Vol. 88 issue 1, 2017

RIDP

Stefano Manacorda,
Angelo Marletta
& Giulio Vanacore *(Eds.)*

Individual Liability for Business Involvement in International Crimes

(International Colloquium Section I,
Buenos Aires, 20-23 March 2017)

Revue Internationale de Droit Pénal
International Review of Penal Law
Revista internacional de Derecho Penal
Международное обозрение уголовного права
刑事法律国际评论
المجلة الدولية للقانون الجنائي
Revista Internacional de Direito Penal
Rivista internazionale di diritto penale
Internationale Revue für Strafrecht

MAKLU

BRAZILIAN REPORT ON INDIVIDUAL LIABILITY FOR BUSINESS INVOLVEMENT IN INTERNATIONAL CRIMES

*By Artur de Brito Gueiros Souza and Matheus de Alencar e Miranda**

1 Introduction

As discussed by Professor Stefano Manacorda in the introduction to the questionnaire, this report responds to Section 1 of the 20th AIDP International Congress of Criminal Law. It focuses on the current challenges faced by criminal law when determining individual liability for the most egregious crimes involving economic actors.

The main goals of that questionnaire included determining the potential liability for criminal acts committed by corporations and the individual criminal liability of civilians, in particular, their 'corporate officials,' for crimes constituting serious human rights violations, and more specifically, the 'core crimes' of the Rome Statute (genocide, crimes against humanity, war crimes and so on). This report will focus on achieving the goals within the discussion of the Brazilian legal situation.

The public debate about the individual criminal liability of members for business activities in international crimes is almost non-existent. This is considered an emerging issue in Brazil.

There are four reasons for this lack of debate: (1) most crimes of this magnitude in Brazil were perpetrated during the military dictatorship, between the years 1964 and 1985, and thus, most of those responsible for the crimes are either quite elderly or dead; (2) the discussion about this topic has only recently come to light, since the country was late to enact 'transitional justice' models, or the so-called 'truth commissions;' (3) the legislation, doctrine or jurisprudence related to international crimes is quite deficient in Brazil; and (4) when it comes to economic activity that aided the dictatorship to commit relevant crimes, criminal investigations and prosecution agencies prefer to seek out remediation of a civil nature.[1]

With regard to the first reason (1), it is important to consider that the cases of crimes of this nature in Brazil are primarily concentrated during the period of the dictatorship, from 1964 to 1985. During this period, members of the military government committed violations of all

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* All the quotes were freely translated to English. The Authors are grateful to Prof Bruce Zagaris, partner at Berliner Corcoran & Rowe LLP, for his useful comments and remarks. Authors: Artur de Brito Gueiros Souza, Professor of Criminal Law at the State University of Rio de Janeiro (UERJ) and University of Estácio de Sá (UNESA), PhD in Criminal Law from University of S Paulo (USP), Post-Doctorate in Economic Criminal Law from University of Coimbra (UC), and Federal Prosecutor (MPF) in Rio de Janeiro; Matheus de Alencar e Miranda, Master in Criminal Law from State University of Rio de Janeiro (UERJ), Legal assistant of State Prosecutor (MPRJ) in Rio de Janeiro.

[1] One of the few texts exploring this issue is: E Saad-Diniz; J R Sponchiado, 'La financiación corporativa de la Dictadura militar en Brasil: en búsqueda de la reparación de las víctimas' in L A Vélez Rodríguez and D A Rodríguez Camacho (eds), *Sociedad y fuerza pública ante los retos de la Paz: Justicia Transicional, víctimas y consolidación democrática* (1st edn, Bogotá: Ibañez 2017) 435-457.

kinds against those who opposed the regime (both individuals and companies). The violations included murder, torture and forced disappearances. They are part of a cruel legacy from the so-called 'years of lead' for Brazilians. An official database documents 434 deaths and disappearances of political opponents, plus thousands of incidents of torture.[2]

As for the participation of corporations and businesspeople 'at work' in such illegal acts, data has been collected as part of initiatives by the National Truth Commission (*'Comissão Nacional da Verdade'* – CNV) and the Brazilian Attorney General's Office (*'Procuradoria Geral da República'* – PGR). With relation to the CNV, the published reports[3] indicate that the main contribution of economic power to the military regime was associated with the promotion of the coup, with campaigns designed to destabilize then President João Goulart, or the financing of the groups that took power – in both cases with the intent of obtaining profits and economic benefits. Within this sphere of political and financial support, two groups created by businesspeople are worthy of mention: (I) Brazil's Research and Social Studies Institute (*'Instituto de Pesquisa e Estudos Sociais'* – IPES), which involved heavy ideological participation of the national business community; and (II) the Brazilian Democratic Action Institute (*'Instituto Brasileiro de Ação Democrática'* – IBAD), which more overtly conspired against the government of João Goulart and which would later work in an equally overt way to persecute those who opposed the new regime. There were several companies and executives that supported IPES and IBAD, most of which originated from the São Paulo business community (the country's wealthiest region).[4]

Nevertheless, if corporations' participation in the plotting, coup and political persecution did not represent the perpetration of acts of human rights violations by itself, what occurred shortly after – during the hardest phase of the dictatorial regime – most certainly characterized the practice of acts described by the crimes covered by Item 4 of this questionnaire. According to the CNV report:

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[2] 'Comissão reconhece mais de 200 desaparecidos políticos'. Agência Brasil (Brasília, December 2014) <http://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2014-12/comissao-reconhece-mais-de-200-desaparecidos-politicos> accessed 24 January, 2017.

[3] Brazil. National Truth Commission. Report: themed texts. (National Truth Commission Report; v 2). Brasília: CNV, 2014. <http://www.cnv.gov.br/> accessed 24 January 2017.

[4] Especially the following companies: A. Queiróz Lugó, Acumuladores Vulcânia, Antônio Maurício Wanderley e Cia Ltda, Armações de Aço Probel S/A, Atlantic, Auto Asbestos S/A, BF Goodrich, Brasital S/A, Cia Carlos Guedes, Cia Comercial de Madeiras Kirali, Cia de Acumuladores Prest-O-Lite, Cia de Cigarros Souza Cruz, Cia Fiação e Tecidos Lanifício Plástico, Cia Madeireira Nacional, Dunlop, Duratex S/A Indústria e Comércio, Duratex SA, Esso Brasileira de Petróleo, Eucatex S/A Indústria e Comércio, Johnson & Johnson, F Slaviero, Fábrica de Cigarros Caruso, Fábrica de Cigarros Flórida, Fábrica de Cigarros Sudan S/A, Fábrica de Gases Medicinais Cremer, Firestone S/A, Good Year, Indústria Brasileira de Eletricidade, Indústria de Ataduras Gessadas Cristal, Indústria de Feltros Lua Nova S/A, Irmãos Justa Transportes, Irmãos Nocera, João Batista Antonio Alário, M Lipper S/A, Madeireira Miguel Forte, Moinhos Santista S/A, Moreira Lima e Cia, Ousei Peceniski (Colchoaria Francisco), P Barelle Ltda, Pfizer Corporation do Brasil, Pirelli S/A, Pneus General, S/A Brasileira de Tabacos Industrializados, Saturnia Acumuladores Elétricos, Serraria Água Branca, Serraria Americana Salim F. Maluf, Serraria Azevedo Miranda, Serraria Bandeirantes, Serrarias Almeida Porto, Serrarias F Lameirão, Texaco do Brasil S/A, V Foreinete, Vicari S/A Indústria e Comércio, and Volkswagen do Brasil. Cf Brazil. National Truth Commission (n 2) 321.

> ... Coordinating with the II Army's officials, with headquarters in the São Paulo capital, the conspirators needed – according to testimony provided by Paulo Egídio Martins in 2006 – to recover their operational conditions. Therefore, the participation of industrial businesspeople from the state was essential, since they supplied the military unit with a variety of vehicles and replacement parts. For this purpose, an industrial task force was created within the sphere of the São Paulo State Federation of Industries ['*Federação das Indústrias do Estado de São Paulo*' – FIESP]: 'Our industrial mobilization group had to work to turn the II Army into a mobile unit.' In more recent statements provided to the São Paulo City Council Truth Commission, Paulo Egídio said that it would be 'difficult to find someone who had not financed the plot' and that the businesspeople used money from a 'slush fund' to make donations: 'Nobody donated profit money.'

From 1964 to 1967, the Permanent Group for Industrial Mobilization ('*Grupo Permanente para a Mobilização Industrial*' – GPMI) worked in close cooperation with the government of General President Humberto Castelo Branco, creating work commissions consisting of civilians and military officials. Several initiatives were adopted to increase the production of goods considered necessary to maintain the operational capacity of the Armed Forces and their auxiliary forces, such as the São Paulo Public Force. According to the newspaper *Folha de S.Paulo*, 'after the 1964 coup and with the dictatorship installed, certain people helped finance OBAN ('*Operation Bandeirantes*'), an organization created by military officials to coordinate repression of those who opposed the regime.' It promoted a continuity of the coup in terms of the relationship between businesspeople and the coercive structure of the regime and perpetration of serious human rights violations.' Finally, the relationship between business segments and government military structures is worthy of note, because it is one of the most significant expressions of civilian participation in the dictatorship regime.[5]

Among the consequences of this political-corporate movement were the government measures that, in practice, prohibited workers from exercising their right to strike and reduced the minimum work age to 12 years, both of which helped cut production costs and increase the profitability of the companies that financed the regime. For those who resisted and maintained the political struggle within the sphere of the labour unions, the political system in place persecuted and silenced opponents to guarantee the maintenance of the new order, the military dictatorship government and the gains of the business class that financed the coup – to repeat – at the cost of oppressing the working class in Brazil and opponents (including business people who did not support the coup).

The CNV report also offers insight into the profits made by business groups associated with the military regime:

> ... During the period of the dictatorship, there was a predominant formation of large economic groups in Brazil. The liquidation of the assets of some (businesspeople who opposed the regime) either directly or indirectly favored

[5] Brazil. National Truth Commission (n 2) 322.

> groups that experienced significant growth during the period. In the case of Panair [group commanded by businesspeople who opposed the regime], for example, it is important to remember that Varig, owned by businessman Ruben Berta, assumed all the country's international airlines at the exact moment when the competitor was shut down by the government. On the other hand, the liquidation of Excelsior (same owners as Panair) occurred within the same context in which another group assumed leadership in the telecommunications segment: the Globo Television Network, owned by businessman Roberto Marinho, an active supporter of the dictatorship regime.[6]

And to complement this information:

> '... Nevertheless, it is possible to observe that, in several different economic segments, large national economic groups were formed benefiting from state protectionism, as was the case of the civil construction industry with the groups Camargo Corrêa, Andrade Gutierrez, Mendes Júnior and Odebrecht; in the heavy industry (steel working, metallurgy, cement, etc.), with Gerdau, Votorantim and Villares; and in the banking system, with Moreira Salles, Bradesco and Itaú, just to cite the most well-known.

In the banking sector, the level of concentration is revealed by the following figures: In 1960, there were a total of 358 banks and banking institutions, including eight foreign banks. In 1980, this number had dropped to 111, given that, among the national institutions, the reduction was from 350 to 95 private and government banks. As part of this process, the dictatorship worked to support the concentration, either by creating a favourable economic environment (by degrading the conditions of the working class, as described earlier), or directly, by favouring certain economic groups.

This history of Itaú Bank is representative of the fact that its good relations with the government staff during the dictatorship allowed for the emergence of economic empires. Founded at the end of the 'New State' dictatorship, it was during the military dictatorship that the bank was able to merge with a series of other banking institutions, based on cases revealed by public reports. In 1967, Itaú was in eighth place in the ranking of the volume of deposits, and jumped to fourth place in 1971 among private banks and seventh place in the overall ranking for the sector. In 1974, it became the second largest private national bank. In this last leap, the government – working through the Central Bank and the Ministry of Finance –intervened in the Commercial Union Bank (BUC), which was experiencing major difficulties. In August 1974, control was transferred to Itaú. BUC had 250 branches, which joined the 468 belonging to Itaú.

If, before the civil-military coup of 1964, there had been important companies in Brazil in the civil construction sector, at the end of the regime, we had a scenario marked by large groups of diversified economic activity and international operations, formed from construction firms. These economic conglomerates, such as Odebrecht, Camargo Corrêa and

[6] Brazil. National Truth Commission (n 2) 327.

Andrade Gutierrez, remain powerful even today.[7] The Brazilian contractors, right after they were formed, organized themselves into civil society apparatuses, developing the collective activity to pressure and influence the adoption of favourable public policies. In addition to having direct contact with government agents, companies such as Mendes Júnior, Rabello and Setal hired military officials to serve on their boards, attempting to facilitate their operations together with government agencies.

Last but not least, consolidating foreign indebtedness as the main source of financing for the economic development process, the dictatorship government encouraged the large national private groups to take out loans in the international market, creating the difficulties that plagued the Brazilian economy during the 1980s. From 1969 to 1985, international debt – the main portion of public debt – grew from US$ 4.379 million to US$ 105.125 million, which meant an increase in the foreign debt/GDP ratio from approximately 10.96% to 46.32%. With the government serving as the guarantor of these transactions, primarily through the state-owned companies, the dictatorship government, with the change in the mood of the international economy starting in the mid-1970s, reflected in the end of liquidity in the international financial system, would nationalize the debts of private groups despite a cynical cry by the São Paulo business community against the 'excessive nationalization of the Brazilian economy.'[8]

As related to the persecutions of opponents, it is important to emphasize the composition of the aforementioned OBAN ('*Operation Bandeirantes*'), which came to assume a central role representing the worst years of the dictatorship. There is more about it in the CNV report:

> … Nothing is more impactful during the investigation on the roles of civilians during the dictatorship regime than the collaboration of major businesspeople when it came to financing the structure of repression. Private properties served as extermination camps for those who opposed the regime, such as in the state of Rio de Janeiro, at the Cambahyba Plant, which belongs to the family of Heli Ribeiro Gomes, in Campos dos Goytacazes, and at the 'House of Death' in Petrópolis, owned by German businessman Mario Lodders.
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> The most symbolic case was '*Operation Bandeirantes*' (OBAN), created in São Paulo after decreeing Institutional Act No. 5 (AI-5). [...] Nevertheless, the most significant support for OBAN came from the large national private, foreign and associated sector, which supplied resources to set up that apparatus of repression. According to General Arthur Moura, in a statement provided in the documentary *Cidadão Boilesen ['Boilesen Citizen']*, by Chaim Litewski (Brazil, 2009):
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> The Army Chief reached the conclusion that it was the right time to appeal to the private sector, primarily the foreign private sector, to make this sector see that there would also be an impact on these sectors if the terrorist forces won. [...] The

[7] The civil construction sector is so powerful that these companies are once again involved in problems with State agents, this time, corruption acts exposed by the 'Operation Carwash' investigations currently underway in the country.

[8] Brazil. National Truth Commission (n 2) 328.

thesis was: 'today it is us, tomorrow it may be you guys, so we need support in order to complete our missions effectively.' And this support would be financial in nature, right?

There was a known banquet organized by Minister Delfim Netto at the São Paulo Club, former residence of Mrs. Viridiana Prado. During this event, each banker, such as Amador Aguiar (Bradesco) and Gastão Eduardo de Bueno Vidigal (Banco Mercantil de São Paulo), among others, donated a sum of US$ 110,000 to supplement OBAN's cash flow.

Together with the bankers, several different multinationals financed the formation of OBAN, such as the groups Ultra, Ford, General Motors, Camargo Corrêa, Objetivo and Folha. There was also collaboration from multinationals like Nestlé, General Electric, Mercedes Benz, Siemens and Light. An unknown number of São Paulo businesspeople also contributed, since the fundraising relied on active support from the São Paulo State Federation of Industries (FIESP) through its president, Theobaldo De Nigris. In the halls of FIESP, Finance Minister Delfim Netto regularly gave lectures to members of the business community during meetings in which they were asked to help finance OBAN.[9]

In terms of even more significant contributions that extended beyond financing, the CNV report clarifies that:

... As Elio Gaspari wrote, in the São Paulo Federation of Industries, they invited businesspeople to meetings that ended with a literal 'passing around of the hat.' Ford and Volkswagen supplied cars, Ultragás loaned trucks and Supergel provided the jail on Tutoia street with frozen meals. According to Paulo Egydio Martins, who assumed control of the São Paulo Government in 1974, 'during that period, considering the climate, it can be stated that all the state's major commercial and industrial groups helped create OBAN.'

Researcher Beatriz Kushnir discovered an active presence by the Folha Group in terms of supporting OBAN, whether through clear editorial support in the news of the *Folha da Tarde ['Afternoon Page']* newspaper, or the use of the paper's trucks to surround and capture opponents of the regime. According to journalist Hélio Contreiras, at least two businesspeople refused to collaborate toward the production of this repressive structure, namely: José Mindlin and Antônio Ermírio de Moraes.[10]

Finally, as for individual businesspeople recognized as some of the most active collaborators, the following can be cited:

... One enthusiast of this collaboration was the Danish businessman living in Brazil, Henning Albert Boilesen, President of the Ultra Group, who was one of the civilians most identified with the repression from that period, although he was

[9] ibid 329-30.
[10] ibid 330.

not the only one. Boilesen became known as the individual who managed the fundraising for OBAN, frequented the entity's head office, observed the political prisoners held captive there and watched the torture sessions. There is evidence that he participated in some of the abuses inflicted on the political prisoners. His participation in acts of such cruelty, crimes against humanity, even involved the importing of equipment to apply shocks to the tortured political prisoners. The equipment had the structure of a piano and was key-activated. It increased the frequency of the shocks the higher the note played. Boilesen's fame would eventually unleash the rage of those who opposed the regime, and in a joint action by two armed left-wing organizations – the *Tiradentes* Revolutionary Movement (MRT) and National Liberation Action (ALN) – the businessman was executed on São Paulo on April 15, 1971.[11]

As for the human rights violations practiced by OBAN, the following are some important reports:

> ... As part of a story for the magazine *IstoÉ ['This Is']* from February 20, 2001, journalist Helio Contreiras revealed the existence of the dossier produced by the Brazilian army about OBAN, which we reproduce below:
>
> 'We have to make these people talk even if it means kicking the crap out of them.' The phrase, an order to use torture as an instrument to obtain confessions, is recorded in a document that carries the Brazilian Army letterhead. It includes phrases handwritten by an official, recommending that his 'comrades' be speedier in their actions against the opponents of the dictatorship. The manuscript is kept in a dossier that military officials insisted on maintaining a secret until today. It is the file from '*Operations Bandeirantes*' or OBAN, the most truculent action employed during the dictatorship, which took place between 1968 and 1970 under the coordination of the II Army in São Paulo. Some of these documents were shown to *ISTOÉ* Magazine by an Air Force Coronel, in downtown Niterói (RJ). A report, written on the letterhead of the Airforce itself, informs that OBAN subjected 1,200 people to long special interrogations, which included electric shocks, beatings and near-drownings. Some of the victims of this treatment did not resist and died. This is the case of Joaquim de Alencar Seixas. His son, journalist Ivan Seixas, also imprisoned by the military, was able to watch the torture session that ended his father's life. 'OBAN was the most violent operation after enactment of AI-5 in 1968,' revealed Octávio Costa, a retired general. That was the first time a military official made comments and revelations about the operation....

As far as Brazilian society knows, the Brazilian Armed Forces continue to this day to deny the existence of any information and/or documentation that clarifies OBAN's activities,

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[11] ibid 330-31.

including the location of the dossier that Contreras consulted in the hands of the Air Force coronel.[12]

A major part of the difficulty in clarifying the private initiative activities involved in the direct violations of human rights comes from the resistance of the Brazilian Armed Forces to reveal the historical truth. To the contrary, the Brazilian Armed Forces has precisely hidden any trace that may affect the amnesty pact established during the later transition to democracy. Furthermore, as mentioned earlier, OBAN would come to form the base for the repressive organizations named the Information Operations Department - Domestic Defence Operations Centre (DOI-CODI) and the Political and Social Order Department (DOPS).

> ... In September 1970, a decree by General Médici integrated OBAN's structure with the official organizational chart, thereby assuming the name of the Information Operations Deployment/Internal Defence Operations Centre (DOI-CODI)[13] of the II Army, which thereafter was headed by Major Carlos Alberto Brilhante Ustra.[14] In the same act, besides São Paulo, the DOI-CODI also established itself as the official institution in Rio de Janeiro, Recife, Brasília, Salvador, Belo Horizonte, Porto Alegre, Fortaleza and Belém. Although it had left behind the informal structure and began to rely on its own budgetary funding, there are notable signs that the main private sector would continue providing the apparatus of repression with abundant resources.[15]

As related to the private sector's participation with DOI-CODI and DOPS, the following is noteworthy:

> ... As mentioned in the testimony from José Papa Júnior, while the work of certain businesspeople was completed on the local level, others were involved with a discrete national action. According to the very Guideline for the Internal Security Policy, from July 1969, structures similar to OBAN would be created in other states. Businesspeople from Rio de Janeiro also visited the São Paulo DOPS, a fact that was revealed during an interview with the former deputy of DOPS, José Paulo Bonchristiano, when he referred to Roberto Marinho. Could it be that they found inspiration in the practices by those from São Paulo for similar operations in Rio de Janeiro and in other federation states?
>
> The revelations of another former deputy at the DOPS of Espírito Santo, Cláudio Guerra, in his statement to Rogério Medeiros and Marcelo Netto – published in the form of a book and reproduced and amplified within the sphere of the National Truth Commission (CNV) – reveal the national financing of the apparatus of repression, torture and murder by the dictatorship regime.

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[12] ibid 331-32.

[13] The most important repression structure during the period of the Brazilian military dictatorship.

[14] Brilhante Ustra was a famous figure in Brazil because he was accused of torturing former president Dilma Rousseff.

[15] Brazil. National Truth Commission (n 2) 332-33.

> According to Guerra, the banks Banco Mercantil de São Paulo and Sudameris stood out as the largest providers of funds to the agents of repression, since they facilitated the payment of a sort of monthly stipend to them. The payments were made on behalf of persons with false identities (or even false names), together with the payment of 'prizes' (in cash) resulting from the capture and assassination of opponents of the dictatorship regime. As could be determined, such resources did not only come from the vaults of these banks, which centralized funds collected from several civilians and who hoped to benefit from maintaining good relations with those in power. Sebastião Camargo, for example, from the contractor Camargo Corrêa – one of the greatest sponsors of 'the OBAN funds' - was able to establish contracts to build major public construction projects, such as the Rio-Niterói Bridge.[16]

It is clearly deplorable that it has taken Brazil so long to look into these violations. Due to this delay, the time factor has proven to be very important in the criminal prosecution of individual suspects. The discussion about these crimes is only occurring today because, as previously mentioned, it took Brazil a long time to complete its briefing about this period, the so-called National Truth Commission (CNV), which only concluded its work at the end of 2014. Together with this initiative, it is also important to note the work of the Brazilian Attorney General (PGR) in terms of investigating and formalizing accusations of serious human rights violations and crimes against humanity.

As indicated by Professor and Attorney General Antonio do Passo Cabral about the PGR's theme of focus in the military dictatorship cases, the Brazilian Attorney General is working on several different fronts. The most relevant work completed by the Rio de Janeiro Transitional Justice Task Force (GT) was published on the website of the Attorney General in Rio de Janeiro (PR/RJ) in the section associated with combating crimes from the period of the military dictatorship.[17] This same website includes the criminal reports, class action lawsuits and statements by PGR on this topic, together with discussions about the legal theses involving the criminal prosecution of the perpetrators of crimes against humanity, the non-occurrence of the statute's limitations, the non-incidence of amnesty laws, etc. The same website also includes audio recordings of most of the testimony given (except for those that are still being used in other investigations and those that included private content from the investigated ones). According to Professor Antonio do Passo Cabral, the Memory and Truth Task Force was created at the Brazilian Attorney General's Office; it is responsible for proceeding with the investigations in terms of the non-criminal aspects, or in other words, in the field of collective guardianship and the preservation of memory sites, among other relevant aspects.[18] Another investigation front assumed by the Attorney General's Office for

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[16] ibid 333-34.

[17] In <http://www.prrj.mpf.mp.br/frontpage/institucional/crimes-da-ditadura> accessed January 2017.

[18] See <http://pfdc.pgr.mpf.mp.br/institucional/grupos-de-trabalho/direito-a-memoria-e-a-verdade/apresentacao> accessed January 2017.

crimes committed during the military dictatorship is associated with the supposed slaughter of indigenous peoples.[19]

Antonio do Passo Cabral further notes the formation of the Joint Investigation Team (Transitional Justice) formed by the Brazilian Attorney General and Argentina's *Federal Prosecutio* to investigate the events surrounding 'Operation Condor'. Relevant information about this joint international work can be found at the PGR Cabinet International Cooperation Department.[20]

It can be observed that with the production of CNV reports and the verification of violations along different fronts by PGR, a series of Crimes Against Humanity can be attributed to the agents who commanded the military dictatorship, as well as the businesspeople who offered them support. These crimes include: murder (Art. 7 (2) (a) of the Rome Statute); imprisonment or other severe deprivations of freedom; torture (Art. 7 (2) (e) of the Rome Statute); rape and other forms of sexual violence; persecution (Art. 7 (2) (g) of the Rome Statute) and disappearance of people (Art. 7 (2) (i) of the Rome Statute).

Faced with the delay in 'settling accounts with the past,' the preference of the Federal Attorney General has been to sue military agents individually, since they were the ones most noted as practicing the violations due to their immediate contact, public exposure and official hierarchical position. Accordingly, considering that the military officials constituted the majority of the violators, and that they are in visible positions, suing them was the less costly solution.

Indeed, cases against agents from the period have been attempted. However, even in these cases, it has been hard to move forward with the accusations, considering the decisions made by Brazilian courts opposing this initiative. Furthermore, the legislation concerning international crimes is quite deficient in the country.

Brazil is a signatory of the International Criminal Court Statute (in Brazilian Portuguese, '*Estatuto do Tribunal Penal Internacional*' – ETPI) and incorporated the document into the domestic legal system through Decree No. 4.388/2002. Despite this fact, to date, there has been no specific definition of the ETPI crimes in domestic law (with the consequent observance of the principle of *nullum crimen sine lege*). In other words, except for the crime of genocide, there is no domestic law that reproduces and classifies the crimes covered in ETPI. According to Artur de Brito Gueiros Souza, 'only the crime of genocide is regulated in Law No. 2.889/56 and in the Military Criminal Code; not the other criminal figures.'[21]

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[19] See <http://6ccr.pgr.mpf.mp.br/institucional/grupos-de-trabalho/gt_crimes_ditadura> accessed January 2017.

[20] See <http://www.internacional.mpf.mp.br/> accessed January 2017.

[21] A de Brito Gueiros Souza, 'Reservas ao Estatuto de Roma – Uma análise do direito de reservas aos tratados multilaterais e seus reflexos no Estatuto do Tribunal Penal Internacional' in K Ambos and CEA Japiassú (eds), *Tribunal Penal Internacional – Possibilidades e Desafios* (Lumen Juris 2005) 107.

In terms of a legislative initiative, only one bill was sent to the Parliament by the Executive Branch in September 2007, but it did not move forward.[22]

Since there is a lack of adequate classifications, PGR has adopted specific dogmatic solutions in these cases. Like even the most serious crimes involving homicide, which would already be covered by domestic law, as well as by the non-existence of the crime classification for forced disappearance,[23] the alternative has been to use the category of the crime of kidnapping. It is classified as a crime endowed with a permanent nature. The accusation of kidnapping considers that the agents of the dictatorship abducted civilians and made them disappear, depriving them of their freedom. As occurs with the so-called permanent crimes, the statute of limitations only begins to be counted after the termination of permanence or the revelation of the site where the disappeared person's body is located. In this case, there is at least legal support for proposing legal action against those violators.

On the other hand, considering that Brazilian Legal System lacks a legal provision for the conduct covered by the ICCS, it may give the ICC the authority it needs to proceed with and rule on cases within its sphere of competence. This brings up a criticism made long ago:

> … Therefore, it is concerning to see the current state of Brazilian law as it relates to the International Criminal Court (ICC). There is a bill under revision by Brazilian Congress that defines and imposes the facts covered in the Statute so that we can exercise, if necessary, our primary jurisprudence, which would exclude – as can be seen – international secondary jurisprudence, under the terms of the principle of complementarity of that Court.
>
> At the present time, if there is some unfortunate event that falls under the authority of the ICC, with the exception of genocide, there will be an extensive and immediate application of its provisions and Brazil will be required to collaborate, deliver, execute, etc., all related decisions. This may lead to a serious incident if the Brazilian courts understand the Statute to be incompatible with the 1988 Federal Constitution.
>
> In summary, it is expected that the Brazilian government purge arrears, sending the Legislative Branch a bill that defines the crimes of genocide, crimes against humanity, war crimes and crimes against the administration of ICC justice, *conditio sine qua non*, so that our Judicial Branch can be 'capable and willing to follow through with the investigation and proceeding' against those suspected of the illegal acts in question.[24]

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[22] Cfr <http://www.camara.gov.br/sileg/integras/600460.pdf> accessed January 25th 2017.

[23] The Inter-American Convention about the Forced Disappearance of People, signed in 1994, only went into effect in Brazil in 2016 (Decree No 8.766/2016).

[24] A. de Brito Gueiros Souza (n 18) 108. About the topic, detailing the different problems related to a lack of appropriate legislation and incorporation of the commitment assumed: MT Rocha de Assis Moura; GH Badaró, MA Coelho Zilli, CEA Japiassú and CV Bastos Pitombo, 'Legal and Political Obstacles to Approving or Implementing the Rome Statute' in K Ambos, E Malarino and J Woischnik (eds), *Legal and Political Obstacles to Approving or Implementing the International Criminal Court's Rome Statute* (IBCCrim 2006) 81-109.

As for the issues of the dictatorship imposed by the military officials during the transition to democracy, it is important to note here that the international courts decided against the validity of this amnesty. It should also be emphasized here that the Inter-American Human Rights Court considers the Brazilian amnesty invalid. As for crimes imprescriptible in international agreements, there would be the possibility of ruling on crimes against humanity committed during the period of the dictatorship.[25]

The issues discussed above also help to explain why, with relation to economic activity that helped the dictatorship regime commit relevant crimes, there has been a preference toward cases of a civil nature, because it is difficult for the criminal justice system to sue the agents directly involved with the violations of the military dictatorship.

From another perspective, there are no reports of cases in Brazil of criminal proceedings against businesspeople (companies, administrators or representatives) for international crimes. Likewise, there are no reports of cases of a civil nature that have been brought before the courts. However, there should be reference to the establishment of investigative proceedings against the German assembler Volkswagen, which received extensive news coverage in Brazil:

> … A number of labor unions and the National Truth Commission (CNV) filed a request to initiate civil proceedings against the German assembler Volkswagen, based on the accusation that it violated human rights inside its factories in São Bernardo do Campo during the military dictatorship (1964-1985).
>
> The case filed with the Federal Attorney General's Office (MPF) will determine whether the German company is liable for cases related to persecutions and tortures that, according to the case, 'constitute crimes against humanity.'[26]

The case was filed in September 2015 and 'is based on documents and reports collected by the CNV, stating that 12 former employees were arrested and tortured inside the Volkswagen facilities, located in São Bernardo do Campo, a satellite city of São Paulo.'[27] The main references for the complaints are the acts practiced at the beginning of the 1970s. Besides the previously cited contribution to the 1964 coup and the financing of the repression, especially OBAN, the complaints are based on the CNV report, which 'revealed the existence of a repressive military-business apparatus, in which the firms monitored the workers, passing on information and reporting it to the Political and Social Order Department (DOPS).'[28]

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[25] See the Inter-American Human Rights Court Decision in the *Case of Gomes Lund and Others (Araguaia Guerrilla) v Brazil*' ruling from 11/24/2014 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf>

[26] 'Volkswagen denunciada no Brasil por crimes da ditadura' <http://www.dw.com/pt-br/volkswagen-%C3%A9-denunciada-no-brasil-por-crimes-da-ditadura/a-18731370> accessed January 27th, 2017.

[27] ibid.

[28] ibid.

It was also reported that the complaints are not based only on the CNV report, because there are other sources indicating that Volkswagen participated:

> … The document, however, presented Volkswagen's participation in further details, together with its contribution to the military regime: 'For *Volkswagen do Brasil*, there are also a series of documents proving the company's cooperation with the DOPS security police agencies.'
>
> 'Volkswagen was not the only company involved, but it played a management role in São Paulo, and even coordinated other companies,' said Sebastião Neto, from the Forum of Workers for Truth, Justice and Reparation. 'They took me handcuffed to the Human Resources department and started torturing me there,' said Lúcio Bellentani, a communist militant and former Volkswagen employee.[29]

In terms of what he suffered, former employee Bellentani later said: 'I was working and two individuals arrived with a machine gun, grabbed me from behind and handcuffed me. When I got to the Volkswagen security room, the torture began right there; I started to get beat up, slapped and punched.'[30]

A story on the digital website *Opera Mundi* featured the following news story:

> … As part of the case sent to the regional attorney at São Paulo State Citizens' Rights, Pedro Antônio de Oliveira Machado, the different entities – including 10 labor union centers, together with researchers, activities and former employees – emphasized the need to clarify episodes from that historical period. And they make reference to the 'obscurity that leads to an abundance of ignorance and superficiality when addressing the topic of the business community's complicity' with the authoritarian regime. The document is also signed by attorney Rosa Cardoso, which coordinated the task force of the labor union movement and the CNV itself through former congressman Adriano Diogo, Chairman of the São Paulo Legislative Assembly Truth Commission, and by Cezar Britto, former Chairman of the Federal Council of the Brazilian Bar Association (OAB), among others.
>
> Volkswagen began negotiating a legal compensation. A director of the German head office, Manfred Grieger, came to Brazil in 2015 to meet with representatives from the Public Prosecutor's Office, including Machado, who spoke about a possible conduct modification agreement (TAC). 'It was the start of a discussion about how to reach an agreement on this issue,' he said on the occasion, speaking to the newspaper *O Estado de S. Paulo*. Sought out to comment on the current stage of the conversations, the executive did not respond to the request for information. The company also had no comment.

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[29] ibid.

[30] 'Relatório da CNV revela caso de tortura em fábrica da Volkswagen' <http://www.dw.com/pt-br/relat%C3%B3rio-da-cnv-revela-caso-de-tortura-em-f%C3%A1brica-da-volkswagen/a-18126119> accessed January 30th, 2017.

> Former member of the labor union movement task force at CNV, Sebastião Neto, coordinator of Exchange, Information, Studies and Research (IIEP), stated that what is most important is establishing the chain of command that existed at the company. 'We want to call in the people to which he *(Coronel Adhemar Rudge, responsible for the industrial security sector at the company)* reported.'
>
> According to Neto, there is no 'Volksphobia' – but the documentation related to the case is extensive. The company demonstrates a close relationship with DOPS. Neto affirms that Grieger's proposal is to make individual compensations, which he does not think is effective. 'We want to discuss collective compensation,' he said, citing possible actions such as education projects and a memorial.[31]

Besides working for the desired civil compensation measures, the story offered more detail about some of Volkswagen's contributions to the regime, including one involving former Brazilian president, Luiz Inácio Lula da Silva:

> ... In the documents obtained referring to how the center operated, one was found, dated July 18, 1983, which records in text format that the representative from the company Volkswagen revealed the most important topics during a meeting, presenting notes in the form of reminders.' New information was recently obtained, after the case was sent to the Public Prosecutor's Office.
>
> A document from the DOPS Analysis, Operations and Information Sector reports, for example, the 'rally' held on March 26, 1980, at the Volkswagen entrance in the ABC Region of São Paulo, citing a 'summary' created by the security Volkswagen itself about the operations of the then São Bernardo and Diadema Metallurgical Workers' Labor Union, at the time headed by Luiz Inácio Lula da Silva. On the occasion, Lula spoke precisely about the monitoring the workers suffered at the factory, citing Coronel Adhemar Rudge. As part of the case submitted to the Federal Attorney General's Office (MPF), the entities stated that Rudge was a 'notorious friend' of Coronel Erasmo Dias, former State Secretary of Public Security in São Paulo.[32]

Given the severity of the indicated events, involving torture and even the monitoring and delivery of information about a former President of the Republic, it was quickly determined that it should be discovered whether the German head office knew what was happening in Brazil. The assembler reacted quickly by hiring a specialist to check into the situation.[33] The individual chosen was Professor Christopher Kopper, from Bielefeld University, who replaced Manfred Grieger, who had commanded the investigative work previously. It was

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[31] 'Ministério público busca elucidar participação da Volkswagen na ditadura militar no Brasil'. Opera Mundi <http://operamundi.uol.com.br/conteudo/samuel/45221/ministerio+publico+busca+elucidar+participacao+da+volkswagen+na+ditadura+militar+no+brasil.shtml> accessed January 30th 2017.

[32] ibid.

[33] <http://www.bbc.com/portuguese/brasil-37782829> accessed January 28th 2017.

Volkswagen's intent to change the previous approach with the Brazilian branch and start investigating the files in Wolfsburg.[34]

The investigation, which began in November 2016, was estimated to last approximately one year, when Volkswagen would distribute a report with the presented results. There will be an analysis of documents in Brazil and Germany, as well as interviews with the former employees of the company in São Paulo. Kopper, a specialist in company histories, hopes to obtain reliable results in the end: 'Since I am not an employee of the assembler, I have all the independence required to research and produce the final content of this work.'[35]

2 General Remarks (in a Nutshell)

As previously mentioned, the incorporation of the most egregious crimes in Brazil's domestic legislation initially occurred with the Law Against Genocide (Law No. 2889/1956), which was enacted immediately after the UN Convention on the Prevention and Punishment of the Crime of Genocide (1951) and, more recently, with the enactment of the International Criminal Court Statute (ICCS). It should be emphasized that, besides the term of the ICCS (2002) and the Law Against Genocide (1956), there is no specific law that covers the other crimes against humanity. This problem, publicized at least since the approval of the ICCS, has continued up to the present (in 2017), meaning that the country, according to the ICC jurisprudence, may have to directly respond to the Court if incidences classified in the Statute occur within the national territory or are perpetrated by nationals from Brazil.

For these reasons, there is nothing specific in Brazilian Law about international crimes compared to what is observed in Compared Criminal Law and International Criminal Law.

From another angle, among the other conduct that constitutes serious human rights violations in the country, an important type is the subjection to conditions analogous to slavery (*plagium*), covered in Art. 149 of the Brazilian Criminal Code, with important modifications based on Law No. 10.803/2003, and the trafficking in human beings with or without a sexual purpose (Art. 149-A, CP, entered by Law No. 13.344/2016). The prosecution of these two crimes is understood to be essential for Brazil, given that, unfortunately, cases of this nature are frequent, causing enormous social and personal damage, and that they are possibly indicated as serious human rights violations.

In Brazil, the 1988 Federal Constitution (*Constituição Federal*, CF/1988) itself consolidated the principle of individual guilt as a fundamental individual guarantee and irrevocable right within the Brazilian constitutional order, covered in Art. 5 subsection XLV of CF/1988.

Having said this, on the matter of crimes committed by more than one person, the Criminal Code ('*Código Penal*' – CP) adopted the tempered monist theory for determining liability. The theory indicates that, as a general rule, there is no distinction between perpetrators and

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[34] 'Volkswagen indica especialista para investigar caso de tortura durante ditadura military no Brasil'. Opera Mundi.
<http://operamundi.uol.com.br/conteudo/geral/45594/volkswagen+indica+especialista+para+investigar+caso+de+tortura+durante+ditadura+militar+no+brasil.shtml> accessed January 30th 2017.

[35] <http://www.bbc.com/portuguese/brasil-37782829> accessed January 28th 2017.

accomplices. Everyone must respond equally for the criminal event they helped to cause (Art. 29, CP). In this case, there only needs to be a causal link between the agent's conduct and the harmful result, as well as the intention to obtain a specific harmful objective, for the attribution of criminal liability to be possible. For these reasons, the accomplice is only held liable for what he or she agreed upon with the perpetrator, or in other words, he or she is not accountable for the excesses, but rather only for the less serious crime agreed upon, except in cases in which the more serious result was foreseeable (Art. 29, §2, CP), a hypothesis that must be obvious.[36]

This monist theory, however, is mitigated: This is why the solution adopted is called tempered or eclectic monism. Art. 29, main section, and §§1 and 2, of the CP, indeed states:

> Art. 29 - Any person who, by any means, is being judged for the crime shall be subject to the sentences imposed for the same, proportional to his or her guilt.
> § 1 - If the participation is of lesser importance, the sentence may be reduced from one-sixth to one-third.
> § 2 - If any of the individuals involved wanted to participate in a less serious crime, the sentence for the same should apply; this sentence will be increased up to half under the hypothesis that a more serious result would have been predicted.

Furthermore, for the determination of the sentence, the CP establishes a system of aggravating and mitigating circumstances that follow the greater or lesser participation of each participant in the criminal event. This infers that the monist theory of crimes committed by more than one person in the Criminal Code is limited, or in other words, the monism is tempered. It is further important to indicate a last condition of co-perpetration or participation, i.e. that which occurs in cases of crimes that set forth specific requirements for the perpetrator, such as his or her position (civil servant in crimes against Public Administration, for example). In this case, it is important to understand how the national legal system addresses the case of a contribution by a person who does not have a specific position in a crime that requires such a condition in the perpetrator (*extraneus*). In this case, the Brazilian legal system extends to the *extraneus* the special condition in the case of participation in a crime, when the condition is an element of the crime. This is similar to crimes of conspiracy in some common law systems, such as the U.S. It is important to remember that, with the lack of a legal distinction between perpetrators and accomplices, the sentences are initially equally applied to any participant in perpetrations within the Brazilian legal system.

With respect to the discussion on *extranei-intranei in delicta propria*, the Brazilian Penal Code has its provision in art 30:

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[36] For more details on the full topic of agent bids, see A de Brito Gueiros Souza and CEA Japiassú, *Criminal Law Course*: *General Part* (electronic resource, Elsevier 2011) 286-312. Citing the work that discusses the entire subject. What will follow is a summary of it.

Incommunicable circumstances

Art. 30 - There is no relationship between the circumstances and conditions of a personal character, unless they are elements of the crime.

The provision means that the sentences applied must consider the specific circumstances and conditions of each person when there is more than one perpetrator. In most cases, the circumstances and conditions of one person cannot be extended to the other when the judge is applying the sentence. However, if the circumstances or conditions are elements of (necessary to) the crime, the judge can extend the condition of the *intraneus* to the *extraneus*.

On the other hand, because it is an extensive condition, the *extraneus* can be punished only if he or she has worked together with the official agent (*intraneus*). Based on that, it is inferred that the position of the *extraneus* could only be the one of a participant in *delicta propria*.[37] This discussion, however, is practically left aside by the courts in that they only use the monism of Art. 29 of the CP, applying the same base sentence to the *intraneus* and the *extraneus*. The sentences will be different only in terms of personal culpability (*mens rea*).

3 Corporate Complicity and *Actus Reus*

As related to the international crimes mentioned in Item 5 of the Questionnaire and the liability of the owners of corporations or members of their top hierarchy, the debate in Brazil is still just beginning. In short, there has been no known case ruled upon that has explored these issues in more depth, and the discussion has only taken place within the theoretical sphere, as will be discussed below.

On the theoretical level, however, the discussion of the issue is precisely the result of the previous discussion about co-perpetration and participation. Especially in the Brazilian case, the reference that we use is crimes that could be characterized as crimes against humanity during the military dictatorship (1964/1985), but the system of their perpetration and participation would be permeated by discussions about this topic within the sphere of Economic Criminal Law. Thinking of the actual discussion, it is indeed possible to hold these criminals, who commit crimes through giving orders, accountable, even in cases in which they were *extranei*, based on their participation or even perpetration in serious crimes, because the penalty is applied according to tempered monism, which was explained above. More specifically, an agent could be punished for any conduct with a causal link: materially providing for an agent that commits the serious criminal acts that were discussed here, including, but not limited to, the delivery of weapons, but also other legal materials, such as automobiles and even the financing or supply of intelligence for the activity. In the case of the obtainment of profit through criminal activity, this would depend on the demonstration of causality and a psychological bond. In any case, even in the previous examples, the possibility does not mean that there is a need or requirement for punishment, granted that there are foundations and limits on punishment for this reason.

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[37] See also A de Brito Gueiros Souza, 'Atribução de responsabilidade na criminalidade impresarial :das teorias tradicionais aos modernos programas de "compliance"' (2014) 54 Revista de Estudos Criminais 93-122.

The first important point is the issue of so-called 'neutral actions'. Materially providing for an agent that commits criminal acts by providing hazardous elements (like weapons) or legal and common ones (like automobiles) will not always be punishable by law, and the relationship, with the theories of participation through neutral actions, will be essential in establishing the limits in such cases.

In this sense, the discussion about neutral actions has been nearly null in the Brazilian courts; rather, it has occurred almost exclusively on the scientific level. In this sense, the study that has had the greatest repercussions for this discussion was conducted by Professor Luís Greco.[38] According to the author, there should be no punishment for all conduct that was legal (regardless of whether it was hazardous) and that had an ample offer (such as the case of activities by fungible professionals), and primarily, refusal would not constitute a relevant preventive measure. In cases that meet these conditions, the refusal would be unenforceable. In this sense, only conduct that meets all the requirements above is not punishable, after a complete assessment regarding *lato sensu* proportionality (necessity, appropriateness and *stricto sensu* proportionality) when analysing the valuation of a disapproved risk within the scope of an objective accusation.

We can take the cited case of Volkswagen as a concrete example. If a director responsible for signing contracts with the government knows that the assembler's cars purchased by the country will serve as 'traps' to capture civilian rebels who will be subjected to every possible type of violation, then this director may be considered liable in some cases, and in others, he will not be. He would not be considered liable in cases in which there were only assemblers willing to sell the vehicles as part of the regular and legal operation of the market economy. In this case, the refusal to sell the vehicles would not protect the rights of the victims in the least. In a hypothetical situation in which there were no competitors or if the use of that company was necessary because its assembly line would be much faster than that of the competitors, which is something necessary for the regime to be able to maintain the 'trap cars' in the streets, then the action would no longer be a neutral and unpunishable one. Finally, as stated above, if Volkswagen did not sell, but transferred or sold these vehicles at symbolic prices, or even financed the fuel required to maintain the vehicles on the streets to perform their unworthy purpose, in this specific case, if there is an actual agent who made these decisions, then this agent could be held liable, even if he only supplied the cars, as is expected of an assembler.

In the case of a weapons sale, although this is an activity with a greater risk of aiding the commission of crimes, the creation of this risk of the commission of crimes is not the problem for the adopted theory. The main problem is instead the risk assessment. In this sense, due to the nature of the weapons market, or due to the objective conditions observed, most cases will require a refusal of sale. In these conditions, those agents who still sell the weapons could be considered responsible for the crime, because they aided the perpetrator with the instrument. Nevertheless, because it is an activity with an accepted level of risk based on the framework, if the case meets the requirements stated above (legal conduct, ample offer,

[38] L Greco, Cumplicidade através de ações neutras : a imputação objectiva na participação (Renovar 2004).

refusal would not constitute a relevant preventive measure), it maintains the aspects of a neutral and unpunishable action, even if it is an extremely dangerous action.

In explaining the examples and comparing them with the actual Brazilian situation, if we understand the analysis of the other indicated conduct, such as providing information that the regime did not have or allowing the company's facilities to be used for the practice of torture, then they could be considered criminal conduct. Activities such as those of businessman Henning Boilesen, of personally financing and seeking out more financial help from other business people to maintain obvert practices in violation of the human rights of those who resisted, as well as taking part in torture sessions, are equally criminal.

It can be further stated that if these agents initiate a hypothetical causal course toward creating a risk that may damage 'legal goods', and they receive dubious acceptance, although they have not reached the result, based on the Brazilian legal system, these agents have a duty to avoid the result if it is possible, as per Art. 13, main section, and §2, 'c' of CP, which covers the relevance of omission. The example used by the national doctrine is that of a subject who pushes another to swim in the sea, and when it is verified that the latter is drowning, the former does not try to rescue him. The one who pushed the person to swim would have the obligation to save him or would be responsible for the obtained result (principle of interference). Although this example is easy to understand, the practical application of the provision in question (Art. 13, §2, 'c', CP) is not that simple, primarily within the sphere of company crimes.

Applying the above hypothesis to the previously described case of illegal automobile sales, which is considered an unpunishable neutral action, it is curious that even in this case, an agent could be held accountable based on the hypothesis of negligent omission as specified in Art. 13, §2, 'c' of the Brazilian CP.

This is because the sale of the automobiles created a risk, but it was considered non-reprehensible, and the conduct was considered to be a neutral action. Such a case involves not punishing for an action. The same conduct, however, could be punished based on omission if the selling agent discovered the concrete action of a human rights violation and had the possibility of impeding the result that adversely affected the legal goods of those who resisted, but did not do so. The charge would apply because the CP attributes the duty of guarantee to those who initiate the causal course of the risk with their own conduct and who have complete knowledge of the situation and the conditions to execute the saving action.

What is left, therefore, is to indicate those cases in which the omission is criminally relevant. The major questions emerge in cases in which there was some omission of control within the company, which generated conduct that led to serious human rights violations. The existence of relatively complex structures of economic activity, which are relevant for the

commission of the crimes (company crimes), pursuant to those required by Professor Carlos Gomez-Jara Diez in Spain, is also important for the discussion.[39]

In this specific case, on the theoretical level, there has been a preference in Brazil for the discussions of Schünemann[40] on company crime,[41] including his thesis of control over the source of the danger,[42] as well as his recent reflections on improper omissions justified by the domain of the risk.

The Brazilian CP, on the other hand, has historically given preference to the model of liability due to improper omission in cases in which the duty of guarantee exists, which is justified by legal or contractual reasons. Accordingly, the duty of control over the company would be dependent on the legal or contractual duties of an agent who is high in the hierarchy of the commercial company.

It is apparent, in this case, that the thesis of a sector of Spanish doctrinal discussion has been transported to Brazil regarding the issue of criminal liability and companies. According to this doctrine, even under the theory that there is an originating duty of control and surveillance by the top management, its limits would be found in the (non-criminal) legislation that provides the origin of said duty. In this sense, other legal fields are necessary, and commercial law is especially important for the top management. These fields and their duties will set the limits of the criminal duty, which may never be greater than the non-criminal duty based on the teleological sense of *ultima ratio*.[43]

Addressing the limits and criminal grounds of the duties of control and liabilities attribution, there are certain works of reference by Brazilian academics, such as, for example, Souza's post-doctorate thesis in Coimbra.[44] It specifically seeks to analyse the institution of criminal compliance as an instrument for verifying the criminal liability of both corporations, as well as their members.

Furthermore, more than Criminal Law is addressed, and more than Commercial Law is considered a marker for the limits of criminal liability. In a work that has had major repercussions in the country, Professors Renato de Mello Jorge Silveira and Eduardo Saad-

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[39] C Gómez-Jara Díez, 'El modelo constructivista de autoresponsabilidad penal empresarial' in C Gómez-Jara Díez (ed), *Modelos de autorresponsabilidad penal empresarial. Propuestas globales contemporáneas* (Colombia's Externado University 2008).

[40] Among other texts: B Schünemann, 'Del derecho penal de la clase baja al derecho penal de la clase alta' in *Obras. Tomo II.* (Rubinzal 2009) 13-40.

[41] In Brazilian doctrine, for example, see more about the use of the distinction of crime between a company and an illegal company owned by Schünemann to determine the practical impact on national legislation in: R de Mello Jorge Silveira, 'Organização e associação criminosa nos crimes econômicos: realidade típica ou contradição em termos?' in W Terra de Oliveira, P Ferreira Leite Neto, T Cintra Essado and E Saad-Diniz (eds), *Direito penal econômico: estudos em homenagem aos 75 anos do professor Klaus Tiedemann* (LiberArts 2013).

[42] More details on the theory and its contemporary competitors: de Brito Gueiros Souza (n 36) 93-122.

[43] In this sense: A Nieto Martín, El cumplimiento normativo. In Manual de cumplimiento penal en la empresa (Tirant lo Blanch 2015).

[44] A de Brito Gueiros Souza, 'Programas de compliance e atribuição de responsabilidade individual na criminalidade empresarial' (Post-Doctoral Thesis, Coimbra University School of Law 2016).

Diniz[45] indicated the influence of both commercial law, as well as that of international law, within the context of compliance.

Professor Eduardo Saad-Diniz's reading of compliance pointed out the '*Fronteras del Normativismo*' ('Frontiers of Normativism')[46] in Brazil. It indicates that the fundamental rights and guarantees covered in the Federal Constitution of 1988 (CF/1988) are the limits to the guardianship of information through criminal law, conditioning the mechanisms of control and the attribution of liabilities based on compliance.

In his master's degree work under the guidance of Artur de Brito Gueiros Souza, Matheus de Alencar e Miranda is currently explaining his view, which is partially critical of this solution. The student proposes surpassing this criterion, including not only commercial law and the fundamental constitutional guarantees as the limits of criminal compliance, but also labour law as a stringent limit. This is because labour law originated from the recognition of inequality between the contracting parties (employee/employer), and labour law is more in contact with the real world, i.e. the 'production world' where criminal liabilities would be prescriptively established. In another study, Matheus de Alencar analysed certain employee protection mechanisms in criminal compliance programs, presenting his conclusions on the International Association of Criminal Law (AIDP) panel of the Brazilian Group of Young Criminalists, whereby it is already possible to understand some of his ideas.[47]

It is important to note here that the entirety of the above discussion occurs only within the theoretical sphere of company crime, historically addressed in Brazil as part of Economic Criminal Law. Transferring the considerations of such work into the sphere of international and human rights crimes is still a challenge.[48] It is important to note that, in many of the discussions presented, the AIDP's institutional incentive was essential, considering that these are works resulting from meetings of young criminalists.

As discussed earlier, the possibility of liability due to omission in these cases is merely theoretical. In the permitted theories, the foundations of liability due to omission would be related to contractual or legal obligations, or to control over the source of the danger.

4 Corporate Complicity and *Mens Rea*

As presented above, there are no specific elements in the legal guardianship provided by national legislation for the international crimes mentioned in Item 4 of the Questionnaire.

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[45] R de Mello Jorge Silveira and E Saad-Diniz (eds), *Compliance, direito penal e lei anticorrupção* (1st edn, Saraiva 2015).

[46] E Saad-Diniz, 'Fronteras del normativismo: a ejemplo de las funciones de la información en los programmas de criminal compliance' (2013) 108 Revista da Faculdade de Direito (University of São Paulo) 415-41. <http://www.revistas.usp.br/rfdusp/article/view/67992> accessed 21 May 2014.

[47] M de Alencar, 'Os programas de criminal compliance como instrumento de proteção do empregado na responsabilidade penal empresarial' in E Saad-Diniz, F Casas and R de Souza Costa (eds), *Modernas técnicas de investigação e justiça penal colaborativa* (1st edn, LiberArs 2015).

[48] With this specific focus, there is some discussion in E Saad-Diniz and others (eds), *Regulação do abuso no âmbito corporativo* (LiberArs 2015) and E Saad-Diniz (ed), *O lugar da vítima nas ciências criminais* (LiberArs 2017). Especially: JR Sponchiado, NR Pinto, and T Carvalho Gomes da Silva, 'Caminhos para a reparação das vítimas da ditadura militar no Brasil' in E Saad-Diniz (ed), *O lugar da vítima nas ciências criminais* (LiberArs 2017).

Therefore, the discussions in the international criminal courts are almost the only existing standards to be followed by Brazilian law.[49]

In terms of the connection between international crimes for holding owners or members of companies' top hierarchy accountable, a previous plan would not be necessary, but rather only the previous agreement and knowledge of the situation constituting the violation. The plan serves only as proof of the systematic violation. Knowledge of the situation establishes a connection between the factual record and the prior agreement, which does not need to be specific when it comes to perpetration. Rather, the liability can be rooted in the modality of participation. There will only be a restriction in the case of excess, when the accomplice responds only to what he or she was initially aware of.

In this same sense, *mens rea* demands knowledge and intention. The knowledge refers to the knowledge of the occurrence and the elements of violations. The intention, in turn, is associated with the agreement made. If there is a focus on making an agreement that can help promote the violations, and if these are known, then the personal element (*mens rea*) is present. Brazilian law includes direct intention (malice, *dolus*) (either first or second degree), eventual or indirect malice (with or without wilful blindness) and negligence (or imprudence), including the conscious negligence modality. In those cases in which there is some specific intention in terms of the criminal typification (for example, the intention to eliminate a certain group or part of it, in the case of genocide), the element prescribes the special malice required by the crime.

For the same crimes, it is possible to be liable due to participation or even to negligent conduct when it is considered serious.

5 Corporate Complicity and Indirect Perpetration

As previously suggested, the criminal liability of individuals due to indirect perpetration using an organization would be possible at theoretical levels within the molds discussed. For this purpose, perpetuations of violations would depend on the plurality of agents, even if they are not necessarily related to a plan or agreement (it can be on a vertical or horizontal level), if it is inferred that there are responsible parties that have not acted materially, but rather only psychologically (especially due to their orders, but also with psychological support so that others could act materially) to commit these infractions. However, they must have been committed in an organized manner. It is important to point out that there is wide acceptance in Brazilian jurisprudence of the theory of control over the fact through organized power apparatuses/control over the organization, as described by Professor Claus Roxin.[50] For these reasons, it is necessary to complete the subjective element of the crime,

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[49] K Ambos, 'Selected Issues Regarding the "Core Crimes" in the International Criminal Law' (2004) 19 Nouvelles études pénales 219-82. Inserting the topic into the national debate: A de Brito Gueiros Souza and CEA Japiassú, *Criminal Law Course: General Part* (Elsevier 2015) 387-98.

[50] In Brazil, more about the discussion at: L Greco and A Aleite, *Autoria como domínio do fato* (Marcial Pons 2014).

remaining aware of the risks of the conduct and willing to commit the crime and obtain the predicted result.

6 Corporate Complicity and Collective/ Inchoate Offences

Continuing on the topic of the crimes mentioned in Item 4 of the Questionnaire, corporate owners, top-ranking corporate officials and other corporate officials can be held criminally liable as accomplices if it is proven that they provided actual psychological support in the execution of the crimes. In the case of a conspiracy, if there is proof of inducement or instigation, then it is considered to be a position of moral complicity. The position of a 'member of a criminal group' depends on the existence of an organization (with vertical or horizontal task division) that justifies assigning this particular condition. To extend the condition of perpetrators to accomplices, Brazilian jurisprudence has preferred, within the sphere of economic crimes, to use the theory of control over the fact through organized power apparatuses/control over the organization created by Professor Roxin (transferring the control over the organization to the companies).

Considering the fact that the Brazilian Penal Code does not distinguish principals and accomplices to apply sentences, this application of Roxin's theory has been widely criticized in Brazil. Some authors, such as Luis Greco[51] and Humberto Santos,[52] consider this to be a distortion of Roxin's theory. For them, it would be the creation of objective liability due to the position adopted by Brazilian jurisprudence.

Another theoretical discussion is liability for participation as a member of a Joint Criminal Enterprise (JCE). Initially, as proposed, preference was given to Roxin's objective-subjective criterion when assigning responsibility.[53] However, using solely the provisions of the Brazilian CP would also mean that the merely subjective criterion of the Joint Criminal Enterprise (JCE) would be suggested as a possibility, primarily in its two basic modalities. As for its third modality, the mere risk of obtaining a more serious result would not be sufficient under Brazilian law. In addition to creation of the risk, it would also be necessary to have a predictable result, within the mold of Art. 29, §2, of the CP.

With relation to the doctrine of command responsibility, it only applies to the public military sphere.

7 Corporate Complicity and the 'White Collar Crime' Doctrine

As mentioned earlier, in the absence of rulings in practical cases and wider discussions about the topic, the answers provided for the individual criminal liability of economic agents for international crimes are all based on the 'White Collar Crime' Doctrine (Economic Criminal

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[51] Greco and Leite (n 49).

[52] H Souza Santos, 'Autoria mediata por meio de dependência estrutural econômico-profissional no âmbito das organizações empresariais' (2015) 117 Revista Brasileira de Ciências Criminais 91-138 (Revista dos Tribunais Nov- Dec 2015).

[53] Discussing the topic in Brazil: B Martins Amorim Dutra, *A Imputação Penal dos Dirigentes de Estruturas Organizadas de Poder: teoria do domínio da organização* (Dissertation Master's in Criminal Law, State University of Rio de Janeiro 2012) 83-88.

Law in Brazilian terms). Therefore, everything previously presented and described here is inextricably linked.

With respect to the delegation of duties, it is accepted and is justified by the work division and the professional specialization of companies' workers. Within the corporate organization, based on the division of work and strong hierarchical structure that currently exists, especially related to the specialization of the production chain,[54] the decisions made by agents that head companies are not followed by relevant physical acts of the same decision-making agents themselves. On the other hand, the body movement of those making the decisions is also frequently distanced and generally has, or may have, a peripheral significance in the decision-making processes. This is because, due to the division of work in modern production systems and the great distance between the execution of the action and the damage to a legal asset, the agents perpetrating the crimes within the corporate sphere do not realize their own contribution to producing the criminal event, or they believe that they only offer inoffensive contributions.[55] Accordingly, the recipient of the rule of criminal law evidently must be the person who makes the decision regarding the injury to the legal asset, or in the case that the immediate recipient of the rule is a legal entity, the person who controls the process that produces the criminal result.

Due to rank, people who generally occupy top positions are those who plan and order actions. Their orders are then transmitted to the executing individuals by the intermediate directors and are completed by these intermediate directors and the subordinates. Therefore, the decision maker's authority could precisely be the duty of guarantee that would require them to halt crimes by subordinates, exercising the due control to avoid crimes.[56]

From there, holding an agent who occupies a top position accountable will depend on his or her behaviour in the sense of preventing the crimes within the sphere of the organization under his or her authority. Therefore, the specific question for Economic Criminal Law is currently not only the commission of the crime through the action, but also the omission due to the possibility of observing the right and duties related to precautions with the elaboration of the compliance programmes.[57] For those cases of omission, the possible punishments result from the guarantor's position, under the terms of article 13, §2 of the CP.

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[54]This point has been peacefully accepted by the scientific constructions of the Company Law for a long time. In this sense, Rachel Sztajn: 'The advantages of specialization are visible in reduced production costs, whether these are related to goods or resources, or whether associated with work. The specialization process is intrinsic to economic organizations. At publicly-traded companies, the administration is - by law - divided between the Board of Directors and Executive Board, which is prohibited from delegating powers. This division is the same as the process of work, production specialization.' In R Sztajn, *Teoria Jurídica da empresa: atividade empresária e mercados* (Atlas 2004) 156.

[55] G Marques da Silva, *Responsabilidade penal das sociedades e dos seus administradores e representantes* (Editorial Verbo 2009) 329.

[56] K Tiedemann, 'El derecho comparado en el desarrollo del derecho penal económico' in L Arroyo Zapatero and A Nieto Martín (eds), *El Derecho Penal Económico en la era Compliance* (Tirant lo Blanch 2013) 40.

[57] U Sieber, *'Programas de Compliance no Direito Penal Empresarial: um novo conceito para o controle da criminalidade econômica'* in Terra de Oliveira and others (n 40) 302.

Within the sphere of the compliance programmes currently under debate in Brazil, Professor Enrique Bacigalupo goes further, proposing that 'an adequate organization should have a chain of supervision with the duties of action at the lowest level, rights of directing and control at the middle level and organization duties at the highest level,'[58] thereby even stratifying the criminal offenses within the same work division structure. According to Professor Klaus Tiedemann, this measure would be aligned with the absence of control over the fact and the will of the lower-level agents,[59] thereby justifying the stratification of duties within the proposed molds and reducing the chances that the employees at the lowest level in the hierarchy are considered perpetrators of the crimes. This type of division would guarantee that, despite no longer having the duty of surveillance over the employees' actions, the top management would have the duty of organization, and therefore, cannot be considered fully free of responsibility. Nevertheless, even if this criterion is not adopted, the board of directors should still monitor the delegate's activity under penalty of being held criminally liable for *culpa in eligendo*.[60]

As for the collective decisions made, all employees will be held responsible in those cases in which they took part in the decision-making process related to the criminal conduct. If they oppose the wrongful conduct, however, the discussion is a bit more complex.[61]

Under Brazilian law, if the appeal to the LSA (Corporation Law) is used, article 158, which covers the (civil) liability of the administrators, prescribes a limit on the liability in similar cases. In its §1, it states the following:

> § 1 The administrator is not responsible for the illegal acts of other administrators, unless the former is complicit with the latter, if he or she neglects to discover them or if, after learning of said acts, he or she fails to act to impede their practice. The dissident administrator is absolved if he or she states his or her disagreement in an administrative agency's meeting minutes, or if this is not possible, offers immediate acknowledgement[62] in writing to the administrative agency, to the audit committee, if there is one in place, or the general meeting.

This provision can be interpreted in two different ways: (1) one of these being that this is the limit of civil liability, and the criminal liability is equally limited with respect to the *ultima ratio* principle; (2) since the civil liability clauses are different from the strict legality of the criminal law, once the administrator becomes aware of a concrete criminal act, and the law gives him or her the duty to act to halt its practice, classifying the crime within the mold of Art. 13, §2, 'a', of the CP, the criminal liability, due to the issue of systemic coherence, could

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[58] E Bacigalupo, *Compliance y Derecho penal* (Aranzadi 2011) 120 (our translation).

[59] K Tiedemann (n 55) 175.

[60] E Bacigalupo (n 57) 120 (our translation).

[61] For more on the topic, see: MA Abanto Vásquez, 'La responsabilidad penal de las personas jurídicas: ¿Un problema del Derecho Penal?' in JF Caballero Castillo and HF Ruiz Solís (eds), *Cuestiones de Derecho penal, proceso penal y política criminal* (7th National Conference of Criminal Law and Criminology (CONADEPC) 2010) 191 and following; and S Salomão Shecaira, *Responsabilidade penal da pessoa jurídica* (3rd edn, Elsevier 2011).

[62] In practical terms, it means voluntary disclosure.

not be considered equally exempt to the civil liability, because the extensive exemption would only serve for the ample liability (civil), whereas for the strict liability, it would be necessary to have an equally strict exemption (criminal). However, in this case, it could only be the fulfilment of the guarantee duty or its unenforceability (due to impossibility, for example). Despite being rarely discussed in the country, it is generally understood that the first hypothesis (1) would be the applicable one.

There is also the possibility of holding liable subjects who have positions of control over the company, although they do not have management positions, in the case of the absence of minimum surveillance over the board of directors, with the liability determined by the LSA under the terms already widely discussed above.

There is no law in Brazil that holds companies liable for the crimes described in Item 4 of the Questionnaire, whether in the administrative or criminal sphere. The existing body of law solely concerns the civil liability of companies.

8 Corporate Complicity and Defences

Because, in the Brazilian case, there is no specific law for the crimes mentioned in Item 4 of the Questionnaire, the rules of the Rome Statute and the existing jurisprudence in international crime matters prevail. Accordingly, there is *no* provision or discussion in Brazil about the possibility of alleging that the act was legal when it was committed with due obedience, fear over refusing to cooperate, duress, state of need or use of the allegation of absence of command to reduce or eliminate the penalties for said crimes.

The maximum that can be extracted from a reading of the general text of the Criminal Code is that the exclusions of permitted illegal activity and *mens rea* apply here. In this case, what applies is the general rule of the general text of the Code, similarly to that of countless other items.[63] The defences, which are specific to the sentencing model for international crimes, are currently not discussed, because they would be relegated to the specific doctrinal and jurisprudential construction of international criminal law.[64]

9 Suggestions and Conclusion

Brazil urgently needs certain reforms. First, Brazil needs a law that permanently and systematically classifies the crimes under the Rome Statute, adjusting the types and expected sentences to the specific characteristics of the Brazilian legal system. There has been discussion of this need for a long time, but there have been no legislative advances.

It is equally important to implement criminal reform to adopt, in the broadest possible manner (as opposed to the restricted scope of environmental crimes), corporate criminal

[63] About the topic in general lines: de Brito Gueiros Souza, Japiassú (n 48) 214-67.

[64] Associating the issue and revealing the comparison between domestic and international law. To be explored more at another time: de Brito Gueiros Souza, Japiassú (n 48) 313-22.

liability in conditions such as those of the legislation of other countries, such as Spain[65] and Chile,[66] for example.

Before ending this brief report, we would like to add the reflections made by Edwin Black, who stated that 'the greed of corporations and businesspeople can reach unimaginable limits.' Consequently, the worst of all crimes committed in the history of humanity were only possible with the technological support of the data processing supplied by the International Business Machines (IBM) Corporation and its autocratic chairman, Thomas J. Watson. It is further shocking that to date, IBM has not apologized for having organized the Holocaust. After all, according to Watson, 'everything would be allowed' for the sake of the second word in his company's title.[67] Considering everything exposed about the Brazilian military dictatorship and the involvement of economic power in the violations against human rights during that period, we hope Brazilian legislators take this into account in the coming years and develop sufficient regulation with regard to this subject.

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[65] Among others, see: Nieto Martín (n 42) and M Polaino-Orts and M Belén Linares, 'Governanza corporativa y criminal compliance en la legislación española tras la reforma de 2015' in E Saad-Diniz and others (eds), *Tendências em governança corporativa e compliance* (LiberArs 2016).

[66] More about Chilean legislation in: MA Abanto Vásquez, 'La responsabilidad penal de las personas jurídicas: ¿Un problema del Derecho Penal?' in Caballero Castillo, Ruiz Solís (n 60); Bacilagupo (n 57); JP Matus Acuña, 'La certificación de los programas de cumplimiento' in Arroyo Zapatero and Nieto Martín (n 42); and JP Matus Acuña, 'Report on the Bill That Establishes the Legal Liability of Individuals for the Crimes of Money Laundering, Financing of Terrorism and Crimes of Bribery' (2009) 15 Ius Et Praxis 287-306.

[67] E Black, *IBM and the Holocaust* (The Crown Pub Group 2001).