

Contents

1	Introduction	1
1.1	Research Questions	1
1.2	Structure of the Thesis	2
1.3	Terminology	3
2	State Responsibility and the Criminal Liability of the Individual . . .	5
2.1	Nuremberg: Setting the Stage	5
2.2	International Criminal Law: A Collision of Legal Systems	11
3	Nullum Crimen Sine Lege	19
3.1	Preliminary Remarks	19
3.2	<i>Nullum Crimen Sine Lege</i> and Domestic Law	19
3.3	The Four Guarantees of <i>Nullum Crimen Sine Lege</i>	20
3.4	Theoretical and Philosophical Foundations	21
3.5	<i>Nullum Crimen Sine Lege</i> and the IMT Nuremberg and the IMTFE Tokyo	23
3.6	<i>Nullum Crimen Sine Lege</i> and Post World War II US Military Tribunals	29
3.7	Changing the Picture? <i>Nullum Crimen Sine Lege</i> and Its Inclusion in Human Rights Law and Humanitarian Law Conventions	31
3.8	The Obligation of International Criminal Tribunals to Comply with <i>Nullum Crimen Sine Lege</i>	36
3.9	<i>Nullum Crimen Sine Lege</i> in International Criminal Law: A <i>sui generis</i> Principle?	39
3.10	The Guarantees of the <i>Nullum Crimen Sine Lege</i> Principle in International Criminal Law: The Principle of <i>Nullum Crimen Sine Iure</i>	42
3.10.1	Preliminary Remarks	42
3.10.2	The Quest for Applicable Law	43

3.10.3	The <i>scripta</i> Requirement and the Sources of International Law: International Conventions as the Sole Legal Basis for Individual Criminal Responsibility?	45
3.10.4	The <i>stricta</i> Requirement and the Sources of International Law	48
3.10.5	The <i>praevia</i> Requirement and the Sources of International Law	51
3.10.5.1	The Shift from Substantive Justice to Strict Legality	51
3.10.5.2	The <i>praevia</i> Requirement and International Conventions	53
3.10.5.3	The <i>praevia</i> Requirement and General Principles of Law	58
3.10.5.4	The <i>praevia</i> Requirement and Customary International Law	61
3.10.6	The <i>certa</i> Requirement and the Sources of International Law	66
3.10.6.1	The Two Facets of the <i>certa</i> Requirement	66
3.10.6.2	The <i>certa</i> Requirement as an Imperative for Improvement	66
3.10.6.3	The <i>certa</i> Requirement as a Safeguard Requirement for the Individual	67
3.10.6.3.1	The <i>certa</i> Requirement and the Moral Blameworthiness	68
3.10.6.3.2	The <i>certa</i> Requirement and the General Sense of the Underlying Criminality	69
3.10.6.3.3	The <i>certa</i> Requirement and the Concrete Underlying International Criminal Norm	70
3.10.6.3.4	Legal Assessment of These Three Approaches to Establish the <i>certa</i> Requirement	71
3.10.6.4	The <i>certa</i> Requirement and Customary International Criminal Law	75
3.11	Concluding Remarks on the Principle of <i>Nullum Crimen Sine Iure</i>	84
4	The Formation of Customary International Law and Its Methodological Challenges	87
4.1	Preliminary Remarks	87
4.2	Traditional Customary International Law	94
4.2.1	State Practice Under a Traditional Interpretation	94
4.2.2	Opinio Iuris Under a Traditional Interpretation	95
4.2.3	Traditional Customary International Law: Practical Concerns and Its Slow Development	100

4.3	Modern Customary International Law	102
4.3.1	Preliminary Remarks	102
4.3.2	The Procedural Aspect of Modern Customary International Law	103
4.3.3	The Substantive Aspect of Modern Customary International Law	106
4.4	The Identification of Customary International Law: The Challenge Ahead	112
4.5	Concluding Remarks	115
5	The Role of Judges When Determining Customary International Law	117
5.1	The Initial Position: Being a Judge in the 1990s	117
5.2	The Role of Judges: Determining, Developing or Creating Customary International Criminal Law?	118
6	Methodological Approaches to Customary International Law by International Criminal Tribunals	125
6.1	The Disclosure of the Method	125
6.2	A Word of Caution	127
6.3	Detectable Approaches to Customary International Criminal Law	128
6.3.1	The Traditional Two Elements Approach	128
6.3.1.1	Preliminary Remarks	128
6.3.1.2	ICTY <i>Tadić</i> Appeals Chamber Jurisdiction Decision	131
6.3.1.3	High Frequency and High Consistency of State Practice	134
6.3.1.4	Denying the Existence of Customary International Criminal Law on the Basis of the Traditional Two Elements Approach	137
6.3.2	Non-allocation to Elements Method	142
6.3.3	Deductive Approach	145
6.3.3.1	Preliminary Remarks	145
6.3.3.2	Value-Based Deductive Approach and Deduction from Technical Humanitarian Principles	145
6.3.3.3	Concluding Remarks	155
6.3.4	Methodological Shortcuts: The Case Law Approach	156
6.3.4.1	Preliminary Remarks	156
6.3.4.2	Case Law as a Genuine “Subsidiary” Source of Law	157
6.3.4.3	International Case Law as Subsidiary Means for the Determination of Customary International Law	159
6.3.5	Concluding Remarks	172

7	Relevant Material for Proving the Existence of Customary International Criminal Law	173
7.1	Preliminary Remarks	173
7.2	Official Pronouncements by States	177
7.3	Passive Practice	180
7.4	National Legislation	180
7.4.1	Preliminary Remarks	180
7.4.2	International Crimes Laws and National Criminal Codes	181
7.4.3	Military Manuals and Military Penal Codes	183
7.5	International Conventions	185
7.5.1	Preliminary Remarks	185
7.5.2	Humanitarian Law Conventions	191
7.5.3	Other Statutes of International Criminal Tribunals	193
7.5.3.1	Statutes of the IMT, IMTFE and Control Council Law No. 10	193
7.5.3.2	Statutes of the ICTY, ICTR, SCSL and ECCC	196
7.5.3.3	Rome Statute	197
7.5.4	Other International Conventions	199
7.5.5	Concluding Remarks	201
7.6	UN Resolutions	201
7.6.1	Preliminary Remarks	201
7.6.2	UN General Assembly Resolutions	202
7.6.2.1	UN General Assembly Resolutions as a Law-Creating Process	202
7.6.2.2	UN General Assembly Resolutions as Law-Determining Agencies	207
7.6.3	UN Security Council Resolutions	212
7.7	Jurisprudence	214
7.7.1	Preliminary Remarks	214
7.7.2	International Court of Justice	214
7.7.3	IMT Nuremberg and Post World War II Tribunals Operating Under the Strength of Control Council Law No. 10	219
7.7.4	Domestic Case Law	225
7.8	International Law Commission	227
7.9	Writings of Legal Doctrine	228
7.10	Concluding Remarks	230
8	Conclusion	231
	List of References	239