Part II
The Overlap Between State and Individual Responsibility for International Crimes in International Practice
Chapter 3

The Overlap of the Material Element: The Seriousness Requirement

International practice shows that international crimes are most of the time carried out with the substantial involvement of states.¹ International crimes are offences which require to be carried out on such a large scale that the participation or at least the support of the state apparatus has often been present. Thus, the material element – that is, the conduct amounting to an international crime – represents the most important point of contact between state and individual responsibility for international crimes.

This is also reflected in the definition of international crimes provided under customary international law. On the one hand, aggravated state responsibility requires the wrongful act to be serious. On the other hand, individual liability arises under customary international law for criminal conduct mostly carried out in a widespread or systematic manner. In particular, some international crimes demonstrate by definition a general pre-requisite concerning the seriousness of the offence.

Therefore, it becomes very important to see how this seriousness requirement is capable of establishing a relationship between state and individual responsibility. In particular, the present inquiry must focus on the way in which the general pattern of state criminality is actually taken into account when establishing individual criminal liability. This question is crucial to determine whether individuals are internationally responsible only for crimes committed in such a widespread and systematic manner as to require the involvement of the entire state apparatus. If so, it remains to be established whether international criminal tribunals first assess aggravated state responsibility or at least a state policy in carrying out international crimes before convicting the responsible state organs. Otherwise, the question concerns the extent to which the broader criminal context can play a role in holding individuals accountable for international crimes.