372, n. 6544, pp. 821-826. Available at <<https://science.sciencemag.org/content/372/6544/821>>. Retrieved on Aug 10 2021.

¹⁵⁶ For example, Maria Cristina Willemann testifies that her father, deceased from Covid-19, "did not see himself as a loyal follower of the President. But as the majority of the population, my father believed in him (Bolsonaro). He saw what the President said in defense of chloroquine and he believed it" "Epidemiologista que alertava contra covid-19 perde pai que 'preferia acreditar no WhatsApp'". *BBC Brasil*, January 20 2021. Available at <<https://www.bbc.com/portuguese/geral-55731179>>. Retrieved on Aug 10 2021.

¹⁵⁷ BERTONI, Estevão. "As associações de vítimas da covid que brigam por reparação". *Nexo*, May 23, 2021. Available at <<https://www.nexojornal.com.br/expresso/2021/05/23/As-associa%C3%A7%C3%B5es-de-v%C3%ADtimas-da-covid-que-brigam-por-repara%C3%A7%C3%A3o>>. Retrieved on Aug 10 2021.

¹⁵⁸ "Deputado se recusa a tomar Coronavac e vai para o fim da fila de vacinação". *Vídeo. Metrôpoles*, July 30 2021. Available at <<https://www.metropoles.com/brasil/video-coronavac-eu-nao-vacino-diz-deputado-estadual-de-go>>. Retrieved on Aug 10 2021.

¹⁵⁹ Agência Brasil. "Cresce recusa de vacina contra covid-19; relato é de 2.097 cidades", 16 jul. 2021. Available at <<https://agenciabrasil.ebc.com.br/saude/noticia/2021-07/cresce-recusa-de-vacina-contra-covid-19-relato-e-de-2.097-cidades>>. Retrieved on Aug 10 2021.



In that sense, when coupled with other elements of the type, the conducts prone to be defined as "other inhumane acts", during the local outbreak of a highly infectious disease are the acts and omissions of State officials which:

- entail the massive violation of human rights, especially the right to life, enshrined in international treaties applicable at the time of the deeds;
- promote the strategy of herd immunity by contagion, scientifically flawed and ethically unacceptable for causing the avoidable suffering and death of millions of people, besides leading to the overburden of the health system and in some places its collapse;
- aim, by the spread of fake news and scientifically unfounded technical information, to cover the massive death with the label of a "legitimate scientific event", claiming the redundancy of human lives ("only the unfit shall die"), particularly those of vulnerable groups, such as the elderly and the bearers of previous diseases, and boosting the banalization of death and social Darwinism;
- flagrantly diverge from the science-based international recommendations, including intergovernmental organizations it composes, and good practices of pandemic response implemented by other States, even disqualifying them with fake news and ideological attacks;
- dismiss the health technical personnel from their posts, abandoning scientific evidence as a foundation to public policies and submit the latter to the ideological strain of command, inducing technical organs to take extravagant stances and, at an extreme point, militarizing the health field;
- flagrantly violate the principle *primum non nocere* ("first, not cause any harm"), a universally accepted premise in bioethics¹⁶⁰, by refraining from mobilizing material and human resources to contain the disease and prescribe potentially harmful behaviors to the health of people;
- compose a wide range of obstruction forms to the contention measures of the virus spread adopted by other tiers of government, which may go from the incentive to subversion and violence to the illegal opening of investigation and the proposal of knowingly unfounded lawsuits;
- reinforce the disproportionate repercussion of the disease over vulnerable populations, by the absence of efficient protective measures for different groups, among which the indigenous, elderly, incarcerated people, besides children and teenagers, LGBTQ community, disabled people and expectant mothers;
- delay and harm the efficiency of immunization programs against Covid-19;
- aim to hide data on the real status of the disease in its territory, including by misrepresenting or distorting official information, besides the systematic attack on experts, scientists, magistrates, health authorities and journalists;

¹⁶⁰ Also named non-maleficence or professional duty to abstain from harmful health practices, BEAUCHAMP, Tom; CHILDRESS, James. *Principles of Biomedical Ethics*. 7a ed. Oxford University Press, 2012, p. 150 e ss.



- expose healthcare workers to overcharging working conditions and, in some cases, to the shortage of protective gear and suitable working conditions, jeopardizing their physical and mental integrity and weakening the ability of response of the healthcare system;
- broaden the definition of essential activities during a major health crisis and/or remove categories of social workers, in order to intensify the circulation of people, in detriment of their physical and mental integrity;
- systematically disregard judicial decisions enforcing the adoption of contention measures to the spread of the disease, even those of final court rulings;
- may constitute the systematic practice of health-related common crimes, which may not even be duly investigated, due to the functional immunity or omission of accountable authorities;
- aim to convert treatments of proven inefficiency into public health policy, as a stimulus to the exposure of the population to the virus, in detriment of effective prevention measures, under the explicit justification of a hierarchy between the economy and human life, substantiating the submission of the latter to economic interests.

Such a list does not intend to be the most comprehensive. From a public health standpoint, it is worth highlighting, all of these conducts constitute real atrocities. We move on to assess the element of intentionality in the Brazilian case.

6.3. *Mens rea: conscious and volitive acts*

According to Article 30.1 RS, the willingness to commit the crime and the knowledge of its material elements are the psychological elements of the crimes over which the Court may rule. Article 30.2 clarifies that a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Moreover, Article 30.3 prescribes that the "knowledge" means the awareness that a circumstance exists, or a consequence will occur in the ordinary course of events. It is valid to recall that, according to the international jurisprudence, a participant of the attack does not necessarily share the same goals of the actors or even approve of such a plan. To ascertain their responsibility, it suffices that they



know about the attack itself and that their conduct is part of it¹⁶¹, so that different criminal accountabilities may be raised¹⁶².

In Brazil, the federal authorities have relentlessly expressed their purpose, by words and gestures. It would take thousands of pages to describe them. We choose to highlight four of them in this piece.

Direct involvement in the spread of the virus. Even at the peak moments of the pandemic, federal authorities constantly commute around the country, for vile reasons, such as the inauguration of previously inaugurated construction projects or to attend demonstrations supporting the government. There was the active engagement of public officials to plan and promote major agglomerations, where they refrain and encourage the refraining from element protective measures such as the use of masks. The footage of the President, holding a child in his lap and taking off their mask during a gathering is emblematic of his action in favor of the spread of the virus¹⁶³.

Elusive conducts. Herd immunity by contagion was disseminated mainly through two strategies: the aforementioned guideline of an "early treatment, which aimed to encourage the population to expose to the virus and was even endorsed by the Ministry of Health¹⁶⁴; and the guideline for a "vertical isolation", repeated to exhaustion by federal authorities, absent from any medical or scientific literature, and consisting of the extravagant notion that we might isolate, in their respective homes, only those most vulnerable, such as the elderly and suffering from previous diseases, eluding the public health measures aimed at the whole population¹⁶⁵. Moreover, public health recommendations are often presented as a political and ideological cleavage, as if the compliance or refusal of any measure were related to the support or the rejection to political campaigns and ideologies.

Denial and banalization of nefarious effects. Federal authorities have resorted to

¹⁶¹ FOUCHARD, Isabelle. La formation..., op.cit., p.28-29

¹⁶² JUROVICS, Yann. Réflexions sur la spécificité du crime contre l'humanité. Paris: LGDJ, 2002.

¹⁶³ "Bolsonaro tira máscara de criança em meio à pandemia de Covid-19 no Rio Grande do Norte". Vídeo. Globo, June 24, 2021. Available at <<https://www.youtube.com/watch?v=-rTNTkWcm0A>>. Retrieved on Aug 10 2021.

¹⁶⁴ VENTURA, Deisy, AITH, Fernando, REIS, Rossana et al., op. cit., §§ 58, 88 e 228.

¹⁶⁵ "Soon after the announcement of such a bizarre idea, researchers of several fields immediately rebuked its scientific validity. In the scientific literature, there is no such concept, even less so its direct opposite, the 'horizontal isolation', vaguely referred to as quarantine and physical distancing as a strategy to reduce contagion", see ALMEIDA FILHO, Naomar. "Pandemia de Covid-19 no Brasil: equívocos estratégicos induzidos por retórica negacionista." In: Covid-19. Volume I - Principais Elementos. Brasília: CONASS, 2021, p.219.



two techniques composing the history of the most serious crimes against humanity: denial and banalization. Following Henry Rousso, although they are different and even contradictory rhetorical procedures from a logical perspective, the historical denialism has either sustained that certain crimes did not take place or that they were not so extended nor brutal. The seeding of inaccurate data and unfounded versions, it produces fake controversies converting what is certain into doubtful, which subverts the burden of proof, that is, it forces the victims to constantly solve misunderstandings, debunk frauds and repeatedly display evidence¹⁶⁶. Thus, there is both a continuous questioning of the data related to the disease scale and fake justifications to the number of cases and deaths.

Persistence of conducts in the face of opposition from institutions and society at large. It is important to claim that the federal response is part of the escalation of confrontation of the Executive branch with both the other branches of government, legislative and judiciary and with state and municipal authorities that adopted contention measures to the disease¹⁶⁷. The dispute takes shape, among others, by intense judicialization, the systematic overthrowing of presidential vetoes by the Legislative branch, initiatives to hold federal authorities accountable, including impeachment complaints of the president and communications with the ICC, and most recently, before the Pandemic PCI, whose sessions have reached relevant public repercussion.

Finally, we underline that the adoption of herd immunity by contagion as a response to the pandemic has been justified by the assumption, exhaustively reiterated by federal authorities, that the measures to contain Covid-19 would entail unemployment, which in turn "would kill more than the virus". At least two aspects of that motivation deserve close attention. Firstly, the federal strategy comes in the wake of the authoritarianism marking the history of the country: "our slavery past, the spectrum of colonialism, the structures of command and patriarchalism, the obstinate corruption, the racial discrimination, the manifestation of gender, sexual and religious intolerance" have never ceased, but have rather taken on more incisive forms¹⁶⁸. For that matter, it is part of the Brazilian authoritarian tradition the omission to judge crimes committed by State officials during the military rule (1964-1985)¹⁶⁹. Secondly, the President interprets

¹⁶⁶ ROUSSO, Henry. "Les racines du négationnisme en France". Cités, v. 36, n. 4, 2008, pp.51-62.

¹⁶⁷ Ibid. §§ 47, 52, 60, 62 e 70-74.

¹⁶⁸ SCHWARTZ, Lilia. Sobre o autoritarismo brasileiro. São Paulo: Companhia das Letras, 2019, p.224.

¹⁶⁹ There is a vast literature on the topic. Only as an example, see MARTIN-CHENUT, Kathia; VENTURA, Deisy, org. "Dossiê Direito à verdade e à justiça nos países do Cone Sul", Revista Anistia Política e Justiça de Transição,



the measures of disease contention, which imply the reduction of the economic activity, as a threat to his hold on power¹⁷⁰.

7. Final remarks

This essay, although preliminary, proposes a debate that is far from conclusion. By identifying the conducts that may be defined as inhumane during the pandemic, it demonstrates that, against all common sense, they are not "evil" nor rare initiatives, not even effectively and unanimously disavowed by societies and States. Although the risk of trivializing the reference to crimes against humanity and to international criminal justice greatly concerns us, we are equally concerned by the banalization of contagion and the massive Covid-19-related deaths, since new pandemics are due to come. In case the awareness of the inhumanity of certain deeds does not accrue, the alliance between neoliberalism and populisms may convert public health in a privileged site to legitimate the annihilation of human beings at each new health crisis.

As jurists of the present, before the atrocities committed during the health catastrophe, we wonder along with Arendt: now that we have laws against *hostis humani generis*, are we in a different situation from that of previous generations? or do we still need to prophetically describe, word by word, each one of the strategies by which totalitarian ideologies will use the State machinery to select and massively destroy human lives? As well as Arendt, we do not bring an answer, but rather a reminder on the relevance of this question:

Ministério da Justiça, n. 9, 2014, p.139-400; e PAYNE, Leigh; ABRÃO, Paulo; TORELLY, Marcelo, orgs. A anistia na era da responsabilização: o Brasil em perspectiva internacional e comparada. Brasília: Ministério da Justiça, Comissão de Anistia; Oxford: Oxford University, Latin American Centre, 2011.

¹⁷⁰ According to the President, "70% will be infected. Why terrify the people? Everybody will die. Those of an advanced age or weak, if they contract the virus they'll have a hard time. Those with diseases, comorbidities, will also have a hard time. These people must be taken care of. By their families. The State cannot take care of everyone, all this demagoguery 'everyone at home' (...) Some people decided to take the President out of office using the economy. But only two entities can take me out of my chair, God and the people. (...) This is life, damn it. Don't fool around about it. Bring bravery to the people to face the problem, because it will be much worse if we follow this policy, the close-it-down, stay-at-home policy. Those under 40, if they catch the virus, since 70% will catch it, the odds of losing their lives is 0,2% and even among those who are obese or have comorbidities, those at 30, 20 also have comorbidities. (...) The ones who are dying, unfortunately, we cannot avoid their death. Well, you could avoid the infection. French study, 86% of people got the virus at home", "President Bolsonaro: press conference about what they hide since the beginning of his term". Video. Band News, May 23 2021. Available at <<https://www.youtube.com/watch?v=P70okK2pwtw>>. Retrieved on Aug 10 2021.



*Totalitarian solutions may well survive the fall of totalitarian regimes in the form of strong temptations which will come up whenever it seems impossible to alleviate political, social, or economic misery in a manner worthy of man*¹⁷¹.

Translation

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¹⁷¹ ARENDT, Hannah. *Les origines du totalitarisme*. In: BOURETZ, Pierre, ed., op.cit., p.812.



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