1 INTRODUCTION

Despite the inevitably and increasingly important U.N. peacekeeping and peace enforcement operations during the last decade,\(^1\) the issue of command responsibility for war crimes in multinational operations remains an underdeveloped area. In 1986 the *Nicaragua* case of the International Court of Justice (ICJ) indirectly touched upon this concept. The Court ruled that when an intervening state gives “direct and critical combat support” to an insurgent force and insurgent operations reflect “strategy and tactics wholly devised” by the intervening state, then an agency relationship is established.\(^2\)

In Section 2, this chapter first explores whether this principle affects or has to affect the command responsibility in the context of multinational operations, since the judgment of the ICJ in the *Nicaragua* case encompasses only state responsibility. Secondly, this chapter will assess, in Sections 3–7, the scope of both institutional (Section 5) and individual (Section 6) command responsibility for war crimes occurring in multinational operations endowed with various mandates (Section 7). Section 3 will particularly delve into the jurisprudential criteria of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on superior responsibility. It will examine whether and to what extent a military commander incurs superior responsibility during military operations.

In light of present international humanitarian law (IHL) developments, the question will be examined whether the present standards hereto suffice. A com-

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plicating factor to be considered is the interplay between IHL and international criminal law (ICL) regarding the doctrine of superior responsibility; this doctrine “requires that crimes have occurred or are likely to occur, and that no action is taken to prevent or punish them.”3 This interplay is clearly envisaged by the premise that while IHL acts in advance to assure that commanders promote its objectives, ICL intervenes when breaches have occurred.4 Command responsibility for war crimes in multinational operations can be positioned in both areas, as envisaged by the so-called Rules of Engagement (ROE) enacted for these kind of operations. Because these ROE have to be examined more thoroughly, the third and final question as to the status of these ROE in the realm of both IHL and ICL is considered in Section 8.

2 COMMAND RESPONSIBILITY: CONCURRENCE OF STATE RESPONSIBILITY AND INDIVIDUAL SUPERIOR RESPONSIBILITY

Under IHL, a military commander is not, _eo ipso_, responsible because he is in a position of authority, nor does such function carry burdens of vicarious or strict liability. This evolves from the criminal (compulsory) elements envisaged by Articles 7(3) and 6(3) of the ICTY and ICTR Statutes, respectively.5 The choice of law differs here with regard to the basis of state responsibility, which is qualified as a concept of “relatively strict liability,”6 in which context it is argued that “governments act through agents” while “the effectiveness of international duties would be much reduced if the complainant State has to prove some level of knowledge or intention at a high level of government in respect to the acts or omissions of subordinate officials” (emphasis added).7 Therefore, the aforementioned concept of state responsibility, as such, seems not—for two reasons—to be legally applicable to command responsibility.8 In the first place, the ICTY in the Čelebići case, rejected a presumption of knowledge of military leaders where crimes under one’s command were widespread and notorious. The tribunal referred hereto—seemingly in opposition to the _High Command_ cases decision9—to the fact that the assessment of the element of knowledge must have taken place on an individual basis by adjudicating

3. _See_ Bantekas, _supra_ note 2, at 593.
4. _See id._ at 594.
5. _See_ commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of Aug. 12, 1949, para. 3543; _see also_ Bantekas, _supra_ note 2, at 577.
7. _Id._ at 85.
8. In the context of the principle of criminal liability, state responsibility can, however, serve as a precedent for institutional liability. _See_ Section 4.