

Fordham Environmental Law Review

Volume 19, Number 2

2009

Article 3

The Rome Statue and Captain Planet: What Lies Between 'Climate Against Humanity' and the 'Natural Environment'?

Mohadmmmed Saif-Alden Wattad*

*Max-Planck Institute for Foreign and International Criminal Law

Copyright ©2009 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

THE ROME STATUTE & CAPTAIN PLANET: WHAT LIES BETWEEN ‘CRIMES AGAINST HUMANITY’ AND THE ‘NATURAL ENVIRONMENT?’*

*Dr. Mohammed Saif-Alden Wattad***

I. INTRODUCTION

Should damaging the natural environment constitute an international individual crime in accordance with the provisions of the Rome Statute, if committed under certain circumstances?

Contemporary international criminal law on individual responsibility is controlled by the Rome Statute of 1998 (hereinafter: Statute),¹ which constrains the International Criminal Court’s jurisdiction (hereinafter: ICC) to “the most serious crimes of concern to the in-

* See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at art. 8 § (2)(b)(iv), July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) [hereinafter “Rome Statute”] The term ‘natural environment’ is taken from Article 8(2)(b)(iv) of the Rome Statute of 1998. See generally, *id.*

** The author is a Post-Doctoral Minerva Research Fellow at the Max-Planck Institute for Foreign and International Criminal Law, in Freiburg, Germany; a graduate of Columbia University Law School, Member of the International Association of Penal Law, Member of the Law & Society Association and Bretzfelder Constitutional Law Fellow. Special thanks are due to Prof. Dr. Hans-Jörg Albrecht for his helpful insights, the Max-Planck Institute and the Minerva Fellowship, for providing me with the resources and the environment required for accomplishing this article and the Indian Society of International Law for inviting me to write this article. The Article was first presented at the Fifth Conference on International Environmental Law of the Indian Society International Law, New Delhi, India. All opinions and errors (and, if applicable, errors of opinion) are my own. I would like to dedicate this article to my very beloved future wife Lana, *A Special Lady with a Special Smile.*

1. *Note:* In his book, Antonio Cassese is of the view that international crimes may be held cumulatively to embrace other violations of international customary rules, as well as rules intended to protect values considered important by the whole international community and consequently binding all States and individuals, as acknowledged by many international treaties. See, Antonio Cassese, *International Criminal Law* 23 (Oxford Univ. Press, 2003).

ternational community as a whole,"² in particular, the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (hereinafter: core crimes).³ As far as the Statute is concerned, international criminal law is relatively a new branch of public international law.⁴ As such, it was only recently that environmental law has become the subject of intensive legal development, a legitimate segment of legal studies, a crucial study of international law and domestically speaking, an eminent subject of criminal law theory.⁵

Damaging the environment has always been thought of as a clear case of wrongdoing. However, determining the nature and degree of this wrongdoing is of special significance in deciding between the possible legal tools required for protecting the natural environment in general, and humanity in particular. The options at the domestic level are clear: (1) administrative regulations, *e.g.* municipal sanctions; (2) civil actions, such as tort law, *e.g.* nuisance etc.,⁶ and (3) criminal law, for instance, enacting punitive statutes that affix penalties for the commission of certain acts that cause environmental damage.⁷ At the international level, environmental law is the specific subject of several international treaties, thus raising several fundamental principles of environmental law to amount as *jus cogens*.⁸ Speaking on the subject of legal protection, Justice Christopher Weeramantry, of the International Court of Justice, once ex-

2. See Rome Statute art. 5, The Court's jurisdiction is "complementary" to national legal systems. See Rome Statute art. 17.

3. See Rome Statute art. 5; *see also*, Rome Statute art. 5(2) (providing that the crime of aggression is not yet in force); *see also*, Rome Statute art. 8 (relating to the crime of genocide, crimes against humanity and war crimes); *see also*, Rome Statute art. 70 (providing that the ICC has jurisdiction over offences against its administration of justice, when committed intentionally).

4. Cassese, *supra* note 1, at 16.

5. See The River and Harbors Act of 1899 § 13, 33 U.S.C. 407, The Rivers and Harbors Act of 1899 makes it a crime to discharge refuse into a navigable water of the U.S. without a permit. *Id.*; *see also*, Gray S. Lincenberg & David S. Krakoff, *The Environmental Crimes Case: From Pretrial Proceedings to Sentencing Guidelines* (American Bar Association 1999).

⁵See, *e.g.*, Christopher Harris, Raymond C. Marshall & Patrick, *Environmental Law Series: Environmental Crimes* (Shepard's/McGraw-Hill, Inc. 1992).

6. See Cassese, *supra* note 1, at 49-50.

7. See Francoise Comte & Ludwig Kramer, *Environmental Crime in Europe: Rules of Sanctions* 217 (The Avosetta Series (5), European Law Publishing, 2004).

8. See Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 *Geo. Int'l Envtl. L. Rev.* 101 (1998).

pressed the view that state obligations in respect of international environmental law, "may range from obligations *erga omnes*, through obligations which are in the nature of *jus cogens*, all the way up to the level of international crime."⁹

This article is concerned with the addendum to Justice Weeramantry's statement: Is environmental law compatible with the concept of international criminalization? The question is not as simple as one's intuition might suggest. The article aims to answer this question in principle; issues of deterrence, efficiency, and "cost-benefit" analysis lay beyond its scope.¹⁰ For this end to be achieved, one must first inquire into international criminal law theory as exhibited in the Statute, thus exploring the nature of international crimes, their history, evolution, development and purposes.

This article's point of departure is that international crimes generate a higher degree of condemnation than domestic crimes.¹¹ Part II discusses the concept of international crime, from its historical inception all the way up to its crystallization by the Rome Statute. It also provides an analysis of the core crimes from four points of view, thus examining the nature of international criminal commission focusing on the: (1) actor, (2) act, (3) state of mind and (4) harm and victim.

Part III provides four basic conclusions on the nature of international criminalization: *First*, no clear or coherent reason exists as to why only the core crimes and their sub-categories are the only crimes included in the Statute. The only obvious reason is the simple fact that the Statute is nothing but a formal codification of pre-existing treaty and customary norms. *Second*: (1) international

9. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66, at 142-43 (July 8, 1996) (reprinted in 35 I.L.M. 814 (1996)).

10. See Rene Provost, *International Criminal Environmental Law*, in *The Reality of International Law: Essays in Honour of Ian Brownlie* 439, 441 (Guy S. Goodwin-Gill & Stefan Talmon eds., Oxford Univ. Press, 1999); but see *Prosecutor v. Erdemovic* (Sentencing Judgment), 29 Nov. 1996, Case No. IT-96-22-T (Trial Chamber I, ICTY), paras. 64-66, (concluding that international penal responsibility involves primarily deterrence, prevention of future violations of the same norm, reprobation, expression of social condemnation of the offence and retribution. Its secondary concern is the creation of historical records of international crimes, and education of present and future generations. In any case, rehabilitation is not what international law seeks to promote).

11. See Mohammed Saif-Alden Wattad, *Is Terrorism a Crime or an Aggravating Factor in Sentencing?*, 4 J. Int'l Crim. Just. 1017, 1022 (2006).

criminal law targets individual actors who are criminally responsible for committing 'international crimes,' regardless of their position, be they state agents or private actors; (2) 'international crimes' address severe acts against the international community, as a collective entity or as individuals; thus shocking the man's conscience, if understood in context; (3) although for the most part the Statute requires both intent and knowledge as the threshold state of mind for international criminal responsibility, the Statute manifestly considers conditional intent (*dolus eventualis*) to qualify as intention – namely, the actor means to engage in the criminal commission – if the actor is indifferent to the result or 'being reconciled' with it; and (4) the concept of 'international crimes' is not necessarily limited to the most serious harms, but rather to the most outrageous actions. *Third*, international criminal law is still undergoing development and the Statute is far from competent enough to offer an ultimate coherent international penal code. The Statute itself includes several provisions that leave the door open for future international criminalization. *Fourth*, the international community of nations is mistaken in adhering to its reactive international criminalization policy that consists of waiting for the atrocity to occur and then criminalizing the actions. Instead, the international community must anticipate possible wrongs that satisfy the threshold for 'international crimes' and from a conceptual and objective point of view, amend the Statute accordingly and thus pre-empt the occurrence of "international crimes."

Finally, Part IV opens with a clear and sharp statement whereby environmental law is not an unknown creature to international criminal law. There are some cognate concepts in the text of the Statute, such as Article 8(b)(iv), which makes damaging the natural environment a war crime if committed in times of international armed conflict.

Admittedly, speaking of war crimes, I recognize no particular logic for limiting such crime to armed conflicts of international character. Moreover, it is my view that limiting such criminalization to 'war crimes' makes no sense, because serious environmental damage takes place, primarily, during times of peace. In times of peace, I can think of many serious forms of environmental pollution (or other damage) that are equivalent in their nature to other existing 'crimes against humanity.' Such acts fit well under Article 7(1)(k) of the Statute – which criminalizes other inhuman acts that intentionally cause great suffering, or serious injury to body or mental or physical

health – especially since the Statute acknowledges the doctrine of *dolus eventualis*.¹² However, I am not suggesting criminalization of environmental wrongs by means of interpreting Article 7(1)(k); this would violate the fundamental principle on *nullum crimen, nulla poena sine lege*. Rather, I suggest amending Article 7(1) to either include the crime of damaging the natural environment, as is the case for war crimes, or to provide a more detailed definition of what ‘damaging the natural environment’ means.

Of course, no one can guarantee that such criminalization would serve as *Captain Planet* to prevent environmental damage and in turn save humanity from consequent atrocities. However, such passing thoughts are applicable to declaration of *e.g.* murder, torture and rape as crimes against humanity.¹³ From my point of view, such criminalization is essential mainly because it reflects the international community’s disgust and condemnation at outrageous practices that undermine the wellbeing of mankind. Environmental damages endanger the existence of humankind. This is not a myth anymore but rather an inevitable, unavoidable and undisputable fact. We must face the problem straightforward. If there is a hope on the horizon we must sail toward it instead of waiting for the sunset - for then it might be too late to act.

II. THE NATURE OF INTERNATIONAL CRIMES

International criminal law regarding individual responsibility is a somewhat new-born sphere of legal studies,¹⁴ normatively understood as:

“...a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and publish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.”¹⁵

12. Rome Statute art. 30(2)(b).

13. See Rome Statute art. 7(1).

14. See Cassese, *supra* note 1, at 117; Povost, *supra* note 10, at 440, 446.

15. Cassese, *supra* note 1, at 15.

However, the notion of 'international crimes' is not a new concept.¹⁶ Until the 19th century only war crimes¹⁷ were considered a genuine discipline of today's notion of 'international crimes,'¹⁸ as an exception to collective criminal responsibility.¹⁹ Another exception was piracy, which constituted a classic international crime between the 17th and 19th centuries; pirates were treated as enemies of humanity (*hostes humanigenis*).²⁰ The idea was that piracy took place on the high seas and as such it urged special jurisdictional rules.²¹

The formal codification of 'international crimes' as imposing individual responsibility, took place at the Nuremberg Tribunal and the other post war courts:²² crimes against the peace,²³ crimes against humanity and war crimes.²⁴ After a long process of international diplomacy in drafting the Statute's core crimes, the international community's mind was captivated by the Nuremberg experience.²⁵ Plainly, the definitions of these crimes have undergone significant development and embrace other treaties and customary norms²⁶ that evolved following the Nuremberg experience.²⁷

16. See William A. Schabas, *An Introduction to the International Criminal Court* 1 (2nd ed., Cambridge Univ. Press, 2004).

17. *Id.*; see also, Cassese, *supra* note 1, at 6, 37.

18. See The British Manual on Land Warfare of 1912; U.S. War Department, General Orders No. 100 of 1863, reprinted in Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflicts* 3 (Martinus Nijhoff Publishers, 1988) (1973).

19. Cassese, *supra* note 1, at 38.

20. *Id.*

21. Cassese argues that piracy was considered an international crime not for the sake of protecting a community value, but rather because piracy involved murder, torture, etc., over which states had no legal jurisdiction because these acts took place outside States' territorial jurisdiction, namely, high seas. See *id.* at 15, 24, 38; see also, Schabas, *supra* note 16, at 26.

22. See, e.g., Schabas, *supra* note 16, at 5-8, 27.

23. The crime of aggression is the equivalent concept to the Nuremberg's crimes against the peace. See Rome Statute art. 5(1)(d).

24. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279 (hereinafter: IMT's Charter).

25. Schabas expresses the view that the Rome Statute is not without serious flaws, such as the lack of a definition of 'rape.' See Schabas, *supra* note 16, at 47; see also, Robert C. Johansen, *A Turning Point in International Relations? Establishing a Permanent International Criminal Court* 13 (Report No. 1, 1 Joan B. Kroc Institute for International Peace Studies, 1997).

26. See Rome Statute art. 10; see also, Schabas *supra* note 16, at 28; see also, Cassese, *supra* note 1, at 23, 145, 153. On its face, Article 10 allows for the inclusion of customary international law as a legitimate source for expanding the premises of the Rome Statute. In my view, since the Rome Statute embraces the gen-

But what are 'international crimes?' A formal approach would suggest: "breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs)."²⁸ Unlike a comprehensive approach, which would initially suggest an inquiry into the Statute, the formal approach examines 'international crimes' in light of the factors that crystallize a 'crime,' in general and 'international crimes,' in particular. These factors are: (1) the characteristics of the actor; (2) the features of the criminal act; (3) the degree of the required state of mind; and (4) the nature of the harm and the victim.

International criminalization targets threats to the peace, security and wellbeing of the world. It targets grave wrongdoings of concern to the international community as a whole.²⁹ It purports to convey a wide international condemnation upon the commission of outrageous acts thus affixing penalties for their commission and guaranteeing a better world for the future generation, as well as ensuring the prevention of further atrocities.³⁰ The criminalized conduct itself (and/or the consequences) shocks the man's conscience, appeals to his feelings and captures his instant intuition.³¹ The heinous nature of international crimes is characteristic of their level of iniquity. This is a source of great concern to the international community and for this reason 'international crimes' mandate prosecution namely because humanity as a whole is the victim.³²

eral prohibition on *nullum crimen, nulla poena sine lege*, such argument cannot hold. See generally, Rome Statute art. 11 (1), art. 22(1), art. 23, art. 24(1); consider, George P. Fletcher, *Basic Concepts of Criminal Law* 12, 23(FN 5) (Oxford University Press, 1998); see also, Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33(2) *New Eng.d J. on Cri. & Civil Confinement* 501, 545 (2007).

27. Schabas, *supra* note 16, at 27.

28. Cassese, *supra* note 1, at 23.

29. See Rome Statute, Preamble, art. 1, 5.

30. Rome Statute, at Preamble.

31. Rome Statute Article 17(1)(d) demands that the ICC dismisses a case as being inadmissible if it is not of "sufficient gravity." *Id.* art. 17.

32. Schabas, *supra* note 16, at 27.

A. *The Actor*

The Statute applies only to natural persons³³ —e.g. not states.³⁴ It is not limited to state agents³⁵ who must, in any case, be treated in an equal manner when the ICC has jurisdiction, regardless of any official capacity. Official capacity shall not constitute any defense or mitigating factor in sentencing.³⁶ Moreover, as a rule, the Statute does not allow for a defense of ‘superior order,’³⁷ and international criminals are persecuted until their death through the fear of being prosecuted because no statute of limitation applies to ‘international crimes.’³⁸

33. Rome Statute art. 25(1); *see also*, M. Cherif Bassiouni, *The Universal Model: The International Criminal Court, Post-Conflict Justice* 814 (M. Cherif Bassiouni ed., Transnational Publishers, Inc., 2001); *see also*, Cassese, *supra* note 1, at 352.

34. Rome Statute art. 25(4); *see also*, Schabas, *supra* note 16, at 101.

35. On the contrary, Cassese argues that crimes against humanity are not isolated or sporadic events, but rather are part of governmental (or a de facto authority) policy. *See* Cassese, *supra* note 1, at 64.

36. Rome Statute arts. 27, 28.

37. *Id.* art. 28. ‘Superior order’ defense applies only when: (1) the actor was under a legal obligation to obey the order, (2) the actor was not aware of the unlawfulness of the order, and (3) the order was not “manifestly unlawful.” Rome Statute, Article 33(1)(b) speaks of “the person did not *know* that the order was unlawful” (*italics added*). In my view, the second and third conditions, as cumulative conditions, are very perplexing. If a person does not know that the order is unlawful, then it is clear that he does not know that it is manifestly unlawful. In addition, when the actor knows that the order is unlawful, then it is also clear that he may not invoke the defense. Moreover, if genocide and crimes against humanity are clear cases of manifest unlawfulness, (Rome Statute, Article 33(2)) does that mean that the defense is possible only in war crimes cases? But how can that be? Is it not clear that war crimes are unlawful, given the detailed nature of Article 8? If so, what is left of Article 28 on the defense of ‘superior order’? *See generally*, Rome Statute.

38. *Id.* art. 29; Schabas, *supra* note 16, at 115; *see also*, Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1970) 754 UNTS 73; *see also*, Fletcher, *supra* note 26, at 7-23.

B. *The Act*³⁹

The Statute's core crimes are the explicit manifestations of the Nuremberg experience,⁴⁰ *i.e.* the Charter of the International Military Tribunal of 1945 (hereinafter: IMT's Charter).⁴¹ These crimes include: crimes against peace, war crimes and crimes against humanity (hereinafter: Charter's crimes). As correctly observed by Cherif Bassiouni, "The ICC's crimes are not therefore newly created treaty crimes, because these crimes exist under international law."⁴²

While the crime of aggression⁴³ resembles the Charter's 'crime against peace,'⁴⁴ the crime of genocide owes its origins to Raphael Lemkin's manuscript in 1944.⁴⁵ Its first reorganization as an international crime was in 1946, by the United Nations General Assembly.⁴⁶ It was subsequently recognized by the Convention on the Prevention and Punishment of the Crime of Genocide of 1951.⁴⁷

39. See The Document on Elements of Crimes, which are published in the report of the first session of the Assembly of States Parties: ICC-ASP/1/3, pp. 108-55. This document is an applicable source for the International Criminal Court as for the interpretation and application of articles 6, 7 and 8; *see also* Rome Statute art. 9.

40. See, *e.g.*, The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (articles II and III of the convention are almost verbatim to article 6 of the Rome Statute); *consider*, Rome Statute Preamble (providing, "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity").

41. IMT's Charter, *supra* note 24, at art. 6.

42. Bassiouni, *supra* note 33, at 815, 817.

43. See Rome Statute art 5 § (2); *see also*, Bassiouni, *supra* note 33, at 817.

44. IMT's Charter, *supra* note 24, art. 6(a). "[P]lanning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Id.* See Cassese, *supra* note 1, at 111-117.

45. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for World Peace, 1944). The crime of genocide was later included in the charges at Nuremberg, but ultimately the term "genocide" did not appear in the provisions of the IMT's Charter, and the Tribunal convicted the accused of 'crime against humanity.' See: Schabas, *supra* note 16, at 7; *see also*, Cassese, *supra* note 1, at 96.

46. GA Res. 96(I).

47. 78 UNTS 277.

The Statute's crime on genocide is,⁴⁸ as William Schabas describes it, "a copy of Article II of the convention against genocide."⁴⁹ The concept of 'crimes against humanity' first appeared in the international arena in the Nuremberg context in 1945.⁵⁰ However, since the Nuremberg experience, this concept has been the subject of change in its scope, definition, and substance.⁵¹ Article 7 of the Statute reflects a combination of Article 6(c) of the IMT's Charter, Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993 (hereinafter: ICTY's Statute), Article 3 of the Statute of the International Criminal Tribunal for Rwanda of 1994 (hereinafter: ICTR's Statute) and other specific criminal acts that fall within the scope of "other inhumane acts."⁵²

The idea of 'war crimes' has domestic roots.⁵³ However, its international origins are known as the 'laws and customs of war.'⁵⁴ The Statute's concept of 'war crimes' is a codification of the IMT's Charter conception,⁵⁵ the Hague Law,⁵⁶ the Geneva Law,⁵⁷ the

48. RS, Article 6; Schabas, *supra* note 16, at 36-41; *see also* William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2000); *see also* Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs, 1960).

49. Cassese, *supra* note 1, at 107; Bassiouni, *supra* note 33, at 815. On the substance, the International Criminal Tribunal for Rwanda best described the nature of genocide as "the crime of crimes." *See Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment and sentence, 4 September 1998, para. 16.

50. IMT's Charter, *supra* note 24, Article 6(c); *see also* Cassese, *supra* note 1, at 70-71; *see also* Schabas, *supra* note 16, at 37. This crime has its origins in 1915 regarding condemning Turkey for its crimes against Armenians, described as "crimes against humanity." *See* Cassese, *supra* note 6, at 67; M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (2d rev. ed., 1999).

51. For example, the Statute neglected the requirement for a nexus between 'armed conflict' and the commission of crimes against humanity. *See* Rome Statute, art. 7; *see also* Schabas, *supra* note 14, at 43. *Consider Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, (1997) 35 ILM 32, para. 140; *Prosecutor v. Kunarac et al.* (Case No. IT-96-23 and It-96-23/1-A), Judgment, 12 June 2002, para. 83; Schabas, *supra* note 16, at 43.

52. Bassiouni, *supra* note 33, at 816 (footnotes omitted).

53. Leslie C. Green, "International Regulation of Armed Conflict," in M. Cherif Bassiouni ed., *International Criminal Law* 355-391 (Vol. I, 2d ed., Transnational Publisher, 2003); *see also* Cassese, *supra* note 1, at 16.

54. This term was invoked in the trials at Leipzig in the 1920s in light of the Treaty of Versailles. *See* Schabas, *supra* note 16, at 3, 52.

55. IMT's Charter, art. 6(c). IMT's Charter, Article 6(b) defines war crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other pur-

ICTY's Statute⁵⁸ and the ICTR's Statute. As it stands today, the Statute provides a more detailed and comprehensive definition of 'war crimes.'

This evolution of the Statute's core crimes leads one to consider the nature of the Statute: Does the Statute constitute a conclusive work on international criminalization? I argue that both the language and purpose of the Statute illustrate that the Statute is not conclusive. Why?

First, criminal theory is a living institute. A particular crime's definition, scope and substance change over time. The history of the evolution of the core crime is a living testimony on how the meanings of 'war crime' and 'crimes against humanity,' for example, have been the subject of serious changes and development throughout history.

Second, the Statute's text provides several cognates thus supporting my view: (1) the Preamble speaks of "*such* grave crimes;"⁵⁹ and namely, these core crimes are not fixed in the Statute, as they are, for eternity; (2) I read Article 5 as composed of two parts: the first part addresses the metaphysics of 'international crimes,' namely, "the

pose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

56. Hague Law concerned with the methods and materials of warfare. See Convention Concerning the Laws and Customs of War on Land (Hague IV), 18 October 1907, including the Regulations annexed to the Convention.

57. Geneva Law restricts the applicability of war crimes to "grave breaches." Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) [Geneva I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1950) [Geneva II]; Convention Relative to the Treatment of Prisoners of War (1950) [Geneva III]; and Convention Relative to the Protection of Civilian Persons on Tome of Ward (1950) [Geneva IV]. See also: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter: 1977 Protocol I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter: 1977 Protocol II).

58. *Consider Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, (1997) 35 ILM 32, para. 140.

59. Emphasis added.

most serious crimes”⁶⁰ and the second part focuses on the practicalities of these metaphysics, *i.e.* it lists the most serious crimes with which the Statute is concerned, namely, the core crimes; however, Article 5 does not allude that the Statute should add to or detract from these core crimes; (3) among other acts that constitute a crime against humanity are, as Article 7(1)(k) provides, “other inhuman acts of a similar character.”⁶¹ Likewise, Article 8(2)(b)(xxi), which provides that “committing outrages upon personal dignity, in particular humiliating and degrading treatment,” constitute a war crime.⁶² Both articles allow for future development of international criminalization.

Third, Article 10 strongly supports this line of thought: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way *existing or developing* rules of international law.”⁶³ The words “existing or developing” speak for themselves.

C. *The State of Mind*

The mental element occupies a prominent factor in the conceptual definition of ‘crime.’ Taken together, the wrongdoing and the mental state, if attributed to the actor, constitute criminal responsibility.⁶⁴ “Unless otherwise provided,”⁶⁵ the ICC’s jurisdiction applies only to criminals who commit their crimes with “*intent*⁶⁶ and *knowledge*.”⁶⁷

60. Rome Statute art. 5 (1998) (emphasis added).

61. Rome Statute art. 7(1)(k) (1998); *see also* *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgment, ¶ 563, 565 (Jan. 14, 2000); *see also* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 50-2, 498, 519 (Aug. 2, 2001). *See also* Bassiouni, *supra* note 33, at 816; Cassese, *supra* note 1, at 25, 81.

62. Rome Statute art. 8(2)(b)(xxi) (1998). I am ready to assume that both articles do not violate the general prohibition against vague crimes because the Statute itself prohibits such vague criminalization. *See* Rome Statute art. 22 (“The definition of a crime shall be strictly construed and shall not be extended by analogy...”).

63. Rome Statute art. 10 (emphasis added).

64. Cassese, *supra* note 1, at 159.

65. *See* Cassese, *supra* note 1, at 171-75 (considering the phrase “[u]nless otherwise provided” as a rescuing anchor, thus solving the arguable deficiencies of Article 30 criticizing Roman Stat. art. 30 (1998)); Schabas, *supra* note 16, at 109.

66. *See* Rome Statute art. 30(2)(a) (explaining “[i]ntent” is defined as “means to engage.”).

67. *See* Cassese, *supra* note 1, at 176 (stating it requires both intent and knowledge.); *see also* Schabas, *supra* note 16, at 108 (suggesting “intent or knowledge”).

This is the highest possible degree of the state of mind.⁶⁸ However, the Statute views awareness of the consequences “in the ordinary course of events” as equivalent to ‘intention.’⁶⁹ This is a clear adoption of the *dolus eventualis* doctrine (conditional intent), whereby the actor is indifferent to the result or is ‘being reconciled’ with it.⁷⁰ This is true as well for the Statute’s conception of the definition of “knowledge,” which consists not only of awareness of the circumstances, but also of the consequences that occur in the ordinary course of events.⁷¹

D. Harm & Victim-Hood

While the crime of genocide clearly aims to punish crimes that involve serious harm as well as protect only collective groups of a certain nature, *i.e.* national, ethical, racial or religious,⁷² its role is much less clear in the context of crimes against humanity and war crimes. The concept of ‘crimes against humanity’ concerns serious harms such as murder, extermination, enslavement, deportation, severe deprivation of physical liberty, torture, rape, sexual violence of comparable gravity,⁷³ apartheid and “other inhuman acts that cause great suffering or serious injury to body or to mental or physical health.”⁷⁴ As for the victim, Article 7 lacks clarity. On one hand, the title ‘crimes against humanity’ would suggest the wholesale protection of a collective.⁷⁵ However, there are several provisions of Article 7 that contemplate the individual as a protected class in instances such as torture, rape and other sexual offences.⁷⁶

68. Schabas, *supra* note 16, at 108.

69. See Rome Statute art. 30(2)(b) (stating “*means to cause that consequence or is aware...*”) (emphasis added).

70. George P. Fletcher, *Rethinking Criminal Law* 445 (Oxford University Press, 2000); see also Cassese, *supra* note 1, at 161. (“[A] particular subjective posture toward the result.”).

71. Rome Statute art. 30(3); see also Cassese, *supra* note 1, at 164. The two-fold requirement of intent and knowledge applies only if the specific provision on the crime does not require otherwise. See Schabas, *supra* note 16, at 41, 55-56.

72. Rome Statute art. 6.

73. See, *e.g.*, *Prosecution v. Kunarac* (Case No. IT-96-23 and IT-96-23/1-A), Judgment, 12 June 2002, ¶ 150.

74. Rome Statute arts. 7(1)(a)-(k) & 7(2).

75. Such as deportation and persecution.

76. Rome Statute art. 7; see also Cassese, *supra* note 1, at 64.

The case for war crimes is completely different.⁷⁷ Article 8 does not confine its scope solely to the most serious harms.⁷⁸ Article 8(2)(b)(vi), as well as Article 8(2)(e)(ix), constitute war crimes as not only killing but also “wounding,”⁷⁹ taking hostages⁸⁰ and “making improper use of flag of truce.”⁸¹ As for the nature of the victim, *first*, Article 8 clearly applies when war crimes are committed against a single person.⁸² *Second*, apart from human beings, Article 8 applies also to property, including *e.g.* vehicles, buildings and flags. *Third*, it applies in cases of causing “widespread, long-term and severe damage to the natural environment” (hereinafter: environmental war crime).⁸³

There we have it. At first blush, environmental law seems to be a stranger to the concept of international criminal law on individual responsibility. But, it is not. Damaging the natural environment constitutes a war crime if other conditions are met.⁸⁴ However, there is no clear acknowledgment of the ‘natural environment’ in Article 6 or Article 7. While this could be understandable for the crime of genocide, it is as much so for ‘crimes against humanity.’ Should it be otherwise?

III. THE ROME STATUTE: A HAZY FUZZY CREATURE – IS IT?

Addressing the nature of the conceptual grounds of the Statute, Steven Ratner once described it as a schizophrenic system of international criminal law.⁸⁵ In his essay on *International Criminal Environmental Law*, Rene Provost joins Ratner’s position thus contending that the existing international crimes lack any coherent conceptualization of the role and nature of criminal law in the international legal system.⁸⁶ Obviously, the inquiry I have provided so far in Part II supports Ratner’s and Provost’s views. However, I am of the view

77. ‘Genocide’ and ‘crimes against humanity’ have a quantitative dimension.

78. Schabas, *supra* note 16, at 30, 55.

79. Rome Statute art. 8(2)(b)(vi).

80. *See* Rome Statute, art. 8(2)(a)(viii).

81. Rome Statute art. 8(2)(b)(vii).

82. Schabas, *supra* note 16, at 30, 56.

83. Rome Statute art. 8(2)(b)(iv).

84. Rome Statute art 8(2)(b)(iv).

85. *See* Steven S. Ratner, *The Schizophrenias of International Criminal Law*, 33 *Tex. Int’l L.J.* 237 (1998).

86. Provost, *supra* note 10, at 439, 441-442.

that the Statute allows for deducing four possible general conclusions.

First, the only obvious reason for limiting the ICC's jurisdiction to the core crimes, including their sub-categories, is the simple fact that the Statute is nothing but a formal codification of previous existing treaty and customary norms. *Second*, (1) the ICC's jurisdiction applies to perpetrators as individuals but not necessarily to state agents;⁸⁷ in any case, it applies to all perpetrators in an equal manner, regardless of their position or capacity. (2) The Statute is concerned with severe acts that target humanity as a collective entity, as well as individuals and singles. Either way, these are acts that shock a person's conscience if they are understood in the context of their commission. (3) Conditional intent (*dolus eventualis*) qualifies as intention if the actor is indifferent to the result or 'being reconciled' with it. Finally, (4) the concept of 'international crimes' is not limited to the most serious harms, but rather to the most outrageous actions. *Third*, the process of developing the field of international criminal law, as represented by the Statute, has reached only the end of the beginning; it includes several provisions that allow for future international criminalization. *Fourth*, instead of anticipating possible wrongdoings of international nature and criminalizing them in advance, the international community seems to wait for an atrocity to occur and only then criminalizes such actions. This is true due to the lack of a coherent theory on international criminalization.

It is true that the Statute is laconic. It is also true that the Statute is far from establishing a coherent conclusive legal arrangement on international individual criminal responsibility. However, it is undoubtedly true that the Statute, as it stands today, provides several indications as to what suits the Statute's premises. In the general context, the four conclusions I have already provided highlight these indications. The question is whether – and if so, how – these conclusions can elaborate on our discussion regarding the possibility of international criminalization of serious environmental wrongs.

IV. INTERNATIONAL CRIMINAL ENVIRONMENTAL LAW

Until the late 1960s, forms of environmental damage were not taken as seriously as they are now. As Antonio Cassese explains: (1)

87. *Id.* at 441.

forms of environmental damage were not committed on a very large scale; (2) states were reluctant to interfere with other states' management of their space and resources; and (3) there was not strong public opinion on the potential danger of environmental damage.⁸⁸ In the late 1960s, serious instances of environmental damage caught the attention of the international community as a whole: illegal dumping in the high seas, damaging the ozone layer, global warming, releasing toxic chemicals in the high seas and other water resources, dumping of toxic and other nuclear waste in the high seas and illegal trade in ozone-depleting substances, oil spills in the high seas, illegal waste disposal, including disposal of hazardous and radioactive waste and illegal trade in endangered species of fauna and flora.

Accordingly, the international community could not stand by silently. Several treaties were concluded thus imposing duties on states to protect the environment, *inter alia* by domestic criminal legislation. Provost provides a comprehensive survey of these treaties: (1) the Paris Convention on the Prevention of Marine Pollution from Land-based Sources of 1986; (2) the Convention on the Prevention of Marine Pollution by Ships of 1973; (3) the Basle Convention on the Control of Transboundary Movement of Hazardous Waste of 1989; (4) the Convention on the International Trade in Endangered Species of Wild Fauna and Flora of 1973; and (5) the Council of Europe Convention on the Protection of the Environment through Criminal Law of 1998.⁸⁹

Truly, in the late 1970s, public opinion in this regard expressed more concern about serious threats to vital environmental resources at large and environmental crimes became the subject of criminal policy. Criminal law is considered as having the capacity to serve as a deterrent, preventing non-compliance with environmental law.⁹⁰ The adherence to domestic tools was, to a great extent an inevitable step, primarily due to the serious hazard posed by environmental damages. Such crucial steps would not have been addressed had it

88. Cassese, *supra* note 6, at 482, 488.

89. Provost, *supra* note 10, at 452.

90. *See id.* at 451, 453 (arguing that the fact that an increasing number of states criminalize serious damage to the environment does not necessarily establish a duty to do so, neither at the domestic level nor in the international arena. In Provost's view, "it seems probable that a treaty will be required before a crime for the international or grossly negligent causing severe, long-lasting, and widespread damage to the environment becomes a reality").

not been clear to the international community that the wellbeing of the world was at serious and imminent risk.

Bearing in mind the nature of environmental damage, including its outrageous consequences and the nature of international criminalization, let us once again ask the question with which we began the inquiry: should damaging the natural environment, in a widespread, severe and long-term manner, constitute an international criminal responsibility? To me, the answer is clearly 'yes,' for the following reasons.

Obviously, causing widespread, long-term and severe damage to the natural environment under certain conditions constitutes a war crime; the Statute clearly provides this in Article 8(2)(b)(iv). Protecting the natural environment therefore, is not a strange animal to 'international individual criminal responsibility.' However, this environmental war crime is limited solely to circumstances of international armed conflict.⁹¹ In any case, outside the premises of Article 8, damaging the environment does not constitute any international crime.

Originally, international protection for the environment was coined in Articles 35 and 55 of the 1977 Protocol I, both of which protect the natural environment in times of war. The basic concept embodied in Article 8 is also located in the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977.⁹² The idea of criminalizing certain assaults against the environment was developed in Article 22(2)(d) and Article 26 of the Draft Code of Crimes Against the Peace and Security of Mankind of 1991.⁹³ These are the grounds on which Article 8(2)(b)(iv) of the Statute is based.⁹⁴ Eventually, the only reason for providing such a limited notion of international environmental crime is the mere existence of prior treaty norms. However, if the Statute is concerned about preventing the outrageous consequences to the environment and to humanity as a whole that are likely to take place during warfare, it is only reasonable to think such protection as extending to periods of internal armed conflict. In

91. Rome Statute art. 8(2)(b)(iv).

92. However, the treaty speaks of "widespread, long-term *or* [but not 'and'] severe effects (Italics and parenthesis added).

93. See Draft Code of Crimes Against the Peace and Security of Mankind, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

94. *Supra* note 91.

addition, most serious environmental damages take place in times of peace. This leads me to examine the premises on which 'crimes against humanity' stand and their compatibility with protecting the natural environment.

Article 7 on 'crimes against humanity' was not intended to be conclusive. This was proved in Part II, thus relying not only on a purposive interpretation of the notion of international criminalization, but also on the Statute's text itself, namely, Article 7(1)(k), which allows for the criminalization of "other inhuman acts of a similar character," "intentionally causing great suffering or serious injury to body or to mental or physical health." Article 7(1)(k) includes more than the obvious. I argue that damaging the natural environment suits the concept of 'crimes against humanity.'

Article 7 concerns serious harms that range from the severe deprivation of physical liberty, all the way up to sexual violence of comparable gravity to torture, murder and extermination, as well as harms "causing great suffering or serious injury to body or to mental or physical health."⁹⁵ Serious environmental damage suits Article 7 as well as to any other inhuman act that causes great suffering and serious injury to humanity as a whole and to every individual separately, to their bodies, to their mental and physical health, directly and indirectly. Needless to say, such damages are committed in particular during times of peace. During times of peace the damages are committed in a widespread and systematic manner - damaging the ozone, global warming and polluting the high seas are only few examples of this type of behaviour. Such serious damages are directed against humanity with the knowledge and awareness of the imminent, direct and certain consequences that these damages will occur in the ordinary course of these events.⁹⁶ Furthermore, being aware that the consequences will occur in the ordinary course of events, which is the case for most serious environmental damages, is equivalent to pure intention (the *dolus eventualis* doctrine).⁹⁷ In conclusion, not only does causing 'serious environmental damage' suit better the concept of 'crimes against humanity,' compared to 'war crimes,' but it also satisfies all the preconditions and elements of the concept of 'crimes against humanity.'

95. Rome Statute art. 7(1)(k).

96. Rome Statute art. 30(3).

97. Rome Statute art. 30(2)(b).

V. EPILOGUE: DEPORTING DOGMATISM, IMPORTING SKEPTICISM

“The point is not dogmatic communication, but investigation and tender for examination on your part.”⁹⁸

In another place, I have invoked a philosophical conceptual distinction between two schools of thought: Dogma versus Skepticism.⁹⁹ In the context of legal theory, dogmatic argument is driven by a set of beliefs which are accepted without argument. Obviously, these are not arbitrary beliefs, but rather are based on reason, methodology and doctrine; they are not about fiction. However, dogma suggests paying no attention to evidence or other opinions. Skepticism is located on the extreme opposite end. “But how will I find such a belief?” René Descartes once asked; and he answered: “by the method of doubt.”¹⁰⁰ Skepticism suggests a very cautious methodology; it is a questioning approach towards what might be considered as dogma otherwise. Skepticism doubts the nature of right and wrong and requires not only reasoning but substantial evidence.¹⁰¹

The codification of the core crimes in the Statute represents a classic case of dogmatism. The Statute codifies that which has already been recognized as a basis for international criminalization. Skepticism calls for a principle inquiry into the nature of international criminalization.

In another but related context, Henry Hart once argued: “a ‘crime’ is... conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”¹⁰² Criminal law is a dynamic system. In substance it has to be stable, clear, coherent and proportionate. However, for

98. Karl Jaspers, *The Question of German Guilt* 9 (E. B. Ashton trans., Fordham University Press 2000).

99. Mohammed Saif-Alden Wattad, *The Meaning of Criminal Law: Three Tenets on American & Comparative Constitutional Aspects of Substantive Criminal Law* (2007) (doctor of law thesis, Columbia University School of Law).

100. René Descartes, *Meditations on First Philosophy* (1641).

101. See T. Z. Lavine, *From Socrates to Sartre: The Philosophy Quest* 95 (1984). The authors point out that René Descartes is the father and originator of modern philosophy and France’s greatest philosopher.

102. Henry M. Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, at 404-05 (1958); See also, Khalid Ghanayim, Mordechai Kremnitzer, and Boaz Shnoor, *Libel Law- A Criminal Offence and a Civil Tort: De Lege Lata De Lege Ferenda*, 25-28 (2005) (in Hebrew); Albin Eser, *The Principle of ‘Harm’ in the Concept of Crime*, 4 *Duq. L. Rev.* 345 (1966).

criminal law to be stable, clear, coherent and proportionate, it must be as close as possible to the sentiments of the community. Assessing the nature of international criminal law, Bassiouni once made the meaningful observation that “[I]nternational criminal justice will always be a work in progress, much like the pursuit of justice at the national level.”¹⁰³

In criminal law theory, society’s observations had a very significant role in the history of criminal law development, referred to as the ‘social protected interest.’¹⁰⁴ This is true for domestic criminal law theory as well as for international criminal law, which concerns the views of the international community of nations. The ‘social protected interest’ concept is the legitimacy for every criminal prohibition.

The contemporary international crimes only came to be formally codified following the miserable experience of World War II.¹⁰⁵ As for damaging the natural environment, Provost expressed his view whereby there is no such thing as international criminal environmental law at present. For Provost, a treaty is required before such an international environmental crime can be articulated.¹⁰⁶

Rejecting Provost’s view, allow me to recall the basic pillars of the nature of international criminalization. It is the Preamble of the Statute that provides that international criminalization shall be mindful that, “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”¹⁰⁷ These atrocities were never limited to times of war. In addition, humanity as a whole is the victim not only of armed conflicts but also of environmental disasters. While the Nazi-like brutality was and continues to be a serious threat to the wellbeing of particular nations, environmental disasters are primarily a threat to the “wellbeing of the world.”¹⁰⁸

Given the context within which international criminal law has been developed, both understanding the potential outrageous consequences of serious environmental damages and comprehending the conceptual notion of international criminalization compel imposition of individual international criminal responsibility upon the commis-

103. Bassiouni, *supra* note 33, at 17, 825.

104. See *Salmond on Jurisprudence* 1 (12 ed, P. J. Fitzgerald 1966).

105. Cassese, *supra* note 1, at 16-17.

106. Provost, *supra* note 10, at 453.

107. Preamble, Rome Statute of the Int. Crim. Ct. (Jul. 17, 1998).

108. See Rome Statute, Preamble.

sion of serious environmental wrongs. These wrongs threaten the existence of humanity as a whole, risk the existence of humankind and cause harm and suffering to the physical and mental health of the human being.

In this article, dogma led me in one direction and skepticism in another. I saw the better and approved of it. This article calls for the international community to act before the horizon shrinks. In 2007, Shimon Peres, the Israeli President, expressed his view that like terrorism, global warming, as well as other serious forms of environmental damage, constitutes an imminent threat to the wellbeing of the world as a whole.¹⁰⁹ Benjamin Franklin once announced that ‘all mankind is divided into three classes: those that are immovable, those that are movable, and those that move.’ I choose to be one of those who move, for “an easy task becomes difficult when you do it with reluctance.”¹¹⁰

109. Shimon Peres, Prime Minister of Israel, Opening speech for the winter session of the Israeli Parliament.

110. Publius Terence, <http://www.famousquotes.com/search.php?cat=1&search=Diet>.

