

Humoud Y. Al-Fadhli

Prosecuting Superior Responsibility in International Criminal Law

From Tokyo and Nuremberg to The Hague
and Beyond



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Foreword

In International Humanitarian Law and International Criminal Law, superiors are not just culpable for the acts they order, they are also liable for the foreseeable atrocities that their subordinates commit. The doctrine of superior responsibility—an enduring and enigmatic feature of international criminal law—has perplexed scholars, jurists, and practitioners for decades. It has survived and evolved through wars, legislation, juridical decisions, and fluctuating jurisprudential views. And yet, it remains one of the most important and at the same time conceptually unsettled modes of liability in the international legal regime. What does it mean to hold a commander criminally responsible not for what they did, but for what they failed to prevent? Can omission rise to the level of culpability equal to direct perpetration? Can responsibility be justified structurally, rather than individually?

In this profoundly insightful and impressively rigorous work, Humoud Al-Fadhli confronts these questions not merely by retracing old debates, but by offering a fresh theoretical lens—“consequential culpability”—that challenges and enriches how we understand superior responsibility as a *sui generis* mode of liability. The book is neither a doctrinal summary nor a theoretical abstraction. It is a powerful synthesis of history, legal reasoning, philosophical inquiry, and normative argument—one that repositions superior responsibility not as an uncomfortable aberration in international criminal law, but as a necessary evolution in a field grappling with hierarchy, authority, and atrocity.

From its foundation in the Lieber Code, and even earlier in antiquity in the Art of War by Sun Tzu, and its early judicial application by the Military Tribunal in the Yamashita trial, to the interpretive drift seen in the *Bemba case* at the International Criminal Court, this book analyzes how jurisprudential inconsistencies and conceptual ambiguities have weakened the coherence of this doctrine. And more importantly, it offers a path forward.

What makes this book truly unique is its ability to balance historical depth with normative clarity. The author resists the temptation to simply analogize international criminal responsibility to domestic criminal law. Instead, this work insists on the autonomy of international criminal law’s logic, architecture, and goals. It refuses to shoehorn international crimes into frameworks that were never built to account for

the horrors of genocide, systemic torture, or command/authority-driven atrocities. In doing so, this book makes three distinct contributions. First, it reframes superior responsibility as a foundational principle of international law, grounded in structural authority and legal obligation, rather than in traditional notions of moral blame. Second, it offers a compelling normative theory—consequential culpability—that bridges the divide between deontological justice and humanitarian necessity. Third, and most importantly, it provides a practical roadmap for courts, scholars, and legal practitioners by distilling clear conceptual elements from decades of fragmented jurisprudence.

Above all, this is a courageous book. It challenges orthodoxy, speaks with moral clarity, and urges us to rethink what it means to be accountable at the highest levels of power. It is both an academic contribution and a clarion call—to recognize that responsibility in international criminal law must evolve to match the complexities of modern warfare, political superiority, and human suffering.

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Preface

This book, originally written as a doctoral dissertation, was conceived in response to enduring philosophical, theoretical, and practical tensions surrounding the doctrine of superior responsibility in International Criminal Law (ICL). Although the doctrine has served as a critical tool for attributing liability to individuals in positions of military and political authority, its legal character remains conceptually unsettled, its application inconsistent, and its interpretation the subject of ongoing—perhaps eternal—debate.

My aims in writing this book are manifold. I aim to clarify the legal and normative basis of superior responsibility, challenge prevailing assumption—especially those drawn from domestic liberal criminal law account—and propose a principled yet functional framework for its future application. The book is driven by the conviction that ICL must be viewed with complexities of modern command and authority structures and the gravity of mass atrocity crimes in mind.

The chapters are organized both thematically and chronologically. The book begins by tracing the doctrine's historical origins, then critically examines its conceptual components, interpretative evolution, and application in international case law. It concludes by proposing a syllogistic model to guide future application—including the potential extension of superior responsibility to serious human rights violations and treaty-based crimes. While the subject matter may appear narrowly focused, this book is written with a broader audience in mind: scholars, legal practitioners, judges, prosecutors, and advanced students interested in the evolution of liability in ICL. Though grounded in rigorous legal analysis, it aims at making complex theoretical insights both accessible and practically relevant. Drawing on historical sources, jurisprudence, statutory developments, and normative theory, the book strives to offer clarity and coherence where the existing doctrine has often fallen short.

I would like to express my gratitude to those who made this book possible. In particular, I thank my late supervisor and dear friend, Professor Johan D. van der Vyver (may he rest in peace), whose wisdom, kindness, and unwavering guidance shaped me, personally, and this work, professionally, in profound ways. I am also grateful to Professors John Witte, Michael Scharf, Leila Sadat, Beth Van Schaack, Michael Newton, Elies van Sliedregt, Kevin Jon Heller, the late Robert Cryer (may

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Sabah Al-Salem University City,
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September 2025

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About This Book

This book offers a comprehensive and critical analysis of the doctrine of superior responsibility within International Criminal Law. Tracing its historical roots from early military codes to its codification in the Rome Statute, this book answers how this mode of liability has evolved from a disciplinary measure *for omission* into a *sui generis* (autonomous) mode of liability for holding military and political superiors accountable *for crimes* committed by their subordinates.

Combining rigorous doctrinal analysis, meticulous jurisprudential review, and novel normative argumentation, this book challenges conventional interpretations—especially those influenced by most liberal criminal law accounts—and proposes a reconceptualization of superior responsibility as a *sui generis* mode of liability grounded in consequentialism and structural culpability. Importantly, it places an emphasis on a more pressing concern: the need to clarify and recalibrate the doctrine’s conceptual foundations before addressing questions of application or expansion. In doing so, it tackles longstanding ambiguities surrounding the doctrine’s conceptual components, its uneven application across international and hybrid tribunals, and, through syllogistic reasoning, its potential for broader application to serious human rights violations and treaty-based crimes.

Written with scholars, legal practitioners, and students in mind, this book serves both as a theoretical inquiry and a practical guide for navigating one of International Criminal Law’s most complex and contested doctrines.

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- *From Nuremberg to The Hague and Beyond: Reincorporating “Taking a Consenting Part” into International Criminal Modes of Liability*, *Netherlands International Law Review*, Vol. 72, Issue 2, (forthcoming, 2025)
- *Corruption in the MENA: Between State Crime and International Criminal Law*, in *The Palgrave Handbook of Criminology and the Global South* (forthcoming, 2025)
- *Prosecuting the Russian Crime of Aggression Against Ukraine: Hopes and Challenges A Study Within the West’s Standards*, *Kuwait University Law Journal*, April 2025
- *The International Right to Peaceful Assembly: A Potential Lacuna in National Legislations and Kuwaiti Law*, *Qatar University International Journal of Law*, February 2025
- *Gulf War I: The Legality of Prosecuting Existing Iraqi Ba’ath Party in Response to Kuwait’s Deceased Captives*, *Kuwait University Law Journal*, March 2021
- *Police Force Organ to Support the ICC’s Judgments and Arrest Warrants: A Proposition to Amend Article 86 of the Rome Statute*, *Courts & Justice Law Journal*, April 2019

Abbreviations

AC	Appeals Chamber of the International Criminal Court
API/II	Additional Protocols to the Geneva Conventions of 12 August 1949
CAR	Central African Republic
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILoW	Islamic Law of War
IMTs	International Military Tribunals
LoAC	Law of Armed Conflict
MLC	Movement for the Liberation of Congo
NMT	Nuremberg Military Tribunal
OTP	Office of the Prosecutor of the International Criminal Court
POWs	Prisoners of War
SCSL	Special Court for Sierra Leone
SNTs	Subsequent Nuremberg Trials
SPET	Special Panels in East Timor
STL	Special Tribunal for Lebanon
TC	Trial Chambers of the International Criminal Court
TMI	Tokyo Military Tribunal
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

WWI World War I
WWII World War II