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THE SCOPE OF THE RIGHTS OF QUILOMBOLA COMMUNITIES IN BRAZIL: AN ANALYSIS OF ADI 3239 AT THE SUPREME FEDERAL COURT AND THE ALCÂNTARA COMMUNITIES CASE BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

O ALCANCE DOS DIREITOS DAS COMUNIDADES QUILOMBOLAS NO BRASIL: UMA ANÁLISE DA ADI 3239 PELO STF E DO CASO DAS COMUNIDADES DE ALCÂNTARA NA CORTE INTERAMERICANA DE DIREITOS HUMANOS

EL ALCANCE DE LOS DERECHOS DE LAS COMUNIDADES QUILOMBOLAS EN BRASIL: UN ANÁLISIS DE LA ADI 3239 EN EL SUPREMO TRIBUNAL FEDERAL Y DEL CASO DE LAS COMUNIDADES DE ALCÂNTARA ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS

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ABSTRACT

The pursuit of effectiveness in the rights of Quilombola Communities faces significant challenges due to the systemic failure of the state to protect, respect, and fulfill their human rights. On the international level, several documents provide special protection to these Communities,

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notably the International Labour Organization's Convention No. 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples of 2007. It was only with the return to democracy, the enactment of the 1988 Federal Constitution, and the subsequent Decree No. 4,887 of 2003 that a protective legal framework was established in Brazil. This article aims to analyze the scope of national and international human rights norms concerning Quilombola Communities. To this end, it adopts a dual methodological approach. First, it conducts a literature review to assess the state of the art of national and international norms regarding Quilombola Communities, along with an analysis of their socioeconomic characteristics. Then, it proceeds to a case law analysis of two landmark decisions: DAU 3239, ruled by the Brazilian Supreme Federal Court in 2018, and the case before the Inter-American Court of Human Rights regarding the Communities of Alcântara, in which the Brazilian State was held accountable in 2024. The article concludes that rights violations against Quilombola Communities persist, and the reach of protective norms remains limited.
Keywords: DAU 3239. Alcântara Communities. Quilombola Communities. ILO Convention No. 169.

RESUMO

A busca pela efetividade dos direitos das Comunidades Quilombolas perpassa por obstáculos significativos, diante da falha sistêmica estatal de proteger, respeitar e assegurar os seus direitos humanos. No plano internacional, há uma série de documentos internacionais que garantem uma proteção especial às Comunidades, em especial à Convenção 169 de 1989 da OIT e a Declaração dos Direitos dos Povos Indígenas, de 2007. Apenas com a redemocratização e o advento da Constituição Federal de 1988 e o consequente Decreto 4.887 de 2003, o arcabouço protetivo foi assegurado no Brasil. Assim, o objetivo deste trabalho é o de analisar o alcance das normas internacionais e nacionais de proteção aos direitos humanos das Comunidades Quilombolas. Para tanto, utiliza-se de uma abordagem metodológica dupla. Em um primeiro momento, procede-se à revisão bibliográfica para verificar o estado da arte das normas nacionais e internacionais sobre as Comunidades Quilombolas, além de analisar suas características socioeconômicas. Depois, procede-se à análise jurisprudencial de duas decisões paradigmáticas, a ADI 3239 julgada em 2018 pelo Supremo Tribunal Federal e o caso perante a Corte Interamericana de Direitos Humanos sobre as Comunidades de Alcântara, o qual responsabiliza o Estado brasileiro em 2024. O artigo conclui que há uma continuidade das violações aos direitos das Comunidades Quilombolas com um alcance limitado das normas protetivas
Palavras-chave: ADI 3239. Comunidades de Alcântara. Comunidades Quilombolas. Convenção 169 OIT.

RESUMEN

La búsqueda de la efectividad de los derechos de las Comunidades Quilombolas enfrenta obstáculos significativos debido a la falla sistémica del Estado en proteger, respetar y garantizar sus derechos humanos. En el ámbito internacional, diversos instrumentos jurídicos otorgan protección especial a estas comunidades, en particular el Convenio 169 de 1989 de la OIT y la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas de 2007. Solo con la redemocratización, la promulgación de la Constitución Federal de 1988 y el posterior Decreto 4.887 de 2003 se consolidó un marco legal de protección. El objetivo de este trabajo es analizar el alcance de las normas nacionales e internacionales de protección de los derechos humanos de las Comunidades Quilombolas. Para ello, se adopta una metodología dual. En un primer momento, se realiza una revisión bibliográfica para examinar el estado del arte de las normas nacionales e internacionales sobre las Comunidades Quilombolas, además de analizar sus características socioeconómicas. Luego,

se lleva a cabo un análisis jurisprudencial de dos decisiones paradigmáticas: la ADI 3239, juzgada por el Supremo Tribunal Federal en 2018, y el caso ante la Corte Interamericana de Derechos Humanos sobre las Comunidades de Alcântara, en el cual el Estado brasileño fue responsabilizado en 2024. El artículo concluye que persisten las violaciones a los derechos de las Comunidades Quilombolas y que el alcance de las normas protectoras sigue siendo limitado.
Palabras clave: ADI 3239. Comunidades de Alcântara. Comunidades Quilombolas. Convenio 169 de la OIT.

INTRODUCTION

In 2025, we celebrate the 80th anniversary of the adoption of the San Francisco Charter, the founding document of the United Nations. Among its various statements, one already stands out in the first article concerning the purposes of the United Nations: respect for the principle of self-determination of peoples (United Nations, 1945).

The centrality of the self-determination of peoples in this international instrument and in subsequent treaties and conventions, such as the 1966 Human Rights Covenants, is justified by the two Great Wars that occurred in the first half of the 20th century, which had in their genesis intra- and inter-state ethnic conflicts.

Alongside the decolonial processes developed in the 1950s and 1960s, indigenous peoples are undergoing a rearticulation of their rights at the international level, precisely based on the principle of self-determination. In 1989, the International Labour Organization (ILO) adopted Convention No. 169 concerning Indigenous and Tribal Peoples, which establishes a series of human rights. After twenty years of debates, in 2007, the UN General Assembly established another normative framework for the protection of the rights of indigenous peoples: the United Nations Declaration on the Rights of Indigenous Peoples.

In Brazil, the recognition of the rights of indigenous peoples also occurred belatedly. Only with the 1988 Federal Constitution was the right to land for indigenous peoples fully realized, even though such a right was already present in other national Constitutions. The protection of the rights of Quilombola Communities stems from the Transitory Constitutional Provisions Act (ADCT). The procedure for the identification, demarcation, and recognition of these lands was established through Decree 4,887 of 2003.

Although there is a chapter in the Constitution dedicated to the protection of indigenous peoples, the concern for respecting and ensuring the effectiveness of the rights of Quilombola Communities still requires its own agenda and greater theoretical development.

Similarly to the land struggle of indigenous peoples, the quest for the recognition of the rights of these Communities still faces intense resistance, generating social conflicts that negatively impact the formation of each of their identities. Only in 2018 did the Federal Supreme Court affirm the constitutionality of Decree 4,887/03 and the integration of ILO Convention No. 169 into the protection of their rights (Direct Action of Unconstitutionality 3239).

Even with such advances, the disrespect for the rights of the communities continues to occur repeatedly. In a recent ruling by the Inter-American Court of Human Rights, in the case of the Quilombola Communities of Alcântara vs. Brazil, the international responsibility of the Brazilian State was recognized in ensuring respect for the rights of these communities, including the right to free, prior, and informed consultation.

Thus, the objective of this article is to analyze the scope of ILO Convention 169 within the Brazilian legal system, particularly concerning respect for the rights of Quilombola Communities. The hypothesis put forward is that Brazil repeatedly fails to comply with its international obligations to protect, respect, and ensure the rights of Quilombola Communities.

The work adopts a dual methodological approach. The first, based on exploratory research, seeks to compile bibliographic and documentary data on the concepts involved in the formation of Quilombola identity and the rights guaranteed to this population. Then, through a case study analysis (Machado, 2017, p. 356-389) of two judicial decisions, one at the national level and one at the regional level, the aim is to assess the scope of ILO Convention 169 within the Brazilian legal system regarding Quilombola Communities. The cases selected for jurisprudential analysis were ADI 3239 adjudicated by the STF and the 2024 case of the Quilombola Communities of Alcântara vs. Brazil from the Inter-American human rights system.

To achieve this objective and the methodological path, the work presents three additional sections. The first, with theoretical characteristics, delineates the differentiating features of Quilombola Communities and Indigenous Peoples, with the aim of verifying whether ILO Convention No. 169 applies to the former population. This section adopts an approach with sociological and historical nuances. Then, in the second part, the judgment of ADI 3239 was analyzed qualitatively, through the examination of its summary (*ementa*) and all the issued votes. In the last part, based on the Inter-American Court ruling, the continuity of violations of the rights of Quilombola Communities by the Brazilian State was outlined. The conclusion attempts to construct pathways for greater effectiveness of the rights of quilombola communities.

2 THE LEGAL CONCEPTUALIZATION OF QUILOMBOS: BETWEEN HISTORY, DISCRIMINATION, AND RECOGNITION

La The genealogy of the concept of "people" in Law requires another research focused on this construction. However, the contemporary understanding of the right to self-determination of peoples refers to the drafting of the United Nations Charter in 1945 and the consequent International Bill of Human Rights, composed of the 1948 Universal Declaration and the 1966 Covenants, which encompass civil, political, economic, social, and cultural rights. The reconstruction of the international order, in a simplified way, results from the developments of the two World Wars in the first half of the 20th century. These events are, at their core, conflicts generated by inter- and intra-state tensions among peoples.

While the self-determination of peoples is one of the objectives of the United Nations (Art. 1.2 of the 1945 Charter), the 1966 International Covenant on Civil and Political Rights recognizes from its first article that "All peoples have the right of self-determination" (Brazil, 1992). This right includes their free economic and social development. This right is reaffirmed in the International Covenant on Economic, Social and Cultural Rights, in terms like the Covenant on Civil and Political Rights.

Nevertheless, the necessary protection of the right to self-determination in these documents faces conceptual problems, as there are no elements, from the point of view of International Law, for attributing the concept of "people" and the consequent exercise of self-determination.

There is, furthermore, a distinction between tribal and indigenous peoples. This distinction, as Xanthaki states (2007, p. 72), is merely theoretical, as both groups possess the same rights. Regarding the first group of peoples, Article 1 of said Convention explains that it applies to tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations (International Labour Organization, 1989). Likewise, the same article also presents a subjective criterion for defining the applicability of the Convention, by establishing that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the international instrument apply (International Labour Organization, 1989). This latter criterion has been the object of concern and disrespect by States, as demonstrated by the case of the Uyghurs in China, who are not recognized by the Chinese State.

Convention 169 revised and replaced Convention 107 of 1957, which contained integrationist language, with the purpose of eliminating various forms of life to integrate them into the majority society (Xanthaki, 2007, p. 68-69). The 1989 Convention generates a paradigmatic shift in the protection of the rights of peoples, guaranteeing them a series of rights, such as: to life, physical integrity, culture, land, among others.

Thus, in a first normative approximation, Quilombola peoples are protected by the provisions of ILO Convention 169, as they fit the concept of tribal people. There is the fundamental criterion of self-identification, in addition to the fact that their social, cultural, and economic conditions are distinct from the majority Brazilian society. Furthermore, they have their own customs and traditions and are even governed by their own special legislation (Federal Decree No. 4887 of 2003).

In this sense, in 2002, around the same time that Federal Decree No. 4,887 was enacted, Brazil adhered to the ILO Convention 169, which, upon its incorporation into the Brazilian legal system, generates international obligations for the Brazilian State.

Silva (2023) points out that Brazil, by ratifying said Convention, recognized as holders of the rights provided therein indigenous peoples, as well as Quilombola communities and traditional peoples, such as riverine (*ribeirinhos*) and extractivist communities. This conception was reaffirmed by the legal descriptions of tribal and traditional peoples included in Decree No. 4,060/2007, which instituted the National Policy for the Sustainable Development of Traditional Peoples and Communities[3], and by Decree No. 8,750/2016, which established the National Council of Traditional Peoples and Communities (CNPCT)[4].

The central theme of the Convention is that there are groups bearing specific identities and that it is the role of Law to ensure them "the control of their own institutions and ways of life and their economic development, and to maintain and strengthen their identities, languages, and religions,

[3] This description is found in Article 3, item I, of Decree No. 4,060/2007, which classifies "indigenous peoples and traditional communities" as: culturally differentiated groups that recognize themselves as such, which have their own forms of social organization, occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral, and economic reproduction, using knowledge, innovations, and practices generated and transmitted by tradition (Brazil, 2007).

[4]This description is found in Article 4, §2, of Decree No. 8,750/2016, which describes indigenous and traditional peoples as: "indigenous peoples; quilombola communities; terreiros peoples and communities/African matrix peoples and communities; Roma people; artisanal fishers; extractivists; coastal and marine extractivists; *caiçaras*; *faxinalenses*; prayers/healers (*benzedeiros*); islanders; herbalists (*raizeiros*); *gerazeiros*; *caatingueiros*; *vazanteiros*; *veredeiros*; everlasting flower gatherers; wetland dwellers (*pantaneros*); *morroquianos*; Pomeranian people; *mangaba* gatherers; *babaçu* coconut breakers; Araguaia riverbank dwellers (*retireiros do Araguaia*); commons and pasture closure communities (*fundos e fechos de pasto*); riverine communities (*ribeirinhos*); *cipozeiros* (vine gatherers); *andirobeiros* (*andiroba* gatherers); *caboclos*; and youth of traditional peoples and communities".

within the framework of the States in which they live" (International Labour Organization, 1989). The right to prior consultation of traditional peoples is found in Art. 6, 1, a, of the document, which states:

> Ao aplicar as disposições desta Convenção, os governos deverão: consultar os povos interessados, por meio de procedimentos apropriados e, em especial, por meio de suas instituições representativas, sempre que estiverem sendo consideradas medidas legislativas ou administrativas que possam afetá-los diretamente (Organização Internacional do Trabalho, 1989).

The right to free, prior, and informed consultation and consent, recognized by ILO Convention No. 169, constitutes a strong expression and guarantee of the right to self-determination of traditional peoples, as it seeks to protect the ability of such communities to define their own priorities, control their development model, and participate in state decisions that affect them directly (Soares; Steckelberg; Weber, 2019). This right foresees that the consultation to be carried out must have broad effects, allowing the consulted community to veto a project that may affect it and determining that its objections be incorporated into the decision-making process (Duprat, 2015). The right in question must also be exercised regarding any legislative or administrative measure likely to affect traditional peoples (Lunelli; Silva, 2023).

Thus, as Miranda (2013) explains, this international legislation, having been incorporated into the national legal system in accordance with the parameters of Article 5, §2, of the Federal Constitution[5], began to guide and support Article 68 of the Constitution and Decree No. 4,887/2003, contributing to reducing the bureaucracy of the Brazilian State, which paralyzed many recognition processes, postponing the rights of some Quilombola communities for years, as previously noted.

It is worth highlighting that, at the international level, the right to prior consultation is reinforced by the 2007 United Nations Declaration on the Rights of Indigenous Peoples; by the American Declaration on the Rights of Indigenous Peoples, from the Organization of American States (OAS), of 2016; and by the jurisprudence of the Inter-American Court of Human Rights.

Regarding the United Nations Declaration on Indigenous Peoples, the semantic alteration concerning the right to free, prior, and informed consultation is notable. While ILO Convention 169 references the state's obligation to conduct the consultation with its constitutive elements, the UN Declaration mentions that the consultation should have a bias towards consent.

[5]Article 5, §2, of the Federal Constitution establishes that: "The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party" (Brazil, 1988).

That is, the consultation must go further and actively seek the consent of the peoples concerned. Based on this change, some commentators (Lunelli; Silva, 2023) argue for the existence of a right to consent for traditional peoples regarding all measures that impact them. Consequently, the notion of consent carries with it the right to veto. In practical terms, in business projects, peoples would have the right to veto their development from the earliest phases.

It is observed, therefore, that the recognition of the rights of the Quilombola people integrated the formation of the principles and parameters of the contemporary Brazilian legal system, guided by the 1988 Federal Constitution. However, the realization of such rights remains conflictual today, marked by legal disputes and political interest conflicts, as will be addressed in the next section of this work.

3 THE RIGHT TO SELF-IDENTIFICATION AND SELF-DETERMINATION IN ADI NO. 3239

As stated, the process of recognizing the rights of Quilombola peoples was also marked by significant judicial decisions, standing out, in this sense, the Direct Action of Unconstitutionality No. 3239, whose judgment by the Federal Supreme Court was concluded in 2018.

ADI No. 3239 was filed in 2004 by the Liberal Front Party (PFL), currently the Democrats party (*Democratas*), with the aim of challenging the constitutionality of Decree No. 4,887/2003 due to alleged formal and material flaws.[6] (Monteiro; Trecanni, 2019). Regarding formality, the main issue raised by the plaintiff was that the content regulated by the decree was a matter reserved for law because it dealt directly and immediately with a constitutional precept provided for in Article 68 of the ADCT (Brazil, 2018).

Regarding materiality, the plaintiff presented three main allegations: a) that the State should limit itself to issuing titles to Quilombola communities that had established residence on their

[6]The following acted as *amicus curiae* in ADI No. 3239: Pro Bono Institute; Conectas Human Rights; Brazilian Society of Public Law (SBDP); Centre on Housing Rights and Evictions (COHRE); Global Justice Center; Socio-Environmental Institute (ISA); Institute for Studies, Training and Advisory in Social Policies (POLIS); Terra de Direitos; Federation of Agricultural Workers of the State of Pará (FETAGRI-PARÁ); State of Pará; State of Santa Catarina; National Confederation of Agriculture and Livestock of Brazil (CNA); National Confederation of Industry; Brazilian Pulp and Paper Association (BRACELPA); Brazilian Rural Society; Mariana Criola Popular Legal Advisory Center; Koinonia Ecumenical Presence and Service; Association of the United Quilombos of Barro Preto and Indaiá; Association of Quilombola Residents of Santana (Quilombo de Santana); Coordination of Rural Black Quilombola Communities of Mato Grosso do Sul; National Institute of Colonization and Agrarian Reform (INCRA); State of Paraná; National Conference of Bishops of Brazil (CNBB); Institute of Racial and Environmental Law (IARA); Palmares Club of Volta Redonda (CPVR).
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respective lands from the abolition of slavery until October 5, 1988, and that the hypothesis of expropriation provided for in Federal Decree No. 4,887/2003 would be unconstitutional; b) that the self-attribution criterion, provided for in Article 2, §1, of Federal Decree No. 4,887/2003, would allow recognition of the right to land for more people than those actually benefited by Article 68 of the ADCT; c) that it would be necessary to prove the "remnant" (*remanência*) and not the "descendance" (*descendência*) of Quilombola communities for the right to territorial demarcation to be recognized, and that this should be limited to lands essential for their physical, social, economic, and cultural reproduction (Brazil, 2018).

It is observed that, in addition to questioning the right to self-determination of Quilombola peoples, the filing of this ADI also led the STF to rule on the thesis of the "temporal framework of occupation," which would restrict the right to land of Quilombola communities to those who were in possession of their territory at the time of the promulgation of the 1988 Federal Constitution. The first time this thesis emerged within the Supreme Court was during the judgment of Petition No. 3,388-4, which debated the demarcation of the Raposa Serra do Sol Indigenous Land in the state of Roraima (Monteiro; Trecanni, 2019).

The trial of the ADI began in 2012, with the vote of the case's rapporteur, Minister Cezar Peluso. The rapporteur ruled in favor of the formal unconstitutionality of Decree No. 4,887/2003, considering that the regulatory route used violated the principles of legality and legislative reservation (*reserva de lei*); and in favor of material unconstitutionality, by accepting the plaintiff's theses regarding identity self-determination and the criteria for demarcating Quilombola lands (Chaves; Monteiro; Siqueira, 2020). Regarding the temporal framework thesis, the Minister proposed that lands whose possession was continuous, prolonged, centuries-old, and qualified until October 5, 1988 should be demarcated (Brazil, 2018).

The process was suspended due to a request for review (*pedido de vista*) by Minister Rosa Weber, who issued her vote in 2015, ruling in favor of the constitutionality of the decree and defending that Article 68 of the ADCT constituted a norm of full efficacy and immediate application, as it is a fundamental right of an ethnic-racial minority group (Brazil, 2018).

Minister Rosa Weber based her vote on recognition theories grounded in the theoretical production of Axel Honneth and Nancy Fraser. The recognition of land ownership holds importance for distributive justice and recognition itself. From this notion, the Minister constructed her vote as a mechanism of transformative justice.

As Karen Engle and Lucas Lixinski affirm (2021), her vote recognizes two types of injustices suffered by Quilombola communities: economic and cultural. Thus, two types of remedies are required: economic redistribution and cultural recognition.

However, the Minister's position presented a peculiarity: in the first version of her vote-review (*voto-vista*) in 2015, the Minister argued that demonstrating the effective possession of the Quilombola territory on October 5, 1988, was an essential requirement for the application of Article 68 of the ADCT; however, at the end of the trial, the Minister issued a new version of her vote, in which she did not directly address the need for possession at the time of the promulgation of the 1988 Constitution, but rejected the date of May 13, 1888, for defining the status of *quilombos* (Monteiro; Treccani, 2019).

> A falta de deliberação do Plenário sobre um eventual marco temporal impede que eu faça considerações, ainda que em obiter dictum. Assinalo, porém, que a data de 13 de maio de 1888 não possui utilidade metodológica para a definição do status dos quilombos. Primeiro, porque o próprio conceito de remanescente de quilombo, nos dias atuais, exige a reprodução contínua de uma comunidade que, originada na resistência à escravidão, permaneceu coesa. Segundo, porque é impossível saber, hoje, em que momento do passado histórico a Lei Áurea — embora assinada naquela data — tornou-se de conhecimento público em localidades remotas do território brasileiro, bem como qual foi a efetiva disposição das autoridades locais para lhe dar cumprimento (Brasil, 2018, p. 130).[7].

The next Minister to express his opinion was Dias Toffoli, who voted for the partial granting of the action, arguing in favor of the constitutionality of Federal Decree No. 4,887/2003, but defending the demarcation of lands that were occupied by Quilombola remnants and were effectively used to guarantee their physical, social, economic, and cultural reproduction at the date of promulgation of the 1988 Federal Constitution (Brazil, 2018). Next, Minister Gilmar Mendes concurred with Minister Dias Toffoli's vote (Brazil, 2018).

It is observed that, in the first votes, the idea of conceptualizing Quilombola Communities through *remnantness* (*remanência*) rather than cultural and ethnic self-identification predominated. As Chaves, Monteiro, and Siqueira explain (2020, p.68), the adoption of this perspective directly jeopardizes the existence of Quilombola peoples, insofar as "the place (*quilombo*) and the person (*quilombola*) merge into a concept that is complete," making it impossible to restrict identity and community recognition to the continuous possession of a territory, especially considering that lands

[7] The following excerpt was taken from the content of the decision rendered in 2018, in which the second version of the vote by Minister Rosa Weber was already included *acórdão* (court decision).

occupied by Quilombolas were constantly subject to persecution and illegal occupation by third parties over time.

However, the course of the trial changed in 2018, with the vote of Minister Edson Fachin. The Minister not only defended the formal constitutionality of Federal Decree No. 4,887/2003, affirming that the right provided for in Article 68 of the ADCT had maximum efficacy, even being stipulated in a transitional norm, but also rejected the thesis that the recognition of Quilombola lands should be based on the community's presence in the area until October 5, 1988 (Brazil, 2018). Fachin argued that the defining element of Quilombola identity should be the community's traditional relationship with the land, the "idea of resistance, of a community that, over the years, despite invisibility and difficulties in relation to its surroundings, survives and maintains its traditions" (Brazil, 2018).

Ministers Luís Roberto Barroso and Luiz Fux also positioned themselves against the adoption of the temporal framework thesis. Barroso argued that proof of the preservation of the link with the Quilombola area should not be given through possessory actions and that communities that were forcibly dispossessed "but whose behavior, in light of their culture, points to their unequivocal intention to return to the territory they occupied [and] to resume the permanence of the cultural and traditional link with the territory" would have the right to property (Brazil, 2018).

For his part, Minister Luiz Fux argued that the chronological restriction of the right to land would ultimately violate the constitutional purpose of the norm in Article 68 of the ADCT, that is, the protection of Quilombola communities, in addition to pointing out that the self-identification criterion had normative support both in the Brazilian legal system and in the provisions of ILO Convention No. 169, ratified by Brazil (Brazil, 2018). In the Minister's words:

> A garantia inscrita no art. 68 do ADCT deve orientar-se para o futuro, não podendo o intérprete reduzi-la apenas às terras comprovadamente ocupadas pelas comunidades quilombolas durante a fase imperial da história do Brasil, na medida em que tal compreensão (i) subverte a finalidade subjacente ao dispositivo constitucional, transformando-o de instrumento protetivo em veículo discriminatório dos grupos remanescentes de quilombos; (ii) cria obstáculos intransponíveis para a efetivação do direito constitucionalmente reconhecido e (iii) ignora a dimensão territorial indispensável para a preservação e afirmação da cultura quilombola (Brasil, 2018, p. 312).

Finally, Minister Ricardo Lewandowski voted to dismiss the action (*não conhecimento da ação*), while Minister Marco Aurélio ruled for the dismissal of the request (*improcedência do pedido*) and Minister Celso de Mello concurred with the vote of Minister Rosa Weber, adopting, however, the observation of Minister Edson Fachin regarding the rejection of the temporal framework thesis (Brazil, 2018).

Thus, by an absolute majority, the Federal Supreme Court determined the dismissal (*improcedência*) of ADI No. 3239, rejecting the temporal framework thesis and confirming the constitutionality of self-identification as a criterion for demarcating Quilombola lands. The decision was, without a doubt, an advance in the protection of Quilombola communities in Brazil. However, despite the relevance of the formal and legal recognition of the right to land for Quilombolas, the realization of this right faces obstacles stemming from prejudice and land conflicts, which, in the harshness of factual reality, expose these peoples to persecution and marginalization, as was evident in the judgment of the case of the Quilombola Communities of Alcântara vs. Brazil.

4 THE PROTECTION OF THE RIGHTS OF QUILOMBOLA COMMUNITIES IN THE CASE OF THE QUILOMBOLA COMMUNITIES OF ALCÂNTARA VS. BRAZIL

The Inter-American system for the protection of human rights has consolidated jurisprudence on the rights of indigenous and tribal peoples, especially regarding the right to free, prior, and informed consultation. Among various cases, two of them deal with the issue paradigmatically. In *Pueblo Saramaka vs. Surinam*, in 2007, the Inter-American Court of Human Rights determined that the State's duty to consult must be carried out in accordance with indigenous customs and traditions. For large-scale business development projects, the consent of the affected populations must be sought, in accordance with the provisions of the Declaration on the Rights of Indigenous Peoples (Inter-American Court of Human Rights, 2007).

Subsequently, in 2012, in the case of *Pueblo Kichwa de Sarayaku vs. Ecuador*, the Court detailed the stages of the consultation procedure, which must occur in the initial phases of the project, to guarantee the prior nature of the consultation; be in good faith, i.e., in accordance with the culture of the potentially affected community; be informed, so that community members have access to all necessary documents for decision-making; and foresee the conduction of environmental impact studies (Inter-American Court of Human Rights, 2012).

The case of the Quilombola Communities of Alcântara vs. Brazil was paradigmatic for dealing, for the first time, specifically with the right to land of Quilombola peoples and highlighting the essentiality of the prior consultation process in the demarcation of their territories (Inter-American Court of Human Rights, 2024). The history of violations of the rights of Quilombola communities in the city of Alcântara, in the state of Maranhão, dates to the military dictatorship. The regime's economic and social development project attempted to integrate the Northern region due to the number of natural resources needed to supply the industrial expansion of the South and Southeast

(Joanoni Neto; Guimarães Neto, 2019). In this sense, various initiatives were adopted, such as incentives for population and business displacement.

Although the Legal Amazon (*Amazônia Legal*) was formally established in 1953, through Law 1,806, it was in 1966, with the creation of the Superintendency for the Development of the Amazon (SUDAM), through Law 5,173, that the region gained greater relevance on the national stage.

The municipality of Alcântara hosts a diverse number of Quilombola Communities. The Brazilian State was interested in building an area for the expansion of its aerospace activity in the city, as it was a region with low population density and far from major centers. In 1979, the government issued a statement expressing interest in creating a space launch center in Alcântara. In the following years, in cooperation with municipal and state public agencies, the resettlement of Quilombola communities residing in the areas of interest was carried out, through the expropriation and donation of these lands to the federal government.

In 1991, a new expropriation was carried out, this time without the relocation of the affected populations. From the 2000s onwards, the Brazilian government sought economic partnerships, through bilateral treaties, with the United States and Ukraine. Initially, only cooperation with the Ukrainian government was approved. Only in 2019 was a partnership signed with the US government (Technology Safeguards Agreement). It is observed, therefore, that there was, in addition to the violation by the State, the participation of companies in joint business projects.

The judgment in the case was published in 2025. It highlights the adoption of the concept of Quilombola Community as a tribal people, historically formed by people who escaped slavery or who were free, i.e., Afro-descendants (Inter-American Court of Human Rights, 2024). Among the human rights violations recognized by the Court – such as the right to communal property and the right to land – the right to consultation presents particularities of the national scenario. According to the Court's ruling:

> A declaração de utilidade pública emitida originalmente em 1980 por decreto do governo militar então no poder serviu de base para a realocação compulsória de 31 comunidades quilombolas de Alcântara que habitavam a área onde posteriormente foi instalado o CLA. Diante do contexto de ausência do Estado de Direito, as Comunidades Quilombolas de Alcântara afetadas por essa declaração de utilidade pública não dispunham de recursos administrativos ou judiciais eficazes para impugnar as desapropriações ou reivindicar medidas de restituição ou compensação. Contudo, esses argumentos não prejudicam a ocupação histórica de seus territórios; ao contrário, reforçam as obrigações legais do Brasil de garantir a propriedade coletiva das comunidades (Corte Interamericana de Direitos Humanos, 2024, p. 47).

The Court also noted that the agreements signed between Brazil and Ukraine between 1999 and 006 for the construction of space launch sites in Alcântara had the potential to cause significant impacts on Quilombola communities, due to possible pressure on natural resources and environmental impacts; and that, having been signed without the consent of the affected peoples, their right to prior consultation was violated. Regarding this right, the Court ruled:

> Os Estados devem garantir o direito à consulta e à participação em qualquer projeto ou medida que possa afetar o território de um povo indígena ou tribal, ou outros direitos essenciais para sua sobrevivência como povo, a fim de salvaguardar o direito à propriedade coletiva. (...) Nessa linha, o Estado deve garantir que os direitos dos povos indígenas e tribais não sejam ignorados em nenhuma outra atividade ou acordo realizado com terceiros, ou em decisões do poder público que afetem diretamente seus direitos e interesses. Portanto, quando for o caso, incumbe também ao Estado realizar tarefas de supervisão e controle e implementar, quando apropriado, formas de proteção efetiva desse direito por meio dos órgãos judiciais competentes (Corte Interamericana de Direitos Humanos, 2024, p. 53).

It is added that, through Resolution 11 of March 2020, issued by the Brazilian Space Program Development Committee under the direction of the then Minister of the Institutional Security Cabinet, Augusto Heleno, guidelines were approved for the elaboration of a consultation plan for Quilombola communities. The consultation was to be carried out by the Ministry of Defense, an agency with little or no experience in human rights issues. In the same resolution, the resettlement of the populations of the communities was determined. That is, the same body responsible for the consultation would also be responsible for resettlement. The resolution was incompatible with ILO Convention 169 and was the subject of legal actions by the Public Ministry, which suspended its effectiveness until its complete revocation in 2021.

In this scenario, autonomous consultation protocols developed by the affected communities themselves gain strength. In the case of the Alcântara communities, a foundational document from 2019 establishes that all involved communities, through their participatory associations, must be consulted (Observatório de Protocolos Autónomos, 2019). There are still two perspectives that must be considered: that of the elders and that of women (gender perspective). The consultation must be conducted exclusively by the State and cannot be delegated to non-state entities. Its form must be in accordance with Convention 169, prior to any administrative or legislative decision.

In its final decision on restitution measures, it is mentioned that the Inter-American Commission emphasized that consultation aimed at consent must be conducted in accordance with the very Consultation Protocol presented by the Communities. A few months before the judgment, Brazil and the Quilombola Communities signed, in September 2024, the *Termo de Conciliação, Compromissos e Reconhecimentos Recíprocos* (Brazil, 2024). In it, the Brazilian State committed to

identifying and delimiting 78,105 hectares as Quilombola territory, whose titling must be carried out within a maximum period of twelve months by INCRA.

Finally, any eventual modifications to this agreement must also be subject to consultation processes with the Quilombola Communities. Although Brazil, in the agreement signed in 2024, acknowledges its responsibility for the lack of delimitation and titling of Quilombola lands, the Court granted a three-year period for it to adopt the pertinent actions to guarantee the right to land (Inter-American Court of Human Rights, 2024, p. 317).

5 FINAL CONSIDERATIONS

Quilombola Communities, although mentioned in studies on the protection of Indigenous Peoples' rights, deserve a detailed analysis of their protection framework, both in relation to the Brazilian legal system and International Human Rights Law. The socio-historical formation of these Communities is a particular characteristic of the Brazilian State, which demands an interdisciplinary reading of various fields of knowledge. This work precisely sought to offer that small contribution.

The persistence of violations of the rights of Quilombola Communities by the Brazilian State reveals a low reach of international norms for the protection of tribal peoples, especially ILO Convention 169.

From a normative point of view, this research demonstrated, initially, that the protective provisions of ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples must be applied to Quilombola Communities. Therefore, there is a state duty to protect the rights enshrined in the most diverse international human rights treaties concerning these Communities.

The delay in affirming the rights of Quilombola Communities, which were provided for in the 1988 Federal Constitution but only in 2003 were properly implemented and regulated by infraconstitutional legislation, evidences state slowness. Decree 4,887/03, by providing for the right to land and the State's duty of demarcation, highlights the continuity of violations through unjustified delays. The data shows an increase in socio-environmental conflicts in the last two decades, a result of the inertia of state action.

It was only in 2018 that the STF determined the constitutionality of Decree 4,887/03. The judgment, especially the vote of Minister Rosa Weber, incorporated the perspective of redistribution and recognition of these constitutionally and internationally recognized rights. Added to this is the rejection of the temporal framework thesis (*marco temporal*), reaffirmed in Theme 1,031 of 2023 adjudicated by the STF regarding Indigenous Peoples.

This continuum of exploitation is verified in the recent paradigmatic case of the Inter-American Court of Human Rights in which Brazil was held responsible for the lack of demarcation of Quilombola Communities' lands and the absence of free, prior, and informed consultation. The case dates to the national dictatorial period, perpetuating over time for more than four decades without a resolution that respected the Communities' position.

One of the possible articulations for a research agenda on the rights of Quilombola Communities is their connection with the Sustainable Development Goals, which must be interpreted interdependently, particularly the promotion of food security, environmental preservation, and gender equality, thereby seeking the reduction of inequalities.

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