
Failure to Act in Times of Pandemic: Is There a Role for the International Criminal Law Doctrine of Superior Responsibility?

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Abstract

This article explores the responsibility of military or civilian superiors in international criminal law for their failure to act in relation to a potentially lethal virus epidemic or pandemic. In this direction, two different angles of the issue are discussed. The first focuses on the responsibility of individuals in positions of power for their failure to prevent the spread of the virus or provide adequate health support to an epidemic or pandemic affected population, when this population is used as a target group for the commission of crimes against humanity, war crimes or even genocide. The second refers to the responsibility of these superiors for their failure to prevent their subordinates to use such an epidemic or pandemic as a mean to commit crimes against humanity or war crimes. It is argued that, in order for superior responsibility to be attributed in these circumstances, a careful consideration on the theory of omission and the nature of superior responsibility is required.

Key words:

International criminal law, civilian and military superiors, commission by omission, deliberate failure to exercise control, due diligence

I. Introduction

This paper considers the international criminal law issues epidemics and pandemics raise with reference to the responsibility of specific individuals for the commission of international crimes.¹ The discussion on how pandemics/epidemics are linked to international criminal responsibility has been prompted by the current Covid-19 situation, but it can relate to similar scenarios of other lethal viruses' propagation in various parts of the world.² In order to explain the focus of the paper, it is useful to clarify first how an epidemic or a pandemic is linked to international criminality. By their construction, international crimes cover a limited number of human rights violations. These limitations are two-fold: in terms of their elements, international crimes have a specific *actus reus* and a specific *mens rea*.³ In

¹ The international criminal law analysis of this paper focuses primarily on the Statute and case law of the International Criminal Court, which is currently the only permanent international criminal tribunal, with potential universal jurisdiction - subject to state membership.

² Since 2016, Yemen is facing the world's largest cholera epidemic, with more than 1 million cases so far, a situation that has created a humanitarian crisis in this war-torn country. The 2014–2016 Ebola epidemic in West Africa was, according to the WHO 'the largest and most complex Ebola outbreak since the virus was first discovered in 1976'. In 2009, a H1N1 outbreak in North America led to a pandemic, while, by 2010, most countries in the world had confirmed infections. See, WHO, 'Yemen: WHO continues efforts in the fight against cholera', 27 February 2020, <http://www.emro.who.int/yem/yemen-news/who-continues-efforts-in-the-fight-against-cholera.html>; WHO, 'Ebola virus disease', https://www.who.int/health-topics/ebola/#tab=tab_1; WHO, 'What is the pandemic (H1N1) 2009 virus?', 24 February 2010, https://www.who.int/csr/disease/swineflu/frequently_asked_questions/about_disease/en/, accessed 7 May 2020.

³ See Articles 6-8 of the Rome Statute of the International Criminal Court (ICC Statute) for the *actus reus* of the international crimes of genocide, crimes against humanity and war crimes; and Article 30 for the *mens rea* of international crimes, which as a general rule is intent of the first or second degree-excluding *dolus eventualis*/recklessness and negligence.

terms of their scope, international crimes require specific “conditions”: genocidal acts need to be conducted under the specific genocidal intent;⁴ crimes against humanity have to be committed as part of a widespread or systematic attack directed against any civilian population;⁵ and war crimes require a belligerent nexus, i.e. to be closely related to the hostilities of an international or non-international armed conflict.⁶

As a result, many of the potential human rights implications of a lethal virus’ spread will not reach the level of international crimes. In terms of the current Covid-19 pandemic, a number of governments have been accused of policy failures leading to mass unnecessary deaths, posing the question of whether their leaders can be accused for the commission of crimes against humanity.⁷ Leaving aside the *mens rea* requirements of international crimes - and even in the rare scenario that a government has intentionally allowed the spread of Covid-19 in the country -, it is this author’s view that these deaths cannot form the basis of a crime against humanity. This is because there is a lack of a widespread or systematic attack against civilians, with knowledge of this attack: inadequate measures against the spread of Covid-19 in a country (even if the inadequacy is intentional) cannot be considered as a purposeful attack of the state mechanism against the whole population of this country. The relatively high standard of widespread or systematic attack distinguishes *crimes* against humanity from human rights violations, and its fulfilment requires attack against a specific civilian group -instead of the whole civilian population of a country in general -, without this creating a “discriminatory ground” requirement⁸ for crimes against humanity in international law.⁹

Exploring further the notion of attack, another possibility arises, even though it is not a Covid-19 feature: the scenario of a state unleashing a deadly virus against the population of another state as an act of aggression.¹⁰ Aggression is considered an international crime under the ICC Statute, which however is very strictly construed: “act of aggression” means the use of *armed* force by a State and, in particular, the invasion or attack by the armed forces of a State of the territory of another State.¹¹ Even though an interpretative expansion of the ‘armed forces’ definition in order to include biological weapons may be possible, it exceeds the scope of this paper. By applying, hence, strictly, the elements of the crime of

⁴ Article 6 of the ICC Statute: “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

⁵ Article 7 of the ICC Statute.

⁶ *Prosecutor v Kunarac et al.* (Trial Chamber Judgment), ICTY, IT-96-23 & 23/1, 22 February 2001, para. 402.

⁷ See, for example, Carli Pierson, ‘Trump Could Face International Human Rights Law Consequences for his Coronavirus Pandemic Response’, *The Independent*, 10 April 2020; Brazilian Association of Jurists for Democracy, ‘Bolsonaro Denounced for Crimes against Humanity before the International Criminal Court’, 3 April 2020, <https://peoplesdispatch.org/2020/04/03/bolsonaro-denounced-for-crimes-against-humanity-before-the-international-criminal-court/>; Isabelle Khurshudyan, ‘Coronavirus Spreads Rapidly in Belarus as Leader Denies Pandemic Exists’, *The Independent*, 2 May 2020.

⁸ With the exception of persecution as a crime against humanity, see *Prosecutor v Kupreškić et al* (Trial Chamber Judgment), ICTY, IT-95-16, 14 January 2000, para. 606.

⁹ A more extended discussion on the nature of crimes against humanity and of international crimes in general, however, is out of the scope of this paper and is not fit for the purposes of this collective publication.

¹⁰ Dan Kaszeta, ‘No, the coronavirus is not a biological weapon: There are many reasons to be skeptical of conspiracy theories about the origins of the disease’, *The Washington Post*, 27 April 2020.

¹¹ See, Article 8bis (2)(a) of the ICC Statute, as well as the remaining sub-paragraphs (b)-(g), all of which refer to ‘traditional’ modes of warfare, requiring the use of armed forces.

aggression, a leader of a country cannot be found criminally responsible in international law.

For these reasons, the analysis of this paper focuses on scenarios of a state's or an armed group's deliberate failure to provide adequate health care to a specific population, either as part of a(n) (state) ethnic cleansing campaign, or in order to gain military advantage in the armed conflict by targeting civilians. These scenarios fulfill the elements and conditions of the international crimes of genocide, crimes against humanity, and war crimes, as previously presented. More specifically, the paper explores the potential responsibility of superiors - state leaders and military commanders - for the commission of these international crimes by taking advantage of an outbreak of an epidemic or pandemic. Such incidents are already taking place when epidemics strike, and this is a reality international criminal law needs to seriously take into consideration. In the ongoing hostilities in the Democratic Republic of the Congo, armed groups have refused access of humanitarian and medical personnel and their supplies to specific populations amidst the Ebola epidemic. The extent of these incidents and their links to crimes against humanity and war crimes led to the adoption of UN Resolution 2439 (2018), where the Security Council warns of the illegality of such practices and requests the responsible parties to cease this practice.¹² Since the beginning of the war in Yemen, the parties to the conflict have been attacking humanitarian and medical personnel fighting against the cholera outbreak. They have also banned medical supplies and denied the affected population access to treatment.¹³ In any case, targeting a civilian population by preventing their access to medical help is a common war tactic, and a violation of international humanitarian law.¹⁴

Discussing the responsibility of superiors in these circumstances, the article establishes a distinction between responsibility of a superior as a participant to the international crime and as a perpetrator of a separate crime of dereliction of duty. Identifying a clear theoretical framework for this distinction is important, as a superior who is considered a wilful participant to an international crime will, naturally, be more severely punished than a superior who is a perpetrator to a dereliction of duty crime due to their negligent failure to supervise their subordinates adequately. In this direction, it has to be noted that a well-justified application of the rules of individual criminal responsibility is even more important when it comes to international criminal law. International crimes are usually the product of collective criminality, where there are individuals in hierarchical positions who are remote from the crime scene but are, nevertheless, responsible for ordering or allowing their commission. Having in place an international criminal law theory to link these individuals to the international crimes is of utmost importance for international justice.

II. Direct and Indirect Superior Responsibility in International Criminal Law

In international criminal law, an individual, who has a position of authority can be responsible for the commission of an international crime, as a superior and/or together with the physical perpetrator(s). In this sense, the superior is a perpetrator when they have

¹² UN Security Council, Security Council resolution 2439 (2018), UN Doc. S/RES/2439 (2018), 30 October 2018.

¹³ See Human Rights Watch, 'World Report 2019: Yemen', <https://www.hrw.org/world-report/2019/country-chapters/yemen>, accessed 30 April 2020,.

¹⁴ In the war in Syria, for example, deliberate deprivation of medical aid to the 'opponent' civilian population has been a widespread tactic by both parties to the conflict. See Jonathan Whittall, 'My enemy's doctor is my enemy', *The Huffington Post*, 10 April 2013.

control over the criminal outcome, as any other individual, or, due to their position, when they have control over the will and acts of their subordinates.¹⁵ In the latter case, the concepts of ordering, soliciting or inducing the commission of an international crime are also relevant.¹⁶ This type of superior responsibility is called 'direct superior responsibility' because the superior becomes responsible for their participation in the crime through their own deliberate acts or omissions.

When it comes to omissions, it has to be noted that criminal law recognises the commission of international crimes not only through actions, but also through omissions. Law is a normative pursuit and, thus, its rules are not limited to a mere description of physical acts.¹⁷ Criminal responsibility is attached to the individual for his or her conscious contribution to the crime committed. This means that, in certain circumstances, a lack of action in the sense of omission can contribute to the criminal outcome in the same way as an act of commission.¹⁸ Such an omission assimilates to an 'active' contribution to the crime, which leads to what the common law jurisdictions refer to as 'commission by omission'¹⁹ and the continental law jurisdictions as 'perpetration through an inauthentic omission'.²⁰

Nevertheless, the omissions of a superior can also entail criminal responsibility for them under a different concept: "indirect" superior responsibility²¹ or the "superior responsibility doctrine" as it is commonly called.²² In the case of indirect superior responsibility, responsibility attaches to the superior, not for their own omissions leading to the criminal outcome, but for their failure to prevent the acts of their subordinates who eventually committed the crime. In other words, the superior responsibility doctrine refers to the responsibility of the superiors - regardless of whether they are military commanders or civilian leaders - for their failure to effectively control their subordinates and take reasonable and adequate steps to prevent the commission of the crime, or to punish them after the crime has been committed.

This latter type of superior responsibility - failure to prevent or punish - has led to significant uncertainty in international criminal law regarding the attribution of criminal responsibility to the superior.²³ This is because the duty of the superior to supervise their subordinates,

¹⁵ See Article 25(3)(a) of the ICC Statute; *Prosecutor v Jean-Pierre Bemba Gombo* (Pre-Trial Chamber II), 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', ICC-01/05-01/08-424, 15 June 2009, para. 347; *Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber I), 'Decision on the Confirmation of Charges', ICC-01/04-01/06, 29 January 2007, paras. 326-341; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber I), 'Decision on the Confirmation of Charges', ICC-01/04-01/07, 30 September 2008, paras. 480-86.

¹⁶ See Article 25(3)(b) of the ICC Statute.

¹⁷ Kai Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* (Oxford: Oxford University Press, 2013), 180-81.

¹⁸ See, George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), 51.

¹⁹ Regarding English law see, for example, *R v Stone & Dobinson* (1977) QB 354; *R v Gibbins & Proctor* (1918) 13 Cr App Rep 134, where it has been discussed how crimes of active conduct can be committed by omission.

²⁰ In German criminal law, for example, this is the concept of "*unechtes Unterlassung*" established in section 13 of the German Penal Code (Strafgesetzbuch, StGB).

²¹ See, Commentary of the International Law Commission on Art. 6 of the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/L.532 (1996), para. 1.

²² See Article 28 of the ICC Statute.

²³ Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What exactly is the superior held responsible?' (2007) 5(3) *Journal of International Criminal Justice* 665; Otto Triffterer, 'Command responsibility – crime sui generis or participation "as otherwise provided" in Art. 28 Rome Statute' in Jörg

which would have enabled them to prevent their crimes in the first place, can give rise to a different type of responsibility as well: that of commission of a separate crime of dereliction of duty.²⁴ Indeed, in criminal law, there are certain crimes that can be committed only through an omission: there are situations, where an individual by omitting to act allows for a certain outcome to take place, a behaviour which the law feels should be punishable. One such example -which is criminalised by several, but not all jurisdictions- is when an individual fails to save someone who finds themselves in danger, when the act of saving can be done without the individual risking their own life.²⁵ In these type of crimes, the perpetrator is responsible not for the outcome but solely for their inaction, which allowed the outcome to happen. Thus, these crimes have been characterised as “authentic omission” crimes,²⁶ where the individual becomes the perpetrator of a special crime of dereliction of duty - a duty that has been created by each particular authentic omission crime.

After explaining this distinction, the next section analyses the responsibility of military commanders and civilian leaders, based on Article 28 of the ICC Statute, in order to apply the suggested theoretical framework to Covid-19 related scenarios in the last section.

III. Analysing the Responsibility of the Superior in Article 28 of the ICC Statute

In contrast to the *ad hoc* criminal tribunals, which approached the notion of superior in a unified approach, Article 28 of the ICC Statute distinguishes between the responsibility of military commanders (subparagraph(a)) and the responsibility of civilian superiors (subparagraph (b)). The main difference is that military commanders can be found responsible, not only for the intentional failure to prevent the crimes of their subordinates or to punish them, but also for their negligent failure (should have known standard). On the contrary, a civilian superior can be found responsible only when their failure has been intentional, or they were wilfully blind to the crimes of their subordinates (must have known standard).

Based on the analysis of the previous section on the types of omissions in criminal law, it is suggested that the different levels of *mens rea* of the superior regarding their control over the crimes of their subordinates can lead to different types of superior responsibility. When a superior, either a military commander or a civilian leader, knows that their subordinates are about to commit a crime and they purposefully refrain from intervening, then this omission is, in fact, an act in disguise, in other words an inauthentic omission, leading to commission (of the crime) by omission. Therefore, the intentional omission of the superior to prevent the crime of others constitutes participation in the crime, under the same principles governing perpetration and/or ordering. It is proposed that this type of superior responsibility can be interpreted as covering the situation where an individual

Arnold and others (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag* (München: C.H. Beck, 2005); Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press, 2010); Kai Ambos, ‘Superior Responsibility’, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002); Maria L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (T.M.C. Asser Press, 2010).

²⁴ See, for example, Ambos, *Treatise on International Criminal Law*, (n. 17) 231.

²⁵ See, for example Art. 223 of the French Criminal Code; Section 323(c) German Strafgesetzbuch.

²⁶ Kai Ambos, ‘Omissions’, in Ambos et al. (eds) *Core Concepts in Criminal Law and Criminal Justice, Volume 1: Anglo-German Dialogues* (Cambridge: Cambridge University Press 2020), 20-21.

capable of exercising control over others, intentionally fails to do so.²⁷ Under the proposed framework, the notion of control is crucial because it provides the causal link between the inauthentic omission of the superior and the criminal outcome by the acts of the subordinates. Such a causal link is required to establish principal participation in the crime.²⁸ The individual who has effective control over others and consciously allows them (or fails to take reasonable steps to prevent) to commit a crime is, without a doubt, linked to the criminal outcome as much as the physical perpetrator is.²⁹

In the case of military commanders, however, Article 28(a) of the ICC Statute renders them responsible for negligence as well. In this case, there is no doctrinal basis for commission by omission, as explained in the previous section. A superior should not be responsible for the crime of others if he/she was not aware of them, even if he/she neglected in his/her duty to supervise them properly. Arguing otherwise would create a type of vicarious liability, where the individual lacks the appropriate *mens rea* for the commission of the crime. Such a liability contrasts, nevertheless, with the criminal law principle of personal culpability, which 'lies at the heart of the criminal law paradigm'.³⁰ As in national criminal law,³¹ an individual should be found responsible only for their specific share to the commission of an international crime.³²

It is proposed, in the latter case, that the military commander should be responsible for a separate dereliction of duty crime, for neglecting to properly supervise his or her subordinates. This due diligence duty emanates from the superior-subordinate relationship, as the outcome of the superior's effective control over their subordinates.³³ The same conclusion can be drawn regarding the responsibility of both military commanders and civilian leaders when it comes to their failure to punish their subordinates after the crime commission. As the superior cannot be a perpetrator to a crime that has already been committed, their omission to punish their subordinates can only be punishable as a separate crime of dereliction of their relevant superior duties.

The dualistic interpretation of Article 28 of the ICC Statute proposed in this article has a clear advantage in the context of the attribution of responsibility in international criminal law. It incorporates the superior responsibility doctrine in the general theoretical framework

²⁷ See also, Meloni (n. 23), 197-98. However, she limits the responsibility of the superior in such a case to accomplice liability and excludes principal liability, 198.

²⁸ *Prosecutor v Germain Katanga* (Trial Chamber II), 'Judgment pursuant to article 74 of the Statute', ICC-01/04-01/07, 7 March 2014, para. 767.

²⁹ In the same direction, Triffterer argues that '[i]ntentionally omitting an act presupposes that the person has the factual possibility and is aware that he can step out of his or her passivity and become active in a way demanded by the situation as the case may be'. See, Triffterer (n. 23), 911.

³⁰ Allison Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93(1) *California Law Review* 75, 134.

³¹ See Andrew Ashworth and Jeremy Horder, *Principles of criminal law* (Oxford: Oxford University Press, 2013) 182.

³² According to the Appeals Chamber in *Tadic*, '[t]he basic assumption must be that in international law as much as in national systems the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated (*nulla poena sine culpa*)', *Prosecutor v Dusko Tadic* (Appeal Judgment) ICTY, IT-94-1-A, 15 July 1995, para. 186.

³³ Under this perception, the English courts, for example, have recognised control as a 'pro-duty factor': which establishes a specific relationship between two parties and, thus, certain duties of the one towards the other. See *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, paras. 38, 48.

on the modes of responsibility. Attributing responsibility to the superior in relation to subordinates' crimes is not, anymore, a peculiar, *sui generis* doctrine of individual criminal responsibility, constituting an exception to the modes of participation in international criminal law.³⁴ Instead, it follows the basic criminal law rule of personal culpability, according to which, an individual becomes criminally responsible when their own acts and minds are sufficiently linked to the criminal outcome.³⁵

IV. How does superior responsibility relate to pandemic-affected international crimes?

As explained in the introduction, the spread of a virus such as Covid-19 and the consequent outbreak of an epidemic or a pandemic can be used as a tool or provide the context for the commission of international crimes. In such a case, international criminal law can attribute responsibility to military commanders or superior leaders, either for crimes committed via their own omissions or for failure to prevent the crimes of their subordinates.

Based on the doctrinal analysis of omission and superior responsibility in the previous sections, the following scenario may occur. In the middle of a state campaign to eliminate a specific minority group within a certain geographical area, the civilian leader of the state deliberately omits to prevent the spread of a deadly virus among this population or deliberately omits to adopt the required health measures in order to fight the pandemic or epidemic. Such a deliberate omission is considered as an act in disguise, an inauthentic omission, according to the analysis provided in the first section. Thus, the superior can be responsible for the commission of a crime against humanity by omission, i.e. extermination by deprivation of access to medicine, calculated to bring about the destruction of part of a population³⁶ and/or persecution by intentional and severe deprivation of fundamental rights,³⁷ as is the right to health.³⁸ This is the case of direct superior responsibility,³⁹ as the superior is in a position to effectively control the state apparatus and deliberately refrains from ordering the state services to introduce the appropriate measures against the virus. If this state campaign has also a genocidal intent against a specific population – the intent to destroy a group as such⁴⁰ - then the superior can be found responsible for the commission of genocide, in addition to crimes against humanity and/or war crimes, depending on the facts.

This scenario can be linked to the Rohingya crisis in Myanmar, where the Rohingya population is facing a widespread/systematic attack by the Myanmar security forces.⁴¹ In this direction, the state deliberately refrains from providing health care to the Rohingya and/or prevents their access to it.⁴² Under the current Covid-19 pandemic, this would mean

³⁴ Otto Triffterer and Roberta Arnold, 'Article 28: Responsibility of commanders and other superiors', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd ed. Beck-Hart-Nomos, 2016), 1060.

³⁵ *Prosecutor v Tadić* (Appeal Judgment), (n. 32), para. 186.

³⁶ See Articles 7(1)(b) and 7(2)(b) of the ICC Statute.

³⁷ See Articles 7(1)(h) and 7(2)(g) of the ICC Statute.

³⁸ See Article 12 of the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 16 December 1966.

³⁹ See Article 25(3)(a) of the ICC Statute.

⁴⁰ See Article 6 of the ICC Statute.

⁴¹ Global Conflict Tracker, 'Rohingya Crisis in Myanmar', 10 June 2020, <https://www.cfr.org/global-conflict-tracker/conflict/rohingya-crisis-myanmar>.

⁴² Human Rights Watch, 'Rohingya Crisis', <https://www.hrw.org/tag/rohingya-crisis>, accessed 2 June 2020.

that the Rohingya community is left unprotected against the spread of the disease.⁴³ In case of a Covid-19 death toll in the Rohingya area, the deliberate omissions of the state leaders could render them responsible as perpetrators of crimes against humanity: extermination by deprivation of access to medicine, calculated to bring about the Rohingya population destruction; and/or persecution of this group by intentional and severe deprivation of their right to health. It has to be also noted that there are allegations of the Rohingya persecution having reached the level of genocide.⁴⁴ If the genocidal intent of destroying, in whole or in part, a national, ethnical, racial or religious group, as such, is proved, then the omissions of the state leaders regarding the protection of the Rohingya against Covid-19 can be considered as 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.⁴⁵ If this is the case, then the leaders can be responsible for the commission of genocide by omission.

A similar scenario can apply regarding detention centres and forced labour camps in oppressive states. In Eritrea, for example, it is estimated that there exist more than 200 detention facilities for political prisoners arbitrarily detained by the state. The sanitary provisions and medical aid to prisoners are almost non-existent, while torturing and killing of prisoners is a common practice. In these conditions, it can be argued that the state seeks to exterminate or, in any case, persecute these detainees in a systematic way. Due to the current spread of Covid-19 around the world, NGOs warn that the refusal of the government to provide adequate health care renders the detainees defenceless against the pandemic.⁴⁶ If there is indeed a spread of Covid-19 in these detention centres, then the deliberate omissions of the state leaders to provide medical aid to the infected can be characterised as extermination by deprivation of access to medicine or persecution via deprivation of their right to health. Based on the theoretical framework developed in the previous section of this paper, these leaders can be responsible as perpetrators of inauthentic omission crimes against humanity.

The situation described in the previous scenarios is rather straightforward, as long as the (inauthentic) omissions of the superior are sufficiently linked to the criminal outcome and can be, thus, treated as acts. The issues arise when we turn to analyse a similar scenario under the umbrella of indirect superior responsibility (Article 28 of the ICC statute). Consider the following scenario: in a war-torn country, a belligerent group is in control of a particular area, which includes villages with a "hostile" civilian population. The epidemic/pandemic that is already present in the country reaches these villages. The soldiers of the belligerent group use the presence of the virus to their advantage and prevent the affected population from seeking health care and/or do not allow NGOs access to the village in order to provide it. As a result, the majority of the civilian population dies. Willful killing of civilians and impediment of humanitarian relief to civilians in need are

⁴³ See also Leah Carter, 'Myanmar: Armed Conflict Puts Brakes on COVID-19 Response', discussing how the armed conflict in Myanmar leaves the persecuted ethnic minorities unprotected against the coronavirus pandemic, Deutsche Welle, 7 May 2020.

⁴⁴ UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/64, 12 September 2018.

⁴⁵ Article 6(c) of the ICC Statute.

⁴⁶ Amnesty international 'Eritrea: Detainees in Overcrowded and Unsanitary Conditions Defenceless against COVID-19', 21 May 2020, <https://www.amnesty.org/en/latest/news/2020/05/eritrea-detainees-in-overcrowded-and-unsanitary-conditions-defenceless-against-covid19/>.

considered grave breaches of the Geneva Conventions and the customary humanitarian law resulting in the commission of war crimes.⁴⁷

This scenario can materialise in Yemen where there is a long-standing conflict between the state forces and belligerent groups. Humanitarian organisations in the country report that the armed groups involved in the hostilities continue to target health care facilities and block access to humanitarian aid, despite the pleas of the international community to protect civilians from Covid-19 infection and prevent the spread of the virus in the region.⁴⁸ In this direction, the UN Secretary-General António Guterres issued an appeal for a global ceasefire so that populations most vulnerable to the spread of Covid-19 can have access to humanitarian aid.⁴⁹

Following the analysis of Article 28 in section III above, it is apparent that in case there is spread of Covid-19 in Yemen, the armed groups' superiors can be found liable under two different sets of circumstances. This depends on the *mens rea* of the individual who exercises effective control over the physical perpetrators. If the military commander is aware or wilfully blind of the acts of their subordinates leading to the commission of war crimes and they deliberately refrain from stopping them, then their omission is in any case a disguised act, an inauthentic omission. Indeed, if the military commander decided to intervene and stop the subordinates under their control, then the crime would not have been committed. Therefore, in case of their inaction, the military commander should be found responsible- alongside with their soldiers- for commission of war crimes, as a perpetrator who is in control of the criminal outcome.

However, if the military commander does not know about the acts of their subordinates, because they have been negligent in their duty to supervise them properly, they cannot be considered as participants to the war crime, due to the lack of intent towards the crime. In this case, Article 28 (a) establishes a new crime, that of dereliction of duty, which the military commander can be found responsible for. As the military commander is not responsible for an international crime his/her sentence should be considerably shorter than that of his/her soldiers who committed the war crime. Finally, responsibility for the dereliction of duty crime of Article 28 is attached to the military commander if he/she also omits to punish their subordinates after he/she finds out that they have committed the war crime. This is because a responsible commander has also a duty to punish his/her soldiers when they violate the laws of war⁵⁰ and Article 28 incorporates this duty in the ICC Statute.

The advantage of this approach cannot be ignored. Establishing the commission of international crimes amidst a humanitarian crisis is complex enough as it is, but it presents even more difficulties when it is escalated by the chaos an epidemic outbreak can create in volatile conditions. Having a solid theory to rely upon when it comes to the contribution of superiors in the crime commission is an undeniable asset for their successful prosecution under international criminal law and their final conviction.

⁴⁷ See Article 8(2)(a), (b)(xxv), (c)(i), (e)(iii) of the ICC Statute, depending on whether there is an international or non-international armed conflict.

⁴⁸ Afrah Nasser, 'COVID-19 in Yemen – A Perfect Storm', Human Rights Watch, 14 April 2020, <https://www.hrw.org/news/2020/04/14/covid-19-yemen-perfect-storm>.

⁴⁹ UN News, 'COVID-19: UN Chief Calls for Global Ceasefire to Focus on "the true fight of our lives"', 23 March 2020, <https://news.un.org/en/story/2020/03/1059972>.

⁵⁰ See, for example, Art 86 and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

V. Conclusion

This article has explored international criminal law's contribution to the global response against an epidemic or a pandemic, when a virus outbreak is used for or aids the commission of international crimes. In these circumstances, the omissions of the superiors - military commanders and civilian leaders - to prevent the spread of the virus or their failure to control their subordinates can render them responsible in international criminal law. The superior's ability to exercise effective control over the criminal outcome and/or over the physical perpetrators can establish their responsibility either for commission of an international crime by omission or for a separate crime of dereliction of duty, depending on the superior's *mens rea* for the underlying international crime.