CHAPTER - III
THE PROBLEM OF CORPORATE CRIMINAL LIABILITY IN FOREIGN JURISDICTIONS

In this chapter an attempt is made to analyse the provisions of criminal law as adopted by foreign governments on the subject of corporate crimes. Reference is made to the principles followed by the national legal systems and the impact which these principles have had when the laws were implemented. This chapter also covers the efforts made by the international organizations when they took the step of formulating a law on international crimes and the step of forming an International Criminal Court (ICC). The discussion here covers the salient features of the major legal systems and then it takes note of the actual cases of corporate liability which have arisen in certain foreign countries. The divergence in the fundamental principles of criminal law of the foreign legal systems have been the main obstacle in formulating the principles of liability for corporate crimes.

More than one jurist has expressed the view that the comparative law problem of diverse national positions in relation to both the principle and form of corporate criminal liability has been a live issue in the debates around corporate criminal liability under international the law.¹

I. Law on Criminal Liability of Corporations in Foreign Legal Systems

There is a broad historical divide between common law and civil law jurisdictions on the principle of corporate criminal liability in modern criminal law. This section provides a brief overview of the different traditions in the common law and civil law jurisdictions in relation to the principle, and form, of corporate criminal liability.

(i) The Common Law Traditions:

The major common law jurisdictions (US, UK, Canada and Australia) overcame legislative and judicial reluctance regarding the imposition of criminal liability on corporations

much earlier than civil law jurisdictions, perhaps as a result of their earlier experiences of rapid industrialisation and its attendant effects. In the United States of America (the US) and England, corporate criminal liability first developed in the context of non-feasance by quasi-public bodies that resulted in public nuisances. By the mid 19th century this had been extended to all offences not requiring evidence of criminal intent. The move to crimes requiring proof of a fault element such as intention or recklessness was first recognised in the US and in Britain in 1917. Despite a common heritage, the current models that have developed across common law jurisdictions differ. For example, at the federal level, US courts have largely adopted a vicarious liability approach to attributing criminal liability to corporations for all offences, including those involving intent. Under this doctrine, sometimes described as the agency principle or (in the language of US tort law) the principle of respondeat superior, a corporation is liable for the wrongful acts of any of its employees provided that such an employee commits the crime within the scope of his or her employment and with intent to benefit the company. These last two conditions have been interpreted very broadly. Further, the concept of aggregate or collective knowledge is used so that it is not necessary to prove that an individual employee had the requisite intent. Information that is known in part to multiple actors within the corporation is aggregated and the aggregation of that knowledge can be imputed to the corporation. These very broad conditions of liability are moderated by prosecutorial policies and sentencing guidelines that recognise and reward certain conduct by the offending corporation including co-operation, internal monitoring mechanisms and compliance. Mitigation in sentencing based on factors such as a company’s internal monitoring systems shift the US approach closer to an organisational model, which identifies corporate fault within the control systems embodied in a corporation’s policies and practices, rather than a purely vicarious liability model.

The Law in England on Corporate Manslaughter


3 Ibid., pp. 13-14 For the history of corporate criminal liability in the common law traditions.

4 Wells identifies the King’s Bench decision of Mousell Bros v. London and North Western Railway in 1917 as the first indication in English law that corporate liability might move beyond

5 Ibid., p. 130. This approach is also endorsed in South Africa: ibid., p. 130. For a discussion of US state criminal law: ibid., pp. 131-132.
In England and Wales the prevailing approach for attributing direct criminal liability to corporations for crimes involving a fault element is the identification or alter ego doctrine. Only conduct by persons who control and direct the activities of a company can be attributed to the company, on the basis that they are considered to be the embodiment of the company.

Hence, ‘[t]heir acts and states of mind are the company’s acts and states of mind’. For that reason, only criminal conduct engaged in by persons considered to embody strict liability or nuisance, albeit that the implications of this decision did not eventuate until sometime later:

The most significant UK decision setting out the identification doctrine is the House of Lords decision of Tesco Supermarkets Ltd v. Nattrass\(^6\). In the legislative sector the Act enacted by the British Parliament is Corporate Manslaughter Act on the subject of Corporate Manslaughter.

Corporate manslaughter is a crime in several jurisdictions, including England and Wales and Hong Kong. It enables a corporation to be punished and censured for culpable conduct that leads to a person's death. This extends beyond any compensation that might be awarded in civil litigation or any criminal prosecution of an individual (including an employee or contractor). The Corporate Manslaughter and Corporate Homicide Act 2007 came into effect in the UK on 6 April 2008.

There are six theories of corporate manslaughter:

- Identification doctrine;
- Aggregation doctrine;
- Reactive corporate fault;
- Vicarious liability;
- Management failure model; and
- Corporate \textit{mens rea}.

\textbf{a) Identification doctrine} This approach holds that the offence of corporate manslaughter is made out when an individual commits all the elements of the offence of \textit{manslaughter} and that person is sufficiently senior to be seen as the \textit{controlling mind} of the corporation. Prior to the Corporate Manslaughter and Corporate Homicide Act 2007, this is the how the law applied in

\(^6\) (1972) AC 153
b) **Aggregation doctrine** This approach, known in the U.S. as the collective knowledge doctrine, aggregates all the acts and mental elements of various company employees and finds the offence if all the elements of manslaughter are made out, though not necessarily within a single controlling mind. This approach is used in the U.S. but has been rejected in England and Wales.

c) **Reactive corporate fault** This idea was proposed by Fisse and Braithwaite. They proposed that where an individual had committed the *actus reus* of manslaughter, a court should have the power to order the employing corporation to institute measures to prevent further recurrence and should face criminal prosecution should they fail to do so.

d) **Vicarious liability** The broader principle of vicarious liability (*respondeat superior* in the U.S.) is often invoked to establish corporate manslaughter. In the U.S., where an employee commits a crime within the sphere of his employment and with the intention of benefitting the corporation, his criminality can be imputed to the company. The principle has sometimes been used in England and Wales for strict liability offences concerning regulatory matters but the exact law is unclear.

e) **Management failure model** This is the approach to be taken under the **Corporate Manslaughter and Corporate Homicide Act 2007** which came into force in the UK in April 2008. Where a corporation's activities cause a person's death and the failure was because of a breach that falls far below what can reasonably be expected of the organisation in the circumstances, the offence is made out.

f) **Corporate mens rea** A further approach is to accept the legal fiction of corporate personality and to extend it to the possibility of a corporate mens rea, to be found in corporate practices and policies. This approach has been widely advocated in the U.S., as the corporate ethos standard and introduced in Australia in 1995.

(tII) **The Civil Law Traditions**

The civil law jurisdictions have been more reluctant to recognise the possibility of corporate criminal liability in modern criminal law. This reluctance has been based on a number
of philosophical objections, including the idea that groups cannot act, be morally blameworthy or the proper subjects of criminal punishment.\(^7\) However, despite what was once considered an intractable legal culture against corporate criminal liability, there has been a rapid expansion amongst civil law nations introducing corporate criminal liability schemes since the 1970s.\(^8\) For example, France introduced corporate criminal liability into its new penal code in 1992.\(^9\) According to current judicial understanding, the French corporate criminal liability scheme predicates any finding of the criminal liability of the corporate entity upon the prior finding of individual criminal liability.\(^10\) This has led to suggestions that the French model is already outdated by failing to address the problem of diffusion of individual responsibility in modern corporations.

II. International Perspectives on Corporate Criminal Liability

1. The Asian Financial Crisis of 1997

The Asian financial crisis was a period of financial crisis that gripped much of Asia beginning in July 1997, and raised fears of a worldwide economic meltdown due to financial contagion. The crisis started in Thailand with the financial collapse of the Thai baht after the Thai government was forced to float the baht due to lack of foreign currency to support its fixed exchange rate, cutting its peg to the US$, after exhaustive efforts to support it in the face of a severe financial overextension that was in part real estate driven. At the time, Thailand had acquired a burden of foreign debt that made the country effectively bankrupt even before the collapse of its currency. As the crisis spread, most of Southeast Asia and Japan saw slumping currencies, devalued stock markets and other asset prices, and a precipitous rise in private debt.

\(^7\) T. Weigend, ‘Societas Delinquere non Potest? A German Perspective’, 6 JICJ (2008) pp. 927 et seq. I address these kinds of objections to corporate criminal liability elsewhere:

\(^8\) Comparative works on this topic include: H. de Doelder and K. Tiedemann, eds., Criminal Liability of Corporations (The Hague, Kluwer Law International 1996); A. Eser, G. Heine and

\(^9\) Art. 121-2 Nouveau Code. These provisions came into operation in 1994 and have been extended by amendments introduced in July 2003: Beale and Safwat, supra n. 36, pp. 115-122.

\(^10\) Ibid., pp. 117-120.
Indonesia, South Korea and Thailand were the country’s most affected by the crisis. Hong Kong, Malaysia, Laos and the Philippines were also hurt by the slump. China, Taiwan, Singapore, Brunei and Vietnam were less affected, although all suffered from a loss of demand and confidence throughout the region. Foreign debt-to-GDP ratios rose from 100% to 167% in the four large Association of Southeast Asian Nations (ASEAN) economies in 1993–96, and then shot up beyond 180% during the worst of the crisis. In South Korea, the ratios rose from 13 to 21% and then as high as 40%, while the other northern newly industrialized countries fared much better. Only in Thailand and South Korea did debt service-to-exports ratios rise. Although most of the governments of Asia had seemingly sound fiscal policies, the International Monetary Fund (IMF) stepped in to initiate a $40 billion program to stabilize the currencies of South Korea, Thailand, and Indonesia, economies particularly hard hit by the crisis. The efforts to stem a global economic crisis did little to stabilize the domestic situation in Indonesia, however. After 30 years in power, President Suharto was forced to step down on 21 May 1998 in the wake of widespread rioting that followed sharp price increases caused by a drastic devaluation of the rupiah. The effects of the crisis lingered through 1998. In 1998 the Philippines growth dropped to virtually zero. Only Singapore and Taiwan proved relatively insulated from the shock, but both suffered serious hits in passing, the former more so due to its size and geographical location between Malaysia and Indonesia. By 1999, however, analysts saw signs that the economies of Asia were beginning to recover. After the 1997 Asian Financial Crisis, economies in the region are working toward financial stability on financial supervision.

III. International perspectives on the Emergence of Corporate Governance

1. **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption
instrument focused on the ‘supply side’ of the bribery transaction. The 34 OECD member countries and six non-member countries - Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa - have adopted this Convention.

The reasons behind the development of an Anti-Bribery Convention.

The work on the Convention began in 1989. It primarily aimed to level the playing field for companies active on the international market. Companies originating from a country where bribery of foreign public officials was criminalized felt that they were facing competitive disadvantages for accessing international markets compared to their counterparts from countries where foreign bribery was not criminalized. However, other reasons further supported the efforts of the OECD in this field, including the recognised increase in corruption globally, heightened public awareness of it, the perceived weakening of the major arguments against taking anti-corruption action multilaterally, and a growing sense that unilateral measures could sometimes have limited impact. The effort had as its purpose to organise effective co-operation between the principal actors in the international economy. That cooperation, building a consensus based on shared objectives, would work to promulgate an effective legal instrument containing reciprocal and comparable legal commitments to combat transnational bribery.

Discussions in the ad hoc Working Group, established in 1989 and composed of all OECD Member countries, resulted in the development of the Recommendation on Combating Bribery in International relations.

2. International Convention for the Suppression of the Financing of Terrorism

The Terrorist Financing Convention (formally, the International Convention for the Suppression of the Financing of Terrorism) is a 1999 United Nations treaty designed to criminalise acts of financing terrorist activities. The convention also seeks to promote police and judicial co-operation to prevent, investigate and punish the financing of such acts. As of August 2013, the treaty has been ratified by 185 states; in terms of universality, it is therefore one of the most successful anti-terrorism treaties in history.

Article 2.1The Convention defines the crime of terrorist financing as the offence
committed by "any person" who "by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" an act "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." ¹¹

State parties to this treaty also commit themselves to the freezing and seizure of funds intended to be used for terrorist activities and to share the forfeited funds with all state parties. Moreover, state parties commit themselves not to use bank secrecy as a justification for refusing to co-operate in the suppression of terrorist financing.

The objective of the International Convention for the Suppression of the Financing of Terrorism (the Convention) is to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.

According to the substantive provisions of the Convention, “Any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or with the knowledge that they are to be used, in full or in part, to carry out any of the offences described in the treaties listed in the annex to the Convention, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. Any person also commits such an offence if that person attempts to commit an offence as set forth above or participates as an accomplice in an offence, organizes or directs others to commit an offence or contributes to the commission of such an offence by a group of persons acting with a common purpose. For an act to constitute an offence, it is not necessary that funds were actually used to carry out an offence as described above. The provision or collection of funds in this manner is an offence whether or not the funds are actually used to

¹¹ Article 2.1 of the International Convention on the Suppression of Financing of Terrorism,
carry out the proscribed acts. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.

The Convention requires each Party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences and Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between Parties under existing extradition treaties and under the Convention itself.”

The Convention entered into force on 10 April 2002 (article 26). 12

3. The Council of Europe Criminal Law Convention

The Council of Europe is an international organisation of 46 member states in the European region, founded in 1949. Membership is open to all European states which accept the principle of the rule of law and guarantee fundamental human rights and freedoms to their citizens. The organisation has also granted observer status to five more countries: the Holy See, the United States, Canada, Japan and Mexico.

The Council was set up to:

• defend human rights, parliamentary democracy and the rule of law
• develop continent-wide agreements to standardise member countries' social and legal practices
• promote awareness of a European identity based on shared values and cutting across different cultures.

Special Treaty Event, April 1999.
Since 1989, it has focused on assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform; as well as providing know-how in areas such as human rights, local democracy, education, culture and the environment.

The Council of Europe's Criminal Law Convention applies to members of the Council of Europe as well as other non-signatories.

It obliges Parties to criminalise a wide range of acts of corruption, which it defines as the "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or prospect thereof."

A pioneering aspect of the Convention is that it extends criminal responsibility for bribery to the private sector. This reflects recognition of the need to limit the differences in rules applicable to the private and public, which is especially important given the transfer of public functions to the private sector.

Overall, the Convention is broader in focus than both the OECD Anti-bribery Convention and the Inter-American Convention against Corruption.

It does not limit the context for bribing foreign public officials to international business transactions or -as already mentioned - to the public sector. It is also the only international Conventions to oblige signatories to provide protections in their domestic laws for whistleblowers.

Monitoring of the implementation of the Convention is undertaken by GRECO: the Group of States against Corruption. The aim of GRECO is to improve the capacity of its members to fight corruption by following up compliance with their undertakings in this field. The Convention was adopted by the Council of Ministers on 4th November, 1998

4. Categories of Obligations

The obligations of the parties to the Council of Europe Convention can be divided into five categories:
1. **Criminalisation**: the Convention obligates signatory states to establish as criminal offences active and passive bribery of domestic and foreign officials and members of assemblies, as well as bribery of officials of international organisations. Active and passive bribery of private sector employees must also be made a criminal offence. The Convention further requires states to establish as offences trading in influence, money laundering and accounting offences connected with corruption offences. The Protocol adds to the criminal offences covered, extending the prohibition to active or passive bribery of domestic arbitrators, bribery of foreign arbitrators, and bribery of domestic or foreign jurors.

2. **Money Laundering**: States are required to treat concealment of the proceeds of corruption as a money laundering offence, with certain limited exceptions.

3. **Provisions Regarding Private Sector**: The Convention requires states to establish the liability of companies and to prohibit accounting practices used in order to bribe foreign public officials or to hide such bribery. Thus parties are required to prohibit the establishment of off-the-books accounts and similar practices used to conceal bribery.

4. **International Cooperation**: given that foreign bribery involves actors in different jurisdictions and that international financial channels are often used to carry out or hide international bribery, the Convention prescribes mutual legal assistance between countries and the exchange of information. It also makes extradition easier in relation to offences governed by the Convention and provides for seizure and confiscation of the proceeds of corruption.

5. **Monitoring**: The Convention provides for monitoring by GRECO, the Group of States against Corruption, which was launched by the Council of Europe in 1999 to monitor the compliance with Council of Europe anti-corruption standards established in several instruments. Technical assistance programmes are linked to the review process. See also
IV. Guidelines of the Organization for Economic Cooperation and Development (OECD)

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD. OECD Publishing disseminates widely the results of the Organisation’s statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by corporate governance of state-owned enterprises is a major challenge in many economies. But, until now, there has not been any international benchmark to help governments assess and improve the way they exercise ownership of these enterprises, which often constitute a significant share of the economy. These OECD Guidelines on Corporate Governance of State-Owned Enterprises fill this important gap, and their development has attracted global interest from a variety of different Stakeholders.

The strong support that OECD has enjoyed for this work, and the broad endorsement of the Guidelines themselves, makes me convinced that they will be widely disseminated and actively used in both OECD and non-OECD countries.

The demand for these Guidelines should not come as a surprise to anyone who has
followed policy developments in this field. The shared experience of countries that have started to reform corporate governance of state-owned enterprises is that this is an important but also complex undertaking. A major challenge is to find a balance between the state's responsibility for actively exercising its ownership functions, such as the nomination and election of the board, while at the same time refraining from imposing undue political interference in the management of the company. Another important challenge is to ensure that there is a level-playing field in markets where private sector companies can compete with state-owned enterprises and that governments do not distort competition in the way they use their regulatory or supervisory powers.

Building on practical experience, these Guidelines provide concrete suggestions on how such dilemmas can be solved. For example, they suggest that the state should exercise its ownership functions through a centralised ownership entity, or effectively coordinated entities, which should act independently and in accordance with a publicly disclosed ownership policy. The Guidelines also suggest the strict separation of the state's ownership and regulatory functions. If properly implemented, these and the other recommended reforms would go a long way to ensure that state ownership is exercised in a professional and accountable manner, and that the state plays a positive role in improving corporate governance across all sectors of our economies. The result would be healthier, more competitive and more transparent enterprises.

V. The ICC Statute and The Problem of Criminal Liability

The comparative law problem of diverse national positions in relation to both the principle and form of corporate criminal liability has been a live issue in the debates around corporate criminal liability under international law.1 In some states, for example, the principle of societas delinquere non potest (a corporation cannot commit a criminal offence) still prevails. In those states that do recognise the concept of corporate criminal liability, approaches to its implementation can vary significantly. In relation to the proposal to include legal persons in the jurisdiction of the International Criminal Court (the ICC), it was argued that different approaches to corporate criminal liability across states would pose a problem in light of the ICC’s
complementarity scheme. The concern was that those States Parties that do not provide for corporate criminal liability within their domestic laws might be viewed as unable or unwilling to prosecute corporate defendants in the context of ICC admissibility determinations, or as non-existent, if corporations were included within the jurisdiction of the ICC. Some delegations held the view that ‘providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground’ to the ‘deep divergence of views’ held by states on the advisability of

Providing for the criminal responsibility of corporations in the Rome Statute of the International Criminal Court (the ICC Statute).

The General Principles of Criminal Law as incorporated in the Rome Statute are the following:-

(a) **Nullum Crimen Sine Lege**

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.\(^{13}\)

(b) **Nullum Poena Sine Lege**

A person convicted by the Court may be punished only in accordance with this Statute.\(^{14}\)

(c) **Non-Retroactivity Ratione Personae**

\(^{13}\) Article 22 of the Rome Statute.

\(^{14}\) Article 23 of the Rome Statute.
1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.\(^\text{15}\)

(d) Individual Criminal Responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      (I) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime

---

\(^{15}\) Article 24 of the Rome Statute.
within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.  

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

(e) Exclusion of Jurisdiction over persons under eighteen years of age

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.  

(f) Irrelevance of official capacity

1. Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from

16 Article 25 of the Rome Statute.
17 Article 26 of the Rome Statute.
exercising its jurisdiction over such a person.\textsuperscript{18}

(g) Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

   (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

   (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

   (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

   (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

\textsuperscript{18} Article 27 of the Rome Statute.
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.\textsuperscript{19}

(h) Non-Applicability of the Statutes of Limitation

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.\textsuperscript{20}

(i) Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

   (a) In relation to conduct, that person means to engage in the conduct;
   
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.\textsuperscript{21}

(j) Grounds for Excluding Criminal Responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

   (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his

\begin{center}
\textsuperscript{19} Article 28 of the Rome Statute.
\textsuperscript{20} Article 29 of the Rome Statute.
\textsuperscript{21} Article 30 of the Rome Statute.
\end{center}
or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

   (i) Made by other persons; or
   (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence. 22

22
1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.23

(k) Superior Orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.

For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful. 24