Chapter 9
Towards a Dual Responsibility Paradigm?

Coming now to the determination of a general framework capable of explaining the relationship between state and individual responsibility for international crimes, we can take, as a starting point, an observation which has already been put forward. When international crimes entail a dual responsibility, international practice shows that the elements of individual criminal liability can only be established by duly taking into account the general criminal context; that there are defences that must be applied in a consistent manner under both regimes; and that there are modes of liability specifically aimed at addressing the collective nature of international crimes. In particular, when political and military leaders are charged with large-scale crimes, individual criminal liability tends to be established in a way which is very similar to that used to prove aggravated state responsibility. All in all, with respect to certain crimes there are direct links between the establishment of state responsibility and the establishment of individual responsibility.

Thus, having found that a certain relationship between these regimes of international responsibility for international crimes emerges from empirical analysis, the final question to be examined here concerns the identification of a general framework that can explain the different elements of this relationship which result from international practice. To answer this question it is necessary to go back to the conceptual schemes described in Part I, and to evaluate whether and to what extent these general approaches are a useful guide in describing the complementarity between state and individual responsibility.

1. Theoretical Approaches and the Complementarity Between State and Individual Responsibility for International Crimes

International practice shows that neither the individual-oriented conceptual scheme nor the state-oriented conceptual scheme is, in its entirety, capable of explaining the variety of the relationship between state and individual responsibility for all international crimes.

According to a pure individual-oriented conceptual scheme as described in Part I, aggravated state responsibility and individual criminal liability are not only governed by different sets of secondary norms but they also originate from different primary
norms. However, the analysis of international practice carried out in Part II reveals that such a complete separation, in particular with respect to primary norms, is not justified. Among other crimes, war crimes are a clear example of international crimes prohibited under primary norms aiming at both state and individual conduct. For example, the violation of the same ‘intransgressible’ principles of international humanitarian law entails both state and individual responsibility. But it is also possible to recall other articulations of primary norms intended to narrow, under specific circumstances, the scope of certain prohibited conduct, and directed at both states and individuals, such as self-defence with respect to the prohibition of aggression or belligerent reprisals with respect to certain war crimes. In such cases, the relevant conduct cannot be regarded as a breach of a primary norm and therefore it is perfectly lawful under international law independently of the fact that it has been carried out by states or individuals. Accordingly, if a certain use of force amounts to a legitimate action taken in self-defence or if a certain type of conduct represents a lawful belligerent reprisal, it cannot entail either aggravated state responsibility or individual criminal liability. In addition, international crimes are commonly collective criminal acts whose material element is established in very similar, if not identical, ways from the standpoint of both state and individual responsibility.

According to a pure state-oriented conceptual scheme as described in Part I, state and individual responsibility are not only governed by the same primary norms, they also belong to the same set of secondary norms governing the special consequences to be attached to the commission of international crimes by states. However, the analysis of international practice reveals that such a complete overlap, in particular, of secondary norms, is not justified. One may recall the fact that the consequences especially provided for under international criminal law also apply to international crimes committed by private individuals and the punishment of such individuals has nothing to do with state responsibility. More generally, the functional analysis of the regimes of state and individual responsibility has shown how difficult it is to include a traditional criminal sanction, such as the punishment of those state organs who are responsible for international crimes, among the secondary rules governing aggravated state responsibility. In particular, these two regimes differ as to some of their basic requirements, such as the mens rea which is a characterizing feature of international criminal law. As discussed above, even if the punishment of state organs for the commission of isolated international crimes could be regarded as a measure that, under certain circumstances, can preclude ordinary state responsibility from arising, this would not be true with respect to aggravated state responsibility, that is, the consequences to be attached to the serious breaches of obligations owed to the international community as a whole.

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1 See supra Chapter 5, note 36.