

COUNTRY REPORT - BRASIL

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1 Legal Framework & Relevant Actors

1.1 Legal Rules governing the prosecution of corporations – in a nutshell

1.1.1 Substantive Criminal Law establishing criminal liability

An expressive part of Brazilian researchers¹ denied the possibility of a corporate criminal responsibility basing their argument on the incapacity of an enterprise to practice a conduct and the inadequacy of the culpability concept to provide adequate answers on the matter. However, Tribunals accept corporate criminal liability mainly relying on the Constitutional prediction of art. 225, § 3 and 173, § 5.² and the environmental crimes law.³

The doctrinal basis rends the criminal persecution of the natural person responsible to prosecute the corporation.⁴ Until August 2013, Brazilian Courts sustained the opinion that the incrimination of legal entity related to environmental crimes should be the necessary concurrent with at least an individual to act on his behalf or for his benefit, applying the double imputation system or parallel imputation system. However, the Federal Supreme

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¹ Such as René Ariel Dotti, Sheila Jorge Selim de Sales, Luiz Regis Prado. See Luiz Regis Prado; René Ariel Dotti, *Responsabilidade Penal da Pessoa Jurídica – em defesa do princípio da imputação penal subjetiva* (3edn RT, 2005).

² 'Article 173 (...) Paragraph 5. The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' monies.' 'Article 225, (...) Paragraph 3. Procedures and activities considered as harmful to the environment shall subject the offenders, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.' BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988 <<http://english.tse.jus.br/arquivos/federal-constitution>> accessed 9 September 2016.

³ 'Corporations will be held responsible administratively, civil and criminally in cases where the crime is committed by its legal or contractual manager, or by its organs, on the interest or benefit of the entity.' Article 3º, law number. 9605/98. BRASIL. Lei n. 9.605, 12 de fevereiro de 1998. Dispõe sobre as sanções penais e administrativas derivadas de condutas e atividades lesivas ao meio ambiente, e dá outras providências. <http://www.planalto.gov.br/ccivil_03/leis/L9605.htm> accessed 30 September 2017.

⁴ BRASIL.STJ. 6ª Turma. RMS 39.173-BA, Rel. Min. Reynaldo Soares da Fonseca. Brasília judged in 6/8/2015 (Info 566). BRASIL. STF. 1ª Turma. RE 548181/PR, Rel. Min. Rosa Weber. Brasília, judged in 6/8/2013 (Info 714).

Court has been acknowledging possibility of criminal prosecution of the legal entity even if there is no criminal action pending against the individual in relation to environmental crime, since not always a particular act is attributed to a single natural person.

Making the prosecution of the liable person a condition to prosecute the corporation, tends to work against the aim of the prevision of corporate criminal liability. Provided that the objective of corporate criminal liability is to allow a more effective response to the crimes committed by a corporation, ignoring that the complex corporate organizations are characterized by decentralization and tasks distribution would make a tough mission to attribute the crime to a certain person. Besides, this condition was never previewed neither on legislation nor at Brazilian Constitution, therefore, setting this as a precedent would result in an undesirable condition to norm.

With regards to possible limitations on corporate criminal liability to specific offenses, Brazilian Constitution clearly previewed its application on crimes against the natural environment and against economic and financial order. However, there is no sealing on corporate criminal liability application on other offenses.

There is a project of a new Brazilian criminal code which is about to expand explicitly the role of offences covered by corporate criminal liability. Accordingly, PLS no. 236, of 2013, which aims to reform the current Brazilian Penal Code, has in its General Part, Title II, art. 1, legal entities governed by private law will be held responsible for acts committed against the Public Administration, the economic order, the financial system and the environment, that is, the offenses set forth in Titles X – Crimes Against Public Administration (articles 271 to 324), XIII – Crimes Against the Economic and Financial Order (articles 348 to 387) and XIV – Crimes Against Meta-Individual Interests – Chapter I – Crimes Against the Environment (articles 388 to 426).

1.1.2 Procedural Law governing criminal prosecution and Actors (Prosecution and other authorities, victims, NGOs, courts)

Our criminal procedure legislation has no special framework for prosecuting a corporation, nor has the specific legislation about environmental crimes, which was the first law to recognize expressively corporate criminal liability. In order to deal with these gaps, the process of integration is a useful ally, since by the utilization of a similar legal rule previewed for a similar hypothesis it is possible to supply the lack of regulation.⁵ On the matter of fundamental rights the general approach adopted to date has been to give corporations all the fundamental rights of the individual on criminal prosecution provided they are compatible with its nature as the Brazilian constitution guarantees defense to litigators whether accused or charged.⁶

⁵ Ada Pelegrini Grinover, 'O interrogatório como meio de defesa' [2005] 53 RBCCRIM 185.200.

⁶ Article 5º, LV, Federal Constitution. 'LV – litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense, with the means and

The corporation's representation in Court should be done by the corporation's manager, albeit this needs to be someone who has capacity of explaining the conduct's motivation, not an agent, who would not have the adequate level of interest in defending the corporation.⁷ For example, regarding interrogatory, being a mean of defense of the corporation (in the place of a defendant) it is claimed the natural person who is going to represent the corporation on Court cannot be the same individual that might be hereafter prosecuted individually to avoid a conflict of interests, as it is the case, between corporation and director's defenses.⁸

Since 1996, Brazilian criminal procedure code⁹ previews that whenever the defendant is personally made aware of the criminal prosecution by and does not present his written defense, the criminal action will be suspended and the same result applies to the prescription term. This way, the procedure would stop until the defendant can be found or until the crime prescribes,¹⁰ without the possibility for the defendant to be tried.

If the defendant is formally communicated and does not defend itself, or stops answering unjustifiably the notifications, the consequences would be restricted to the nomination of a dative defender and unnecessary to communicate the defendant about the procedures acts (except the one that notifies about the sentence), importing no presumption of guilty.¹¹ Therefore, it is perfectly possible in Brazilian legal order to try a corporation or an individual *in absentia*.

The Brazilian Money Laundry Law (l. n. 9.613/98, art. 2, § 2) entitles the political choice of not applying the general rule with respect to the absent defendant. The legal article claims the defendant who does not attend or nominates a lawyer shall be fictive called to answer and a dative defender would be nominated to deal with the prosecution until judgement.

resources inherent to it'; BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988. <<http://english.tse.jus.br/arquivos/federal-constitution>> accessed in 9 September 2016. See also Ada Pellegrini Grinover, 'O interrogatório como meio de defesa' [2005] 53 RBCCRIM 185.200.

⁷ Ada Pellegrini Grinover, 'O interrogatório como meio de defesa' [2005] 53 RBCCRIM 185.200 Regarding jurisprudence, the following decision illustrates: TRF da 4a Região, MS 2002.04.013843-0-PR, Rel. José Luiz Germano da Silva, Relator para o Acórdão Fábio Bittencourt da Rosa, dezembro de 2002.

⁸ Fauzi Hassan Choukr, 'Aspectos processuais da responsabilidade da pessoa jurídica' (Canal de ciências criminais, 13 November 2015) <<http://canalcienciascriminais.com.br/aspectos-processuais-da-responsabilidade-penal-da-pessoa-juridica/>> accessed 12 September 2016.

⁹ Article 366, CPP. BRASIL. Decreto-lei nº 3.689, de 3 de outubro de 1941. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3689Compilado.htm> accessed 30 September 2017.

¹⁰ There is some controversy regarding the final term of prescription's suspension. Brazilian Court of Appeals (Súmula 415, STJ) understands the prescription should be calculated based on highest penalty applicable to the crime, however the Supreme Court understood there should not be any limit to the prescription's suspension, that would be conditioned to the defendants apparition.

¹¹ Article. 367 and 197, Criminal Procedure Code. BRASIL. Decreto-lei nº 3.689, de 3 de outubro de 1941. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3689Compilado.htm> accessed 30 September 2017.

Despite the legal dispositive, doctrine¹² criticizes the idea, basing their assumptions on the defenses amplitude and the right to contradict properly indictment.

1.2 Principles of Jurisdiction /Building the nexus – in a nutshell

In Brazil there is no legislation to regulate specifically transnational crimes. On those cases Brazilian jurisdiction is affirmed by the above mentioned art. 7 from our Criminal Code, and treaties applicable to some species of crimes, for instance the Convention of Vienna (drug dealing), Convention of Palermo (organized transitional crime) – *UNTOC* –, Convention of Merida (corruption) – *UNCAC* – and International Convention to Suppress Terrorism Financing.

The underlying rationale is that there should be a ponderation between convenience and viability. Regarding convenience, it excludes irrelevant conflicts for the Brazilian State, regarding viability, where it will not be possible to enforce the compliance of the judgement, national jurisdiction should not try to operate.

Regarding the mechanisms available to prosecute offenses committed overseas, we could affirm Brazil is interested in prosecuting them. However, the rule is to apply the territoriality principle, leaving extraterritoriality as an exception.

The passive personality principle is recognized in criminal code, on art. 7, § 3, which claims that cases where the victim is Brazilian, even though the crime author is a foreign and the crime is committed abroad, will be judged according to the Brazilian law. This is a subsidiary disposition, which is used to avoid the absence of prosecution, following the State's obligation to protect its citizens.¹³

The combination of Brazilian criminal liability of corporations and the concept of territorial jurisdiction tends to build up a vehicle for foreign claims, since there is a concern about not leaving spaces for impunity, mainly regarding the concept of territory.

1.2.1 Defining jurisdiction – in a nutshell

Brazil does not distinguish jurisdiction to prescribe from jurisdiction to adjudicate. Regarding the relation between jurisdiction to prescribe and jurisdiction to adjudicate these are two sides of the same coin, since States do not applicate foreign criminal law. If the court has jurisdiction, it applies its own substantial law, meaning that if it applies *lex fori*, the Court has jurisdiction.

¹² Renato Brasileiro de Lima, *Curso de Processo Penal* (Ius podium, 2016) p 1768.

¹³ The principle's application is conditioned by the requisition of the Minister of Justice and the denial or no existence of demand of extradition; the entrance of the agent in Brazilian territory; punishability of the crime also in the country where it was practiced; inclusion of the crime between those which would allow Brazilian law to grant extradition; conviction on the foreign country where the crime was practiced or no accomplishment of the penalty; no forgiveness or any other reason to extinct punishability.

The Bustamante Code, which is operative in Brazil, treats the rules of competence in criminal matters, reinforcing the idea of the application of *lex fori's* law (art. 340 and 341). Therefore, for the purposes of intention criminal state jurisdiction, jurisdiction to prescribe and jurisdiction to adjudicate coincides.

Differently to what occurs with prescriptive jurisdiction, regarding which there is not a lot of consensus about its limits, when it comes to the executive jurisdiction we are unanimous in affirming it should respect territoriality. In other words, Criminal International Law do not allow any State to execute any measure inside other State's borders without its permission to do so.

1.3 International Law / Human rights framework

- The Convention on the Prevention and Punishment of the Crime of Genocide;
- Rome Statute for the International Criminal Court;
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (not ratified);
- United Nations Convention against Transnational Organized Crimes – Convention of Palermo – and its Protocols, namely Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Protocol against the Smuggling of Migrants by Land, Sea and Air; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention against the Taking of Hostages; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; Inter-American Convention Against Terrorism (Barbados Convention); between others not mentioned;
- Arms Trade Treaty; Treaty on the Prohibition of Nuclear Weapons.

1.4 Framework for Prosecuting a Cross-Border Case – in a nutshell

In criminal matters, judicial cooperation can assume 4 different forms: extradition, transference of arrested people or processes, homologation of a foreigner sentence, and judicial international assistance.

Even though the Inter-American Convention on Mutual Assistance in Criminal Matters is the most recently ratified by Brazil, the international instruments mentioned above preview the same measures, without the details previewed in a norm which purpose is basically to regulate this kind of judicial international criminal cooperation.

On the matter of criminal international assistance, Brazilian laws have chosen the instrument of international rogatory letter, which can be active, when comes from the Brazilian Jurisdictional system, or passive, when comes from a foreign system of Justice.

However, this type of instrument seems to be insufficient to face transnational criminality, since, with the procedure of validation by Superior Justice Court and execution by the federal judge, they are bureaucratic and slow.

This is why, whenever possible (since it is required to celebrate a treat or an agreement), the procedure of an international criminal assistance can be executed by the central authority. For example, in money laundry case, the Justice Ministry, through the department of Assets recuperation and International Cooperation is the central authority.¹⁴

Regarding evidences that might appear abroad, Brazilian criminal procedure code do not report itself in any occasion to them, bringing as consequence the impossibility to validate them to the national prosecution. The use of rogatory letter to validate the evidences is not a possibility as well, since the art. 780 to 782 of Criminal procedure code do not allow the evidence production generally, acceptance only inquisitions, which could function as testimonials. This way, the Convention against transnational organized crimes would be the close regulation we could get about the issue.

In Brazil the right to be present is a consequence of the right of self defense, which is deniable, what lead us to conclude that the defendant's presence is, at a first impression, a faculty not a duty to be chosen by itself. However, if there is the need of the defendant's recognition, it can be coercively conducted to the act, which is not protected by *nemo tenetur se detegere*.¹⁵ Not even in the interrogatory the defendant's presence is mandatory, since the constitution gives it the right to remain silent, the absence would be a choice given to the reo, not to the judge (who can only exclude him in case of testimony's intimidation). Last but not least, despite the right to be present at jurisdictional acts, its presence is not indispensable to the regular development of the criminal action, meaning it would have the effect of *nulité* if it causes the defendant any harm.

Legally, there are no differences between individuals and companies and, until now, neither in jurisprudence.

1.5 Prominent cases, media coverage

When it comes to prominent cases, even when it triggers a public debate like it was with the environmental disaster caused by *Vale do Rio Doce e Samarco*,¹⁶ this debate usually does not abroad criminal responsibility either corporate responsibility.

¹⁴ Brazil does not use the model of direct contact to cooperate in judicial assistance matters.

¹⁵ Right to not incriminate oneself.

¹⁶ **José Marques, 'Environmental Disaster in Minas Gerais: Federal and State Government Subject to Civil**

Actions for Dam Rupture in Mariana' (2016)

<http://www1.folha.uol.com.br/internacional/en/brazil/2016/01/1734465-environmental-disaster-in-minas-gerais-federal-and-state-government-subject-to-civil-actions-for-dam-rupture-in-mariana.shtml>> **accessed 10 September 2016.**

Apart from legal media, in Brazil, general media does not discuss criminal aspects of violations committed by corporations. In fact, whenever any reflection is made regarding the criminal corporate responsibility it operates in the sense of showing its usefulness, because of the low frequency of convictions. Moreover, most part of the time the responsibility is about environmental crimes that does not show any transnational characteristic.

1.6 Statistics

There are no such available statistics.

1.7 Public debate on Corporate Social Responsibility?

Corporation's accountability, their compliance with the law and ethical standards has been subject of recent debate specially since big schemes of corruption started to be investigated, prosecuted and linked to government and public employees. Public medialised corruption scandals brought the subject to most part of Brazilians conversations, but not necessarily with the technical focus.

The existing debate on corporate criminal responsibility is relegated to legal means, it is not properly a public debate, and with more reasons neither it is its exclusion of ICC Statute.

There is not a political movement concerning corporate criminal responsibility.

2 Holding Corporations Accountable - the Jurisdictional Issue

2.1 General Jurisdiction / General Aspects of Jurisdiction

2.1.1 General Jurisdiction – Generals

There is not a clear general doctrine underlying rules of international jurisdiction.

2.2 Territorial Jurisdiction

The territoriality principle is the most important to determinate jurisdiction in Brazil (art. 5, Criminal Code), what in a certain way shows its precedence regarding the others. The verdict shall follow the law of the State where the crime was committed, without taking in to account what is the nationality of the victim, the agent or the object of the crime, this principle could only be mitigated by international conventions, treaties e rules. The principle emerges from the State sovereign, which consequence is the State exercising jurisdiction about people that are in its territory. Other good reason for its application is that the State on which territory the crime was practiced is the most capable to prosecute it, specially regarding the evidences.¹⁷

¹⁷ Celso Duvivier Albuquerque de Mello, *Direito penal e Direito internacional* (Freitas Bastos, 1978)14.

a) *Legal Framework*

The concept of territory (which defines territorial jurisdiction) includes terrestrial surface (soil and subsoil), territorial waters (rivers, lakes and sea) and the correspondent airspace. Aircrafts and ships are considered to be national territory by extension, through legal fiction.

Regarding surface, when it comes to occupied soil, with recognized limits, there is no difficulty in establishing its limits. However, when limits are fixed by mountains, there could be designed by the highest tops of the mountain or the watershed, or when they are fixed by rivers, it will belong to the country that possesses the river or, if shared, to the middle of it or the deepest part of the river.¹⁸ Territorial waters are defined by territorial sea (12 nautical miles along the coast) and continental platform (200 nautical miles, named Exclusive Economic Zone). The airspace is defined by the air columns correspondent to the country's soil and territorial sea.¹⁹

Ships and aircrafts, if public, wherever they are, will be considered Brazilian territory. If private, whenever they are in Brazilian territory (regardless which nationality they have) or territorial sea (if they have Brazilian nationality), they will be considered Brazilian territory.

The 6th article of Brazilian criminal code determines the place where the crime took place based on where the defendant took action, accomplishing or attempting the crime, or where the effect happened. This disposition avoids the inconvenience of negative conflicts of jurisdiction (when one State chooses the place where the defendant took action and the other where the effects were produced) and gives a solution for the issue of distance crimes, in which case action and effect happens in different places. Any double judgement could be solved with the application of art. 8, that establishes a compensation of penalties.

b) *Practice; (High Court) Jurisprudence*

As jurisdiction is a face of sovereign, its exercise inside the country's borders is limitless, however, when it comes to cross-border crimes, respecting its limits is a need. With these considerations Brazilian Supreme Court seem to enforce territoriality, what is concretely signed with the constant demand of rogatory letters and other more simple instrument of cooperation, with the disadvantage of not providing straight cooperation.

By choosing this point of view Brazilian Supreme Court takes the territoriality serious not only regarding our territory, but also other country's territories. However, when it comes to the give the extension of Brazilian jurisdiction, the Court usually positions itself in the sense of applying extraterritoriality to attract Brazilian law application²⁰.

¹⁸ Cezar Roberto Bitencourt, *Tratado de Direito Penal* (1st volume, 22^a edn, Saraiva, 2016) 225.

¹⁹ Cleber Masson, *Direito Penal* (10th edn Gen, 2016)165.

There cannot be extracted any position regarding objective and subjective territoriality, neither for fact finding problems from the cases.

3 Extraterritorial Jurisdiction

Brazilian legal system takes territoriality as the rule and extra-territoriality as an exception.

There are different interests recognized as bases for extra-territoriality, which varies with type of it, conditioned or unconditioned. On the last case, the hypothesis involves the relevance of the interests harmed by the crime, for instance, crimes against the life or freedom of the President, crimes against the Public Administration, genocide and crimes against the patrimony or credibility of the State. On the first case, the interest is to not leave certain crimes unpunished, for instance, crimes previewed in treaties or convention signed by Brazil, crimes practiced by Brazilians abroad, crimes committed by against Brazilian outside Brazil.²¹

3.1 Active Personality (or Nationality) Principle

3.1.1 Generals

By recognizing the active nationality principle, the Brazilian state has the objective of avoiding impunity of nationals for crimes committed in other countries, which are not included by territoriality criteria.²² The principle is legally provided on 'article 7, I, d'²³ and 'article 7, II, b' both from the criminal code. The constitutional reasoning regarding it is the prohibition of native Brazilians extradition,²⁴ through which the principle's application avoid impunity for Brazilians who commit crimes outside the country and come to Brazil. When nationals leave the country they still have its duties with it, not being fair that they practice them counting on the impunity on their mother land.²⁵

²⁰ BRASIL. STF. Ext 1300, Relator(a): Min. LUIZ FUX, Primeira Turma. Brasília, judged in 11/06/2013, ACÓRDÃO ELETRÔNICO DJe-123 DIVULG 26-06-2013 PUBLIC 27-06-2013). BRASIL. STF. HC 67913, Relator(a): Min. CARLOS VELLOSO, Segunda Turma. Brasília, 16/10/1990, DJ 22-03-1991 PP-03054 EMENT VOL-01613-01 PP-00084).

²¹ Article 7 Criminal Code. BRASIL. Decreto-lei 2.848, de 07 de dezembro de 1940. Código Penal <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm> accessed 30 September 2017.

²² Cezar Roberto Bitencourt, *Tratado de Direito Penal* (1st volume, 22^a edn, Saraiva, 2016) 222.

²³ Part of brazilian doctrine (Cezar Roberto Bitencourt, *Tratado de Direito Penal* (1st volume, 22^a edn, Saraiva, 2016) 227; Carlos Eduardo Japiassu; Artur Brito de Souza Gueiros, *Curso de Direito Penal* (Elsevier, 2011) 105; Guilherme de Souza Nucci, *Código Penal Comentado*(Gen, 2014) p. 74) considers it as an application of universality principle, on the other hand some authors such as Masson considers it as an application of nationality principle. Cleber Masson, *Direito Penal* (10th edn Gen, 2016) 171.

²⁴ Art 5, LI of Federal Constitution 'LVI – evidence obtained through illicit means are unacceptable in the process;' BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988 <<http://english.tse.jus.br/arquivos/federal-constitution>> accessed 9 September 2016.

²⁵ Carlos Eduardo Japiassu; Artur Brito de Souza Gueiros, *Curso de Direito Penal* (Elsevier, 2011)105.

On the first case mentioned above, when the agent is Brazilian or domiciled in Brazil, the principle's application regards the crime of genocide. In this case, its application will not be subject to any condition, because of the relevance of interests harmed by the crime.

Whereas on the second case, when the crime is practiced by a Brazilian citizen, there is no restriction regarding the type of crime. However, the application of Brazilian law is conditioned to the cumulative presence of the following conditions (art. 7, § 2, Brazilian criminal code): the entrance of the agent in Brazilian territory; punishability of the crime also in the country where it was practiced; inclusion of the crime between those which would allow Brazilian law to grant extradition; conviction on the foreign country where the crime was practiced or no accomplishment of the penalty; no forgiveness or any other reason to extinct punishability.

The Brazilian law takes into consideration whether the act also constitutes a crime according to domestic law, since there is the legal prevision of genocide in Brazilian law and regarding the other crimes it is a condition for the principle's application that the crime is punishable 'also in the country where it was practiced', in the terms of art. 7, § 2, b.

The principle is not viewed as an exception neither by the doctrine which does not attribute this character, neither by the jurisprudence, where it is possible to find many cases of the principle's application.²⁶

3.1.2 *Corporations and the Active Personality Principle*

Until nowadays the active personality principle has only been applied to natural persons, however there is no legal barrier for its application.

The only legal express prevision regarding corporate criminal responsibility is the one on 3rd article of Brazilian environmental crimes law, nevertheless Brazilian Constitution does not restrict responsibility to these cases. Its text enlarges environmental crimes and general offenses committed on the development of economic activities. Providing this, it is possible to conclude there is no such limitation.

In relation to the nationality of the corporation, a corporation will be Brazilian if its acts/instruments of creation and if its statutory seat and central administration are in Brazil (art. 300, l. n. 6.404/76 and art. 1.126, Civil Code). This way, Brazilian law basically defines a corporation as Brazilian by the presence of both criteria, being closer to the place of registration criteria.

3.2 *Passive Personality Principle*

3.2.1 *Generals*

²⁶ BRASIL. STF. HC-QC 83,113/DF, relator Min. Celso de Mello, Pleno. Brasília, 26.06.2003, STF; BRASIL. STJ, CC 120.887/DF, 3^a S, rel. Alderitan Ramos de Oliveira, Brasília, 04.02.2013.

The principle of passive personality is only present in cases of extraterritoriality of Brazilian Criminal Law, that is, when the Brazilian Criminal Law is applicable to crimes committed abroad.

This principle is mainly applied to the hypothesis provided for the art. 7, paragraph 3 of the Brazilian Criminal Code, i.e. crimes committed by foreigners against Brazilians abroad. It should be noted that for this principle to be applied the following requirements must be met:

- the criminal must enter Brazilian territory;
- the fact has also to be punishable in the country where it was committed;
- the crime must be included among those for which Brazilian law authorizes extradition;
- the offender must not be declared not guilty abroad or must not have served his sentence abroad;
- the agent must not have been pardoned abroad or, for other reasons, his criminal liability must not be extinguished, according to the most favorable law.
- the extradition was not requested or it was denied;
- there was a special and formal request of the Brazilian's Minister of Justice.

This principle stands as a subsidiary principle to territoriality, and also to the other principles of extraterritoriality in Brazilian criminal law and there are no substitutes for criminal prosecution under the passive personality principle

3.2.2 *Corporations and the passive personality principle*

Corporations, as explained previously are criminal responsible only for environmental offences. There is no specific provision in the Brazilian Criminal Code for the passive personality principle due to corporations, because at the time of the elaboration of the Brazilian Criminal Code there was no provision for corporation's liability. Furthermore, no special law provided such provision. As a result, taking into consideration the lack of provision it is possible to infer the impossibility of its application.

The Brazilian legislation makes a difference between Brazilian and foreign corporations based in three characteristics: a Brazilian corporation has to be constituted under Brazilian law, the company headquarters have to be located in Brazil and the administration of the corporation also has to be located in Brazil.²⁷

3.3 Protective Principle

²⁷ Carlos José Napolitano, 'A Nacionalidade das Sociedades empresariais' (Associação Internacional Dom Bosco, 1 May 2016) <http://www.aedb.br/seget/arquivos/artigos08/114_A_NACIONALIDADE_DAS_SOCIEDADES_EMPRESARIAIS.pdf> accessed 10 September 2016.

3.3.1 *Generals*

The protective principle is adopted into the Brazilian Criminal Code in its art. 7, I, in what is called unconditioned extraterritoriality of the Brazilian Criminal Law, i.e., the Brazilian Jurisdiction is applied in any case. This principle is applied every time, in a foreign country, there is a crime against the life or the freedom of Brazilian's president, against Brazilian's State assets, frauds or crimes against Brazilian's Public Administration, committed by its agent.

As it can be seen, only special offences against relevant interests of the Brazilian State can be prosecuted under the protective principle, so, it is very rare to apply this principle in Brazilian Courts.²⁸

There is no special concern in Brazil with the abuse of the use of the protective principle, as well as, due to its rare use, there is no fear that the use of the protective principle could harm international relations.

3.3.2 *Corporations and the passive protective principle*

There is no Brazilian corporation targeted under the regime of secondary boycotts, nor the Brazilian Republic has against any nation any boycott as the U.S. Helms-Burton Act.

a) Jurisdiction over military personnel and/or private military contractors

In Brazil we have a special jurisdiction to military personnel, private military contractors and persons acting under its military order. The Brazilian Military Criminal Code establishes that it can be applied in this specific cases:

- I the crimes mentioned in this Code, as defined differently in ordinary criminal law, or not mentioned therein, whoever commits it;
- II the offenses defined in this Code, even if with the same definition of the ordinary criminal law, when committed:
 - a) by military or against military;
 - b) by military, in place subject to military administration, or against a former military or a civilian;
 - c) by military against property under military administration, or against the military administrative order;
- III the crimes committed by a former military, or retired, or civilian, against military institutions, considering as such not only those included in item I, as the item II in the following cases:
 - a) against property under military administration, or against the military administrative order;

²⁸ See table on item 8, which shows extraterritoriality application cases on Brazilian jurisprudence.

- b) in a place subject to military administration or against official military prosecutor or the military justice system;
- c) Even outside the place subject to military administration, the crime against military because of military nature, or in obedience to superior legal determination.

c) *Vicarious Jurisdiction – Stellvertretende Strafrechtspflege*

The only possibility that Brazil prosecutes alleged offenders acting for another State, is the impossibility of extradition. The art. 5, item LI of Brazilian Constitution²⁹ says that a born Brazilian cannot be extradited by Brazil, so as an application of the principle *aut dedere aut judicare*, because of the impossibility of extradition of a national rule, nations that apply are required, by a general principle of public international law, to take upon itself the jurisdiction over the crime occurred overseas.³⁰

4 Universal jurisdiction

The Brazilian Criminal Law has one example of the universal jurisdiction principle. It is provided under the art. 7, number II, letter a, of the Brazilian Criminal Code. The Brazilian criminal law can be enforced against crimes which by treaty or convention Brazil is compelled to repress.

It is remarkable that universal jurisdiction to be applied has to gather all the conditions established by the art. 7, paragraph 2 of the Brazilian Criminal Code and mentioned in item b) (Passive Personality Principle).

For example, Brazil is compelled to repress terrorism by the Inter-American Convention against Terrorism³¹, corruption by the Inter-American Convention Against Corruption,³² organized crime by the Palermo Convention against Organized Crime.³³

There is no frequent use of this principle, so we do not have any cases to present.

²⁹ BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988 <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm> accessed 9 September 2016.

³⁰ Vladimir Aras 'Jurisdição extraterritorial e competência criminal federal'. (Blog do Vladimir 25 November 2013) <<https://blogdovladimir.wordpress.com/2013/11/05/jurisdiacao-extraterritorial-e-competencia-criminal-federal/>> accessed 11 September 2016.

³¹ BRASIL. Decreto n. 5.639, de 26 de dezembro de 2005. Promulga a Convenção Interamericana contra o Terrorismo, assinada em Barbados, em 3 de junho de 2002 <http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Decreto/D5639.htm> accessed 14 September 2017.

³² <<http://www.oas.org/juridico/portuguese/treaties/b-58.htm>>.

³³ BRASIL. Decreto n. 5.015, de 12 de março de 2004. Promulga a Convenção das Nações Unidas contra o Crime Organizado Transnacional <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5015.htm> accessed 14 September 2017.

5 Other sources of jurisdiction

There is no 'creative' grounds of jurisdiction in order to hold corporations liable into Brazilian Criminal Law

6 Transitional justice mechanisms

The Brazilian Truth and Reconciliation Commission, so called National Commission of the Truth (*Comissão Nacional da Verdade – CNV in Portuguese*), was established by the Act 12.528,³⁴ in 2011, targeting the investigation of the massive violations of the human rights during 18 September 1946 and 5 October 1988, focusing specially in the period of the Brazilian dictatorship (1964 – 1985).

The criminal liability was not one of the aims of the CNV, for the aforementioned reason we do not have special rules for transitional justice in Brazil. At the end of the Brazilian dictatorship, in 1979, the law n. 6.683³⁵ was approved giving a full amnesty to the Brazilian government agents and also to the ones who fought against the regime. Even with the condemnation of the Brazilian State by the Inter-American Human Rights Court, in the Case Gomes Lund and others x Brazil,³⁶ establishing the nullity of the Brazilian Amnesty Act, the Brazilian Supreme Court has not yet delivered its decision about this issue.

7 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)

7.1 General

No, Brazilian Jurisdiction is not based on international treaty or customary law. What we usually do is to internalize an international treaty and then we approve a law containing the judicial mechanisms set into the treaty.

For example in case of torture, Brazil had incorporated into Brazilian torture Act (art. 2) the standards established into UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning jurisdiction.

Brazil never bases its jurisdiction on international treaty or customary law, but they inspire, from time to time, directly the Brazilian legislator.

7.2 Jurisdictions prescribed by International Humanitarian Law – Core Crimes

In relation to the established in art. 4 and art. 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 the Brazilian Act

³⁴ BRASIL. [LEI Nº 12.528, DE 18 DE NOVEMBRO DE 2011](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112528.htm). Cria a Comissão Nacional da Verdade no âmbito da Casa Civil da Presidência da República <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112528.htm> accessed 16 September 2017.

³⁵ BRASIL. [LEI Nº 6.683, DE 28 DE AGOSTO DE 1979](http://www.planalto.gov.br/ccivil_03/leis/L6683.htm). *Concede anistia e dá outras providências* <http://www.planalto.gov.br/ccivil_03/leis/L6683.htm> accessed 16 September 2017

³⁶ Inter-American Court of Human Rights Gomes Lund et al v Brasil (2010). <http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf> accessed 16 September 2017.

against Torture (Law 9455/1997)³⁷ establishes on its art. 2 that “The provisions of this Law are also applied when the crime was not committed in national territory, the victim is a Brazilian citizen or the offender is located somewhere under Brazilian jurisdiction”.

In relation to the established in art. 4 and 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Brazil has modified his legislation about human trafficking through the 12015/2009 Act,³⁸ introducing the criminalization of international human trafficking for sexual exploitation and national human trafficking for sexual exploitation.

In relation to the established in art. 36 of the UN Single Convention on Narcotic Drugs of 1961 Brazil has its Drug Act (law 11.343/2006).³⁹

In relation to the established in art. 4 and 5 of the UN Convention for the Suppression of the Financing of Terrorism of 1999 and in art. 4 of the UN Convention for the Suppression of Terrorist Bombings of 1997, Brazil has recently adopted our Terrorism Act (Law 13260/2016)⁴⁰ where both, the terrorism and the financing of terrorism are criminalized.

7.3 Jurisdiction based on Customary International Law

Brazil does not acknowledge jurisdiction based on Customary International Law.

8 Overlapping Domestic Legal Frameworks and the Prosecution of Corporations

8.1 Conflicts of jurisdiction – General

There is no doubt that Brazil is very reluctant in claiming jurisdiction in cross border-cases. We do not have the tradition *nor* of claiming jurisdiction nor of apply extraterritorial

³⁷ BRASIL. Lei n. 9.455, de 07 de abril de 1997. *Define os crimes de tortura e dá outras providências* <http://www.planalto.gov.br/ccivil_03/leis/L9455.htm> accessed 16

³⁸September 2017

BRASIL. Lei n. 12.015, de 07 de agosto de 2009. Altera o Título VI da Parte Especial do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 - Código Penal, e o art. 1º da Lei nº 8.072, de 25 de julho de 1990, que dispõe sobre os crimes hediondos, nos termos do inciso XLIII do art. 5º da Constituição Federal e revoga a Lei nº 2.252, de 1º de julho de 1954, que trata de corrupção de menores <http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Lei/L12015.htm#art2> accessed 16 September 2017.

³⁹ BRASIL, lei n. 11.343, de 23 de Agosto de 2006. Institui o Sistema Nacional de Políticas Públicas sobre Drogas - Sisnad; prescreve medidas para prevenção do uso indevido, atenção e reinserção social de usuários e dependentes de drogas; estabelece normas para repressão à produção não autorizada e ao tráfico ilícito de drogas; define crimes e dá outras providência <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11343.htm> accessed 16 September 2017.

⁴⁰ BRASIL. Lei n. 13.260, de 16 de março de 2016. Regulamenta o disposto no inciso XLIII do art. 5º da Constituição Federal, disciplinando o terrorismo, tratando de disposições investigatórias e processuais e reformulando o conceito de organização terrorista; e altera as Leis nºs 7.960, de 21 de dezembro de 1989, e 12.850, de 2 de agosto de 2013 <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13260.htm> accessed 16 September 2017.

jurisdiction. Consulting the two principal Courts in Brazil⁴¹ we can find only 16 cases based on extraterritorial jurisdiction.

| Brazilian Court of Appeals (STJ) | | |
|-----------------------------------------|------------------|---------------------------------------|
| <i>Process number</i> | <i>Crime</i> | <i>Extraterritoriality hypothesis</i> |
| CC 107397 / DF | Torture | art. 7, § 3, CP |
| CC 120887 / DF | Rape | art. 7, II, b, CP |
| CC 122119 / DF | Document forgery | art. 7º, I, b, CP |
| CC 119645 / MG | Document forgery | art. 7º, I, b, CP |
| CC 115375 / SP | Theft | art. 7, II, b CP |
| CC 104342 / SP | Murder | art. 7, II, b, CP |
| CC 56771 / RS | Smuggling | art. 7, II, b CP |
| HC 18307 / MT | Murder | art. 7, II, b, CP |
| REsp 182274 / RJ | Document forgery | art. 7, I, b, CP |

| Brazilian Supreme Court (STF) | | |
|--------------------------------------|------------------|---------------------------------------|
| <i>Process number</i> | <i>Crime</i> | <i>Extraterritoriality hypothesis</i> |
| HC 105461 / SP | Murder | art. 7, II, b CP |
| Ext 1349 / DF | Drug Trafficking | art. 7, II, b CP |
| Ext 1223 / DF | Rape | art. 7, II, b CP |
| Ext 541 / EU | Drug Trafficking | art. 7, II, b CP |
| HC 67913 / SP | Financial crime | art. 7, II, b CP |
| RHC 64535 / SC | Murder | art. 7, II, b, CP |
| HC 63188 / SP | Drug Trafficking | art. 7, II, b CP |

8.2 Overlapping Domestic jurisdictions – in a nutshell

As explained previously, we do not have in Brazil legislation that can make corporations be held accountable in collateral legal domestic frameworks for providing financing or other involvement in atrocities abroad.

8.3 Conflicting International jurisdictions – in a nutshell

In Brazil we do not have specific provision which address problems of international jurisdiction conflicts. The extraterritoriality jurisdiction of Brazilian law can be applied in two ways: conditioned or unconditioned.

⁴¹ Brazilian Supreme Court (Supremo Tribunal Federal - STF) and Brazilian Court of Appeals (Superior Tribunal de Justiça - STJ).

The hypotheses set into art. I, of Brazilian Criminal Code are applied even if another country claims or exercises its jurisdiction, for that reason it is called unconditioned. The only balance possible is predicted by art.8 of Brazilian Criminal Code that establishes that the sentence served abroad attenuates the sentence imposed in Brazil for the same crime.

The hypotheses set into art. 7, II, of Brazilian Criminal Code are applied only if a foreign country does not exercise its jurisdiction.

9 Proposals for Reform of the Legal Framework of Jurisdiction

The main issues that are discussed in Brazil do not focus on the role of rules on jurisdiction for defending sovereignty or for fixing global problems. As explained before, Brazil does not have a tradition to exercise its extraterritorial jurisdiction and, besides, the main questions that concern Brazilians, due to criminal issues, are related to the ordinary criminality and the public security problems that are still common in the major Brazilian cities.

10 Conclusion

Unfortunately, the issue of corporate criminal responsibility for acts committed or having effects abroad is not well developed in Brazil. We barely establish the corporate criminal responsibility for acts committed in Brazil, as explained, it is only possible in environmental crimes.

Even in these cases we do not have clear rules for the criminal procedure and the Brazilian doctrine still discusses which elements may be used to characterize the *actus reo* or the *mens rea*.

So, we think that we are not going to see any improvement into Brazilian legislation due to corporate criminal responsibility for acts committed or having effects abroad in a short period.

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