Contents

Intro	oduction	1					
1.1	Research Questions						
1.2	Structure of the Thesis	2					
1.3	Terminology	3					
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					
Nulli	um Crimen Sine Lege	19					
3.1	Preliminary Remarks	19					
3.2	Nullum Crimen Sine Lege and Domestic Law	19					
3.3	The Four Guarantees of Nullum Crimen Sine Lege	20					
3.4	Theoretical and Philosophical Foundations	21					
3.5	Nullum Crimen Sine Lege and the IMT Nuremberg						
	and the IMTFE Tokyo	23					
3.6	Nullum Crimen Sine Lege and Post World War II US Military						
	Tribunals	29					
3.7	Changing the Picture? Nullum Crimen Sine Lege and Its Inclusion						
	in Human Rights Law and Humanitarian Law Conventions	31					
3.8	The Obligation of International Criminal Tribunals to Comply						
	with Nullum Crimen Sine Lege	36					
3.9	Nullum Crimen Sine Lege in International Criminal Law:						
	A sui generis Principle?	39					
3.10	The Guarantees of the Nullum Crimen Sine Lege Principle in						
	International Criminal Law: The Principle of Nullum Crimen						
	Sine Iure						
	3.10.1 Preliminary Remarks	42					
	3.10.2 The Quest for Applicable Law	43					

	3.10.3 The scripta Requirement and the Sources of International					
				onventions as the Sole Legal Basis	45	
			for Individual Criminal Responsibility?			
	3.10.4			ent and the Sources		
					48	
	3,10,5			nent and the Sources	51	
		of Interna	of International Law			
		3.10.5.1		rom Substantive Justice to Strict		
			Legality		51	
		3.10.5.2		a Requirement and International		
			Convention	718	53	
		3.10.5.3	The praevi	a Requirement and General		
			Principles	of Law	58	
		3.10.5.4	The praevi	a Requirement and Customary		
			Internation	al Law	61	
	3.10.6	The certa		nt and the Sources of International		
		Law			66	
		3.10.6.1	The Two F	facets of the certa Requirement	66	
		3.10.6.2	The certa I	Requirement as an Imperative for		
			Improveme	ent	66	
		3.10.6.3		Requirement as a Safeguard		
				nt for the Individual	67	
			3.10.6.3.1	The certa Requirement and the		
				Moral Blameworthiness	68	
			3.10.6.3.2	The certa Requirement		
				and the General Sense		
				of the Underlying Criminality	69	
			3.10.6.3.3	The certa Requirement		
				and the Concrete Underlying		
				International Criminal Norm	70	
			3.10.6.3.4	Legal Assessment of These Three	. +	
			2120101211	Approaches to Establish the certa		
				Requirement	71	
		3.10.6.4	The certa I	Requirement and Customary		
		01101011		al Criminal Law	75	
3.11	Conclu	ding Rema		rinciple of Nullum Crimen	, .	
5.11				· · · · · · · · · · · · · · · · · · ·	84	
	Sine In				0-7	
				national Law and Its		
Meth	~		•	, ,	87	
4.1	Prelimi	nary Rema	rks		87	
4.2	Traditional Customary International Law					
	4.2.1 State Practice Under a Traditional Interpretation 94					
	4.2.2	Opinio Iuris Under a Traditional Interpretation 99				
	4.2.3 Traditional Customary International Law: Practical					
		Concerns	and Its Slov	v Development	100	

4

1997 - 1997 - 19								
	ontents				xiii			
	4.3	Moder	n Customa	ry International Law	102			
		4.3.1		Preliminary Remarks				
3		4.3.2		Preliminary Remarks 1 The Procedural Aspect of Modern Customary				
			Internati	International Law				
		4.3.3		The Substantive Aspect of Modern Customary				
			International Law 16					
	4.4			of Customary International Law:				
2. A. A. A.		The Challenge Ahead 1						
and the Alexandre of	4.5	Conclu	uding Rem	arks	115			
§ 5			_	hen Determining Customary International				
					117			
- var strangenske ander	5.1 5.2	The Initial Position: Being a Judge in the 1990s 1 The Role of Judges: Determining, Developing or Creating						
1910161		Custor	nary Intern	ational Criminal Law?	118			
6	Meth	odologi	cal Appro	aches to Customary International Law by				
la Maria				l Tribunals	125			
V. Level V	6.1	The D	isclosure o	f the Method	125			
99 - N - S	6.2			on	127			
\$ *	6.3			paches to Customary International				
- North Contractor				• • • • • • • • • • • • • • • • • • • •	128			
		6.3.1		litional Two Elements Approach	128			
			6.3.1.1	Preliminary Remarks	128			
;			6.3.1.2	ICTY Tadic Appeals Chamber Jurisdiction	101			
			6212	Decision	131			
			6.3.1.3	High Frequency and High Consistency of State Practice	134			
			6.3.1.4	Denying the Existence of Customary	134			
			0.5.1.4	International Criminal Law on the Basis				
				of the Traditional Two Elements Approach	137			
		6.3.2	Non-allo	cation to Elements Method	142			
			e 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		logical Shortcuts: The Case Law Approach	156			
			6.3.4.1	Preliminary Remarks	156			
			6.3.4.2	Case Law as a Genuine "Subsidiary" Source				
			6242	of Law	157			
			6.3.4.3	International Case Law as Subsidiary Means				
				for the Determination of Customary International Law	150			
		635	Conclud		159 172			
		6.3.5 Concluding Remarks						

à 1000 -

7				Proving the Existence of Customary		
				Law	173 173	
	7.1		iminary Remarks			
	7.2		ial Pronouncements by States			
	7.3		e Practice			
	7.4		mal Legislation			
		7.4.1		ary Remarks	180	
		7.4.2		onal Crimes Laws and National		
				Codes	181	
		7.4.3		Manuals and Military Penal Codes	183	
	7.5 International Conventions				185	
		7.5.1		ary Remarks	185	
		7.5.2		arian Law Conventions	191	
		7.5.3	Other Sta	atutes 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 Int	ernational Conventions	199	
		7.5.5	Concludi	ng Remarks	201	
	7.6 UN Resolutions				201	
		7.6.1	Prelimina	ary Remarks	201	
		7.6.2		ral 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 Secu	rity Council Resolutions	212	
	7.7				214	
		7.7.1		ary Remarks	214	
		77.2		onal Court of Justice	214	
		7.7.3 IMT Nuremberg and Post World War II Tribunals				
				g Under the Strength of Control Council		
				10	219	
		7.7.4		Case Law	225	
	7.8			Commission	227	
	7.9			Doctrine	228	
	7.10			rks	230	
0			U			
8	Conc	IUSION .	••••		231	
Lis	st of R	eference	es		239	