EXECUTIVE SUMMARY

Access to Justice:
Human Rights Abuses Involving Corporations

BRAZIL

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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

Under Brazilian civil and administrative law corporations may be held liable for certain human rights abuses committed on its territory. Corporations may not, however, be held liable under criminal law. Despite the availability of civil and administrative procedures, they have not necessarily been effective in holding corporations legally accountable. Nevertheless, there are many positive developments in Brazilian law. In addition to the inspections carried out by the public authorities, the mechanisms most often used to deal with disputes concerning enterprises and human rights abuses are public civil actions and '*Termo de Ajustamente de conduta*' (*TAC*) agreement. From the range of cases analysed in this country study, public civil action is the remedy that has proven the most effective in countering abuses by business enterprises. The judicial decisions that can be obtained through this form of action may have a remedial impact on all affected groups. Public civil actions, which are of a collective character, are the most appropriate instrument to achieve remedy and reparation for the infringement of collective rights and interests. However, public civil actions as well as individual actions typically involve excessively lengthy legal proceedings in Brazilian courts.

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EXECUTIVE SUMMARY[1]

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Brazil

A Project of the International Commission of Jurists

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1. This summary is based on the original study researched and drafted with the support of staff at Conectas-Human Rights and independent researchers in Brazil. Ana Cristina Valadares and Diego Valadares (at Valadares & Vasconcelos Advogados Associados) prepared this executive summary, which has been reviewed by Ian Seiderman, Anand Sudhakar and Carlos Lopez at the International Commission of Jurists.

Introduction

This report is part of the International Commission of Jurists' project "Access to justice for human rights abuses involving corporations", which identifies and examines trends across jurisdictions among legal and judicial practices regarding the treatment of human rights abuses committed with the participation of enterprises and corporations. The methodology uses national doctrine and legislation about rights and available remedies in cases of human rights abuses involving corporations, and analyses leading cases[2], taking into account the diversity of rights impaired, the effectiveness of the remedies and the obstacles faced in obtaining a remedy. As with other country reports, this report was presented and discussed at a conference in which specialists and civil society discussed its findings and recommendations.

I. Legal Liability for Corporations in National Law

The progressive 1988 Brazilian Constitution contains a comprehensive list of civil, political, economic, social, cultural, environmental and consumer rights that should be observed by private actors. The Constitution gives constitutional status to human rights treaties ratified with the approval of a qualified majority in Parliament. Brazil is a party to most human rights treaties at the global and regional levels, and is subject to the jurisdiction of the Inter-American Court of Human Rights.

The Brazilian legal system encompasses civil, criminal and administrative liability for corporations. The Civil Code establishes the duty to compensate for harm caused to others. As a general rule, liability depends on fault. In certain cases civil liability can be strict/ objective. Criminal responsibility of companies is applicable in respect of environmental offences. However, company administrators can be held accountable for crimes committed through the conduct of corporations. Penalties applicable to individuals include imprisonment, restriction of rights, and fines (the latter two are applicable to corporations). Liability under administrative law could include warnings, revocation of licences and declarations of 'unfitness to bid'.

Falling under the scope of one or more of these categories are liabilities under labour, environmental and consumer laws. Brazil has a Labour Law Code and is party to most International Labour Organization (ILO) multilateral instruments. Breach of labour laws may trigger monetary sanctions. Individuals may incur criminal responsibility for abusing labour rights. Civil liability for environmental damage is mostly objective liability. Environmental damages can also result in

2. For the purpose of this report, cases should be understood as leading due to their repercussion and not their binding nature on other decisions. In the Brazilian legal system, except for very exceptional circumstances, precedents are not binding.

criminal and administrative sanctions. The Consumers Code contains an extensive list of rights and contemplates the possibility of reversing the burden of proof in consumers' civil claims. Consumer rights violations may also result in administrative and criminal responsibility.

The Constitution and the Civil and Criminal Procedures Codes regulate the jurisdiction of Brazilian courts. The Civil Procedure Code defines the scope of jurisdiction to consider acts (i) which originated in Brazil, (ii) were carried out in Brazil or (iii) if the responding company is domiciled in the country. The determination of criminal jurisdiction is, as a general rule, a function of the place where the offences were committed or, if attempted, the place where the last action was concluded. Further to this general rule, jurisdiction can be extended when Brazil has a special interest in judging crimes, *e.g.* genocide, even if perpetrated abroad, when the perpetrator is in Brazil.

II. Available Legal Remedies for Corporate Human Rights Abuse

Public agencies, in particular the Prosecutors' Office and the Public Defenders' Office play a special role in enforcing public interest law. The public prosecutor's office that protects the public interest and fundamental rights has over 12,000 prosecutors at the federal and state levels that can bring lawsuits against companies violating human rights. The Public Defenders' Office represents individuals or groups that cannot afford private lawyers. With over 4,500 public defenders throughout Brazil, it can represent vulnerable victims in cases against corporations.

Several remedies can be used against companies to safeguard and protect human rights. ***Habeas corpus*** protects individuals' right of freedom of movement, and can be issued against companies restricting or threatening to restrict that right. The ***Habeas Data*** protects the right of access to information and correction of data maintained by public entities, often in databases shared with companies. The ***Mandado de Segurança*** *(*similar to *amparo* or *mandamus)* protects rights from violations or threats by public entities or corporations entitled to carry out public activities. The ***Actio popularis*** (*ação popular*) can be filed by any citizen to obtain protection of public property, the environment and historic and cultural heritage, against private entities or individuals causing or benefiting from a wrongful act. **Judicial constitutional control** of laws or other normative acts ensures consistency with the constitution. The **public civil action** (*ação civil pública*) protects various collective interests against public or private actors that violate fundamental rights. Several State organs and civil society organisations have the right to resort to this remedy with *erga omnes* effects. **Civil remedies** redress or compensate any damages or harm suffered, and anyone suffering damages has the right to resort to it. Even in criminal responsibility cases, reparation should be sought before civil courts. **Criminal charges** can be filed by the Prosecutors' Office, or initiated by the victims and, in some cases, by the victim's relatives. For environmental

crimes only the Prosecutors' Office can take a case. Environmental crimes are the only crimes for which the Constitution expressly recognises corporate criminal responsibility.

A number of mechanisms of a certain **quasi-judicial** character have investigative powers and their work leads to exposure and correction of wrongful corporate conduct. **Police Inquests** to gather evidence of criminal acts and their authors and **Civil Inquests** are preparatory steps to future judicial actions. The **Agreement** called *Termo de Ajustamento de Conduta* - **TAC** is a preventative instrument which may also provide for reparations. It is aimed at defending collective rights and rights guaranteed to all. By signing a TAC a person or corporation undertakes to adjust its conduct to the requirements established in law. The Agreement is certified by the Public Prosecutor. A **Parliamentary Inquiry Commission** (*Comissão Parlamentar de Inquérito*) is an investigative organ of the Parliament constituted for internal investigation of acts of the government and facts relevant to the public interest.

Administrative Remedies are also available. Government **Ministries**, such as the Ministry for the Environment and the Ministry for Work and Employment, have regulatory powers and may impose administrative sanctions in cases of corporate abuse of human rights. **Public Consultations** enable individuals or entities to participate in the Administration's decision-making process. **Regulatory Agencies** may decide on disputes in their respective areas of activity and impose administrative sanctions. Administrative sanctions are subject to judicial review.

III. Obstacles to Access to Justice

Leading cases of human rights abuses involving companies include impairments to the enjoyment of health, life, physical integrity and mental health, employment, environment, and consumers' and food safety.

Asbestos case: It is estimated that 3.5 million people have lung diseases caused by exposure to asbestos in Brazil. Federal laws regulate the use of asbestos and some states' laws prohibit its use. Several civil remedy actions have been filed by victims suffering health problems due to asbestos exposure. The Supreme Federal Tribunal declared that states' laws prohibiting asbestos were consistent with the Constitution. In a pending case, a declaration of unconstitutionality of the use of white asbestos has been requested.

Waste incineration case: A company that incinerates waste from hospitals and clinics released smoke and gases that spread over several residential neighbourhoods of Belo Horizonte and affected the environment and health of more than 15,000 people. The Human Rights Commission of the Minas Gerais State's Legislative Assembly held consultations and the affected community resorted to administrative remedies. These actions resulted in the suspension of the company's environmental licence and the imposition of fines. Civil compensation actions

are expected. The lack of compliance with or the judicial suspensions of fines imposed by the administration show the limitations of administrative remedies.

Housing construction in a contaminated area: In 2000, while investigating the causes of an explosion in a housing project, the authorities discovered that it was built on a former waste landfill, which emitted toxic gases. The Prosecutors' Office and two civil society organisations filed a civil lawsuit against the Municipality, the former land-owner company, the water and sewage company, the construction firm for the project and the legal firm responsible for selling and supervising the project construction. The defendants were sentenced to full restoration of the environment and demolition of all the buildings of the project. The defendants were ordered to pay an amount equivalent to the total purchase price plus moral damages.

Tobacco industries case: In Brazil, tobacco producers recruit small farming units, working primarily as family farms. This production system can cause serious social problems, including health risks to farmers and their families due to the intensive use of pesticides, child labour and serious environmental contamination. Several public civil actions have been filed against tobacco industries and TACs concluded regarding labour conditions in these farms. Lawsuits were also filed to claim reparation for health problems caused by the consumption and exposure to tobacco smoke. Divergent judicial decisions, lack of parameters for assessing moral damages and difficulties in holding successors of liquidated companies liable functioned as obstacles to justice.

GMO and food safety case: Since the late 1990's public civil actions have argued that the absence of informative labelling and Environmental Impact Assessments on GMO products would violate consumers' rights. The Prosecutor's Office filed a suit to allow for civil society participation in the Executive's technical commission on GMOs.

GM seeds in Environmental Protection Area (EPA) and violence: A corporation carried out research on corn and soya GM seeds in a property just 6 kilometres from an EPA. The Brazilian Environmental and Renewable Natural Resources Institute (Ibama) imposed a fine that was judicially challenged. When protesters occupied the land, a private security firm working for Sygenta tried to remove them by force. The episode resulted in the death of a protester and injury to a security guard and several others. A criminal lawsuit was filed against the owner of the security firm, employees and some of the protesters, but did not include Sygenta's managers. Complainants argue that the 'corporate veil' doctrine is protecting Sygenta's managers and the parent company from civil liability in this case.

Google and child pornography: In 2006, the Federal Prosecutors' Office, requested a criminal investigation against the board of directors of Google Brazil in connection with the use of a social networking website, Orkut, to have access to child pornography. R$130 million were requested as damages. A Parliamentary

Inquiry Commission on Paedophilia suggested Google managers could be held criminally accountable for not cooperating with investigations. In 2008, Google signed a TAC committing to review all complaints of child pornography, racism and other crimes in the social network. The absence of laws on responsibility of internet service providers and the corporate veil doctrine (Google Brazil and its US parent company) were identified as obstacles to justice.

Abusive child advertisement case: A children's clothing company launched a commercial publicity campaign using a photograph of a 4-year old girl that was seen as having sexualised connotations in violation of children's rights. The State Prosecutors' Office of Santa Catarina State notified the company of a civil inquest into the matter, and the company agreed to sign a TAC in which it committed to end the publicity campaign in question. In this case, the local office of the State Prosecutor was reluctant to take action because the protection of children's rights in relation to advertising was seemingly a new, unexplored field of work.

Slave labour in ethanol distillery: Since 2001 over a thousand workers have been found working in conditions analogous to slavery in an ethanol distillery. Despite several orders to pay the damages and penalties levied against it, the distillery continued to use slavery-like conditions of work. Judicial, civil, criminal, and quasi-judicial mechanisms were used but the distillery refused even to comply with the TACs it signed with the Prosecutors' Office. The distillery's name was included in a "dirty list" kept by the Ministry of Labour. Companies on the list have restricted access to credit and public financing, wrongful conduct is exposed to the public and suppliers and consumers are discouraged from contracting with the company**.** Some of the problems faced in this case include the victims' lack of knowledge of the law, the absence of legal representation due to poverty, slow court proceedings and the economic and political power of the company.

Urban slave labour case: Marisa, one of the largest retailers in Brazil, was found guilty for keeping 18 people, mostly illegal immigrants, in conditions analogous to slave labour. In 2007, Marisa signed a TAC with the Prosecutors' Office, committing to take steps to stop business with retailers using illegal labour, but it continued its practice. A second TAC was signed in 2010. Problems highlighted by this case include the absence of specific laws on labour outsourcing, migrant workers' lack of protection, ignorance of labour rights, and economic dependence.

Body searches in the workplace: Employees of the retailer Marisa and Carrefour Supermarkets were the object of periodic intrusive body searches, in some cases forced to stand nearly naked in front of their colleagues or employers. Employees alleged that body searches violated *inter alia* their rights to privacy and human dignity and were discriminatory. The lack of a clear legal standard related to "body searches", inconsistency among judicial decisions and the employees' fears of retaliation were highlighted as problems in this case.

Guanabara Bay oil spill case: In 2000, 1.3 million gallons of oil leaked into Guanabara Bay from a Petrobras oil refinery pipeline. Remedies used in this case included precautionary measures ordered to prevent further environmental damage with daily fines in case of non-compliance. Lawsuits were filed by the Prosecutors' Office and a fishermen's organisation. The amount of compensation has not yet been determined. One clear problem is the difficulty of quantifying the damage caused to fishermen and determining who should be entitled to the receive compensation, the absence of parameters for compensation of a collective nature, the perceived slowness of courts, and the difficulty in assessing environmental damages.

Basf/Shell case: In 1992, Shell sold a chemical plant located in the Municipality of Paulinia to Cyanamid, which was later acquired by Basf. In this context an environmental assessment determined that the plant's soil and ground water was contaminated. Shell reported this to the authorities and a TAC was signed with the Prosecutors' Office in which it undertook to clean and monitor the ground waters. Years later, heavy metals such as arsenic and titanium were detected in the blood of residents of the neighbourhood due to water pollution. Various individual lawsuits and a public civil action were filed, some of them still ongoing.

How remedies actually work

In relation to **Judicial Remedies**, individual lawsuits and public civil actions were used frequently and in many cases simultaneously. In many individual lawsuits, NGOs assisted the victims. Public civil actions and other collective actions have the advantage of drawing more publicity to the cases, reducing the risks of divergent judicial decisions and balancing corporate power with that of the plaintiffs' collective action. Criminal lawsuits were rarely filed and had limited effect; however, the provisions on corporate criminal responsibility for environmental crimes have arguably functioned as a deterrent. As to **Quasi-judicial Remedies**, the use of TACs was frequent and fairly effective in the face of a generally slow judiciary, and has facilitated compliance with a less punitive approach. However critics point out the lack of adequate mechanisms to monitor compliance with TACs. With regard to **administrative remedies**, infringement notices served and administrative sanctions imposed were important to strengthen litigation strategies. The periodic publication by the Ministry of Labour and Employment of a "dirty list" containing the name of establishments where slavery-like working conditions prevail and a list of the companies with the largest number of consumer and labour actions has proved to be quite effective. Lastly, **political mechanisms** such as participation in sessions of the legislature has attracted visibility to human rights issues.

Specific barriers to accessing justice in cases of human rights abuses involving companies

Common problems in the Brazilian justice system are also relevant in the context of access to justice in cases of corporate abuse. These include costs, the paucity of justice, ignorance of laws and rights, general absence of public interest law firms working with NGOs, the absence of a judicial doctrine of precedent and a general apathy and non-compliance with TACs and judicial decisions.

In addition to these general problems there are specific issues relevant to the kind of cases under study. These include the recurrent difficulty of proving the causal link between the company conduct and the damage caused, the perceived immunity of parent companies from legal liability as a result of the application of the doctrine of separate legal personality, actual or potential retaliation against workers who bring complaints against the company, and the lack of regulation in important areas of economic and political relations where companies exert important influence.

Conclusions and Recommendations

The Brazilian legal system, especially regarding civil and administrative law offers legal instruments to hold corporations liable for human rights–related abuses and provide remedies to the affected persons. However, there is a deficit of effectiveness in the Brazilian system of legal remedies that needs to be addressed.

To expand and/or strengthen available legal remedies, the following recommendations may be considered:

- Strengthening of the Public Defenders Offices to better develop their protection functions;
- Strengthening NGOs engaged in strategic litigation;
- Adopting measures to speed up judicial procedures, especially in cases concerning human rights abuses;
- Strengthening or creating monitoring mechanisms to improve compliance with TACs;
- Expanding the human rights monitoring role of the executive and legislative branches of government;
- Fostering initiatives to prevent abuses and to promote corporate respect for human rights;

- Regulation or clarification of the legal liability of parent companies for acts of subsidiaries, subcontractors or other business partners;
- Further elaboration of criminal law and procedure applicable to corporations.

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