Chapter – I
CRIMES AND JUSTICE IN INTERNATIONAL POLITICS

The present chapter examines how justice is understood in international politics. It takes into account different theoretical approaches that include International Relations (IR) theory, international political theory and theories of justice. Secondly, this chapter examines how criminality is perceived in domestic and international contexts. It explains the underlying norms and rules on the basis of which crimes are defined. Lastly, this chapter explains different conceptions of justice that have been advanced to address international criminality that involve large-scale atrocities and grave violations of human rights.

JUSTICE IN INTERNATIONAL POLITICS

Before addressing the issue of criminality and justice in international relations, it is important to first make a brief review of how the concept of international justice is dealt with in different theoretical traditions. The concept of justice, as evolved over a period of time, has been a subject matter of intense debate among scholars and political thinkers. Ronald Dworkin claims that all approaches to justice are based on common assumption, but have different interpretations. He presents an abstract egalitarian thesis i.e. "the interests of the members of the community matter, and matter equally." All contemporary theories of justice seek to address these two questions: "What people's interests are" and "what follows from supposing that these interests matter equally." Differences arise, however, because of different answers to these questions. On the other hand, it has been noted that contending theories of justice are based on values which are intrinsically different; different approaches offer their own "ultimate political ideals" like "equality in Marxism, liberty in libertarianism, utility in utilitarianism, contractual fairness in liberal equality, common good in communitarianism, and androgyny in feminism." However, the application of the concept of justice in international relations has remained problematic, the primary reason being the dominance of realism as a school


2 For a collection of six main approaches to justice within political philosophy – utilitarianism, liberal equality and libertarianism (in Vol.I); Marxism, communitarianism and feminism (in Vol.II), see Kymlicka, n.1.
of thought in mainstream International Relations (IR) scholarship. Realism advocates selfish pursuit of interests by states. Realism has dominated IR to such an extent that IR as a branch of social science has been viewed as devoid of values, ethics and morality. Nevertheless, in recent times, partly because of rapid globalization, increasing democratization process and dominance of human rights agenda, the concept of justice is increasingly acquiring prominence in the realm of IR. In this connection it may be pertinent to cite the views associated with writers like Hedley Bull, Terry Nardin, Michael Walzer and Chris Brown who consider justice as the central theme of IR theory.

Chris Brown refers to a few perspectives on justice in international politics. They are (a) normative concerns in mainstream (traditional or orthodox) IR theories, (b) literature in the field of international political theory, and (c) the contribution made by the traditional theories of justice in understanding international justice.

**International Justice and IR Theory**

Realism holds that states are the sole actors in international politics; they are perpetually engaged in pursuit of self-interest; and they always strive to maximize their power. This thesis was stated by Hans Morgenthau in the Post-War world to counter arguments advanced by the so called “Utopians” who saw possibility of realization of common good by means of international institutions. Classical realists like Hans Morgenthau and EH Carr had different notions of ethics. They argued about “morality of state craft” and the duty of a diplomat towards his own state. The idea of international justice stood just on the opposite side of a theory that stated that outcomes in international politics are mere reflections of distribution of power. According to classical realism, states stand in relation with one another in exactly the

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1. The insensitivity to normative concerns is seen even in practice. While concerns for equality, liberty and justice have always dominated political discourse within states, the pursuit of such goals with the same vigour has been lacking in external affairs of states. The most significant moral question in this respect concerns with the obligations and duties towards those who are not co-nationals or fellow citizens.


3. Yet another way to examine justice in international relations is to look at the influence of Marxism, critical theory, feminism and postmodernist thinking. Most of the thinkers in this category show great disenchantment with lack of morality in mainstream (or orthodox) IR theory. In their own ways they address the present moral crisis. The approaches they adopt are viewed as emancipatory. See, Kimberly Hutchings, *International Political Theory: Rethinking Ethics in a Global Era* (London, 1999), pp. 63-88.
same manner in which individuals stand in relation to each other in a Hobbesian state of nature. Justice simply has no place. The only chance is that states may, sometimes, show respect to norms, which is likely to benefit only a few without adversely affecting interests of others. States do cooperate when it is in their interest, but the commitments they make cannot be relied upon. Realists hold that international law and institutions reflect underlying power relationships. They do not have any significance in changing state behaviour. Treaties protect interests of more powerful. Starting with the 1970s, classical realism saw a sharp decline as a theory of international relations. It was inadequate to explain or account for much of the changes taking place in the world. Two distinct approaches – neorealism (also known as structural realism) and neoliberal institutionalism (also known as neoliberalism) – emerged that were considered offshoots of realism.

Kenneth Waltz, the main figure of neorealism, explained a systems theory of international politics in which states are treated as functionally similar units but having different capabilities. He argues that anarchy characterizes the international politics and states are primarily driven by their instinct to survive. Self-help is the only means available to them. In a state of anarchy, states are particularly sensitive to their relative power. Their primary concern is “not to maximize power but to maintain their position in the system”.

Neoliberal institutionalism, which developed as an alternative to neorealism, shares some of the basic assumptions with neorealism; for instance, that there is anarchy in the international system, states are the primary units of the system and states are rational egoists. But neoliberal institutionalists also see the possibility of cooperation and thus of normative considerations in relations among states. Drawing on game theory and microeconomics, Kenneth Oye argues that even in the absence of a central authority in international politics there are incentives for states to cooperate and they

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6 Chris Brown, n.4, pp.275-276.  
8 The fundamental difference between them remains over absolute and relative gains. Neoliberals posit that states tend to maximize their absolute gains while least concerned with gains of others. Cheating is the “greatest impediment to co-operation among rationally egoistic states”. The problem of cheating can be tackled through institutionalization. On the other hand, neorealism claims that states are positional rather than atomistic in character, and states accord high priority to relative gains. Apart from their own gains, states give equal emphasis to gains of others. Hence, cheating is not the only impediment in international cooperation but states’ concerns with relative gains are equally important. See, Joseph M. Grieco, “Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism,” in David A. Baldwin, *Neorealism and Neoliberalism: The Contemporary Debate* (New York, 1993) pp.116-135.
can adopt "mutually advantageous courses of action" by altering the circumstances in which they interact.\(^9\) They recognize the importance of rules and institutions in promoting cooperation among states. Regime theory is an extended version of neoliberal institutionalism. Apart from power and interests, regime theory equally stresses on the importance of ideas, rules, norms, and institutions. According to Krasner, "[r]egimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice."\(^10\)

Keohane argues that uncertainty and absence of authoritative government are two features of the international context within which actors have to make choices. Regimes facilitate governments to arrive at "mutually beneficial agreements" under this anarchical setting.\(^11\) Neoliberals focus on compliance and reciprocity to avoid sub-optimal outcomes. Neorealists do not see any value in norms. They place greater emphasis on relative gains and regard regimes as "epiphenominal".

However, it seems that the normative considerations about which neoliberals talk are limited to a great extent because, like neorealists, they also accept rational egoism of states and anarchy as an essential condition of "international system". It appears that such norms are more the result of pragmatism than anything else and owe their origin to complex and interdependent world, and to international institutions that allow states to maximize profits. However, the threat of cheating always exists taking into account

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10 Krasner views regimes as "intervening variables" between basic causal variables and behaviour. Basic causal variables, which are most crucial for creation and sustenance of regimes, are egoistic self-interest, political power, norms, and principles, habit and custom, and knowledge. Among these, he regards, the last two as mere supplementary and the first two (interests and power) as most important. See, Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Stephen D. Krasner, ed., *International Regimes* (Ithaca, 1983), pp.1-21.

11 Keohane notes that regimes help in reaching agreements among actors by reducing transaction costs (costs of organization or of making side-payments); coordinating actor expectations (a qualitative and quantitative improvement in making information available to actors) and by establishing legal liabilities. However, he does not see the scope of binding and enforceable legal obligations within the regimes. See, Robert O. Keohane, "The Demand for International Regimes," in Krasner, n.10, pp. 148-155.
anarchy and rational egoism, making such norms highly vulnerable. It would not be wrong to say that here the emphasis is more on resolving problems of cooperation rather than international justice. The impact of rational choice realism was such in IR that it denied the discipline the value of normative issues, which where typical of “Utopian” liberal internationalism.

Justice and International Political Theory

International political theorists like Hedley Bull, Stanley Hoffmann, Terry Nardin, Michael Walzer and Chris Brown place equal emphasis on justice besides sovereignty in international relations. They view international politics in terms of a society of states as against realist conception of system of states. According to Chris Brown, international political theory involves “mediation” of sovereignty, rights and justice.

International political theory also accords importance to international law, which is regarded more as a social process than a body of rules. It attempts to reconcile divergent norms that appear to be contradictory in orthodox IR theory. This involves aligning sovereignty (non-intervention) based norms with those of human rights and democracy. However, the kinds of justice with which these theorists deal are “procedural and formal” rather than “social and distributive”.

According to Hedely Bull, international society (society of states) exists where states are aware of their common interests and values, and where a common set of rules governs relations among them. Taking note of the Hobbesian (realist), Kantian (universalist) and Grotian (internationalist) traditions of thought on international politics, Hedley Bull concludes that international society is anarchical in the sense that it exists without a government. Contending against arguments based on domestic analogy which claims that states, unlike individuals, are not capable of orderly social

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12 Chris Brown, n.4, p.279.
13 International political theory has its origin in the well-known “English School”, with Martin Wight and Hedley Bull as its chief founders.
15 Among these three, it is the Grotian tradition that views international politics in terms of a society of states. In this tradition, international politics is seen neither as an absolute state of war nor a complete unanimity of interests. “As against the Hobbesian tradition, the Groatians contend that states are not engaged in simple struggle, like gladiators in an arena, but are limited in their conflicts with one another by common rules and institutions. But as against the Kantian or universalist perspective the Groatians accept the Hobbesian premise that sovereigns or states are the principal reality in international politics; the immediate members of international society are states rather than individual human beings.” Hedley Bull, The Anarchical Society: A Study of Order in World Politics, 2nd ed. (Houndmills, 1995), pp. 23-25.
life in the absence of a government (common power to keep them in awe), Bull holds that states are very different from individuals in nature and they do form an anarchical society without government that “reflects features of their situation that are unique”.16 Hedley Bull views international justice to be formal justice rather than substantive justice. Substantive justice deals with recognition of specific political, social or economic rights while formal justice demands equality before law i.e. legal rules to be applied in a fair manner to everyone. Similarly, he writes, international justice is more commutative or reciprocal than distributive. Commutative justice involves mutual recognition of rights and duties through bargaining. Distributive justice, on the other hand, involves decision of the society as a whole to advance the common good.17 Bull has placed special emphasis on the compatibility of order and justice in international politics. Bull clarifies that any kind of justice can be realized only when there is some sort of order. Order entails existence of a pattern of social activity where elementary or primary goals of social life can be achieved and where there is possibility of realizing other advanced goals.18 To him, demands for cosmopolitan justice are demands for the transformation of the system of states. Such a step would be revolutionary, which would further require a conflict with the very structure through which international order is presently maintained. Bull’s idea of international justice encompasses procedural rules or “rules of the game” which confer rights and duties upon states in the structure of international coexistence. These norms and rules are also enshrined, to some extent, in international law.19 Maintenance of order occupies a central place in Bull’s conception of international justice. He accepts that institutions and mechanisms of international order such as balance of power, wars and special position of great powers frequently violate

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16 Since international society is anarchical, it has its limitations. As an element in international politics it competes with elements of a state of war and of transnational solidarity. Bull cautions that international events should not be interpreted solely on the basis of element of international society. All these elements are equally important. Ibid, pp. 44-50.
17 Ibid, pp. 76-77.
18 Bull has identified three elementary or universal goals that are essential to sustain order. These are: “First, all societies seek to ensure that life will be in some measure secure against violence resulting in death or bodily harm. Second, all societies seek to ensure that ... agreements, once undertaken, will be carried out. Third, all societies pursue the goal of ensuring that the possession of things will remain stable to some degree...” Ibid, p. 4.
ordinary notions of justice. However, they are essential to preserve order and enforce law in international system. 20

To what extent demands for justice are compatible with order in international politics? Bull examines three doctrines in response to this question. First is the orthodox view according to which there is an inherent contradiction between order and justice in international politics. It accords priority to order because it believes that maximum that can be achieved in international politics is “minimum order” or coexistence. Second is the revolutionary view, which also accepts inherent conflict between order and justice but regards justice as having the superior value. This view believes that though pursuit of justice may cause disorder at the initial stage, ultimately a just order would prevail. Third is the liberal or progressivist view, which rejects conflict between order and justice. It seeks to reconcile the two. It holds that by addressing causes of injustices, international order can be strengthened. 21

Bull also accepts that order and justice are not mutually exclusive. Attempts to provide order in international politics have to take into account demands for justice to succeed. Similarly, efforts for just change cannot ignore value of order. However, Bull also makes it clear that order is not only desirable and a fortiori in international politics, “there is also a sense in which it is prior to other goals, such as that of justice.” It is the condition which is imperative for the realization of other goals of “the great society of all mankind.” 22

With respect to international law, Hedley Bull accepts the argument that it is more a social process of decision-making, and hence is open to social, moral and political considerations, extraneous to legal rules. He also agrees that international law governs relations not only of states but also of other agents. Hedley Bull concedes that international law as a practical activity does share with municipal law many common features. However, one area where it departs radically from municipal law is that it is not backed up by the authority of a government. He says that in the absence of a central authority, the efficacy of international law does depend on measures of self-help such as use of force by individual states. 23

In order to evaluate the efficacy of rules of international law so that they can be treated as a factor in international politics, Bull considers of extent of harmony

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20 Ibid, pp. 87-89.
21 Ibid, pp. 90-91.
22 Ibid, pp. 91-94.
23 Ibid, pp. 122-130.
between the actual behaviour and the behaviour prescribed by the rules. He says that to a substantial degree international behaviour matches the behaviour prescribed by the rules. Incidence of violations of rules does not suggest that international law does not matter. In fact violation of a particular rule occurs in the context of conformity with other rules of international law. Moreover, offending states try their best to clarify that they respect the rule in question. Cases where states refuse to accept the validity or legitimacy of the rules in question indicate their inefficacy. Bull says this happens when there is "reasoned appeal to different and conflicting principles, or by an unreasoning disregard of the rules." Bull has identified three functions of international law that serve to contribute in the maintenance of international order. The most basic function international law performs is that it confirms, what he regards as the "fundamental or constitutional principle" of international politics (and also the "supreme normative principle of the political organization of mankind") in present times, i.e., "the idea of a society of sovereign states." Order in contemporary period has been achieved through recognition of the principle that world is divided into states which interact on the basis of a common set of rules. The confirmation of this principle by international law sets aside alternative principles such as the Hobbesian notion of international politics or the idea of a cosmopolitan state. Secondly, international law serves to identify the basic rules of coexistence among states and other actors. These rules mainly deal with the control of violence, adherence to agreements and sovereignty or independence of states. The third function of international law is to ensure compliance with the rules of international society in terms of both the rules of coexistence as well as of cooperation. Bull argues that compliance with rules of international law is in part due to "habit or inertia", as if states were "programmed to operate within the framework of established principles". States' conformity with rules emanates from three kinds of motives. First, what is required by rules may also be regarded as valuable or obligatory to achieve a bigger goal. Second, compliance may be the result of coercion or threat of use of force. Third, compliance with rules may be the result of considerations of reciprocal

24 Bull says, "If it were possible or meaningful to conduct a quantitative study of obedience to the rules of international law, it might be expected to show that most states obey most agreed rules of international law most of the time." Ibid, p.131.
25 Ibid, pp.131-133.
action. This can be seen in laws of war and principles of international law that safeguard state sovereignty. \(^\text{27}\)

Both Terry Nardin and Stanley Hoffman have made a significant contribution in the growth of scholarly attention to "international ethics". Terry Nardin provides a more impressive notion of international society. He vigorously argues in favour of international legal framework and proceduralist approach to justice in international relations. Nardin sees international society as a form of civil association, which depends upon authoritative practices of law and diplomacy to operate. Terry Nardin's conception of international society is based on what he calls "rule of law positivism". Like Hedley Bull, Nardin also views international law as a social practice. \(^\text{28}\) Rule of law as a mode of international relations is distinct both from morality and exercise of power. Laws are neither commands nor instrumental maxims to produce a desired outcome. Legality in international relations is determined by "an authoritative body of non instrumental rules." Applying legal positivism to international relations, he opines that international law has its roots in the practices of international society i.e. in the customs and agreements which govern relations among states. He claims that because international society rests on general rules rather than particular treaties, it is customary international law that is most relevant. Customary law (i.e. common laws applicable to all) sets apart international society from a variety of ad hoc transaction. Common laws which are derived from customs bind all states whereas particular treaties (even constitutional treaties such as the League Covenant or the UN Charter) bind only states that are party to them. Hence, customary law is "authoritative and binding". Nardin says,

Customary international law regulates the relations of states in the absence of explicit agreement, prescribes procedures for reaching agreement and determining their validity, and limits what states may do by making treaties. Treaties are the outcome of particular transactions and also instruments of international cooperation, but customary international law cannot be understood in this way. Its rules are prior to these transactions, the noninstrumental presupposition of all international cooperation. Treaties are practically important but custom has conceptual priority. \(^\text{29}\)

\(^{27}\) Ibid, pp.133-134.  
\(^{28}\) Nardin observes that positive law is distinct from divine law, natural law and moral conventions of society. Furthermore, validity as well as authority of law is determined by criteria internal to a legal system and not by extraneous considerations whether moral or rational. He also counters different approaches within legal positivism such as John Austin's view that law is the command of a sovereign. See Terry Nardin, "Legal Positivism as a Theory of International Society," in David R. Mapel and Terry Nardin, eds., *International Society: Diverse Ethical Perspective* (Princeton, 1998), pp.17-24.  
\(^{29}\) Ibid, p.21.
As for justice, the rule of law positivism presents a form of nonconsequentialist conception. It is concerned neither with the consequences of an act nor with the fair distribution of benefits. But it is related with the rightness of state conduct on the basis of rules of customary international law, law of treaties and laws of war. Hence “[i]nternational justice concerns the circumstantial propriety, not the consequential desirability, of these laws.” Moreover, Nardin makes a distinction between justice (the moral rightness of a law) and legality (the validity or authenticity of a law). He says that justice of law should not be confused with certain features of the rule of law which are regarded as “the inner morality of law” (“the inner morality of law” clarifies certain aspects such as there should be no retrospective application of law or arbitrary exemptions or private laws). These features are not criteria of “just” law but they are inherent in the rule of law itself. The criteria to determine the validity of rules of international law are internal to it.30

Just war thinking occupies an important place in international political theory. Just war tradition can be traced back to Augustine, which again found a new lease of life in the wake of Vietnam and the Gulf War. Michael Walzer’s contribution in this area remains most remarkable. Michael Walzer in his theory of aggression31 explains when wars can be morally justified and when they cannot. His theory of aggression is based on what he terms as the legalist paradigm.32 This legalist paradigm also clarifies Walzer’s conception of international society, law and order. It should be noted that this legalist model is not rigid and is open to revision under particular circumstances to address ground realities, which the international society may find itself facing. Six propositions of his model may be summarized as below:

First, international society33 is composed of independent states and not of individuals. Though international society can recognize the rights of individuals, the enforcement of these rights requires careful examination because it has bearing on the fundamental values of the society i.e. “the survival and independence of the separate political communities”.

33 Walzer says through domestic analogy international society can be understood as a political society, whose characterisation is possible by means of notions such as crime, punishment, self-determination and law enforcement. Ibid, p.58.
Second, the law of international society establishes the rights of its members. The rights of territorial integrity and political sovereignty hold supreme over all other rights. These rights are rooted in the rights of the individuals to form a common life.\footnote{Walzer says that common life is manifestation of the political association which individuals have built through “shared experiences and cooperative activities” in the course of history. And people are justified in defending their common life as they protect their homes because “the country is collectively as the homes are privately owned.” Ibid, pp.53-55.}

Further, the law of international society is applicable only to states (not to individuals) and its contents are defined through a continuous process of interaction among states. Third, aggression is defined as “any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another.” And aggression is a “criminal act.” The act involves “actual or imminent boundary crossings.”\footnote{Walzer has squarely focused on the criminal nature of aggression. He says, “[a]ggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for.” Ibid, p.53.}

Fourth, two kinds of violent responses are justified against aggression\footnote{Aggression is still aggression even if not resisted. Ibid, p.52.} - First response refers to a war in self-defence and second refers to a war for the sake of law enforcement. With respect to enforcement of law of international society, all members have a right to help the victim and to “use [all] necessary force against an aggressor.”\footnote{Walzer says absence of “policemen” in international society requires its members to share responsibility in law enforcement. Furthermore, while resisting aggression in self-defence, a state is not only fighting for itself because “aggression is a crime against society as a whole.” It justifies involvement of other states in counteraggression. Ibid, p.59.}

The theory of aggression demands members to forgo “neutrality.”\footnote{Walzer says all members of the international society are equally vulnerable to aggression. If not stopped, it is bound to spread. Individual victims are not only fighting for themselves. They are engaged in protecting future victims. Because aggression poses a general threat to everyone, states are expected not to observe neutrality. Ibid, p.238.}

Fifth, war is justified only against aggression. Here the theory seeks to restrict the occurrence of war as much as possible and to protect the principle of non-intervention.\footnote{This proposition is open to revision. Use of the words “imminent boundary crossings” in the first proposition suggests pre-emptive strike. Walzer provides the criteria to make a distinction between legitimate and illegitimate first strikes. He says three elements must be considered to verify “sufficient threat” before strikes: “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk” (p.81). Secondly, under compelling circumstances, says Walzer, interventions are justified. But those who intend to intervene must justify the reasons. Rejecting John Stuart Mill’s arguments that self-determination should be protected even when people are under repressive governments because only through it people come to realize the value of freedom and liberty, Walzar holds that on occasions it cannot be said with certainty whether people are really “self-determining”. Interventions can be justified in three types of situations: first for the cause of national liberation; second to counter a prior intervention by a foreign power; and third to protect people from severe}
Sixth, the aggressor state can be punished after being repulsed. Object of the punishment is to prevent war. 40

Theories of Justice and International Politics
In recent years many justice theorists, who were once considered to be concerned exclusively with domestic affairs, have shown interest in aspects of international justice. It is important to note that the justice theorists advocate universalism or cosmopolitanism, whereas international political theorists have particularist and communitarian approach. This is also the area where Kant dominates.
Laberge offers an interpretation of Kant’s Perpetual Peace. In his view, Kantian ideal theory requires individuals to live in a world republic. Kant’s categorical imperative states, “so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law.” 41
Central problem lies in the “coexistence of free agents” in state of nature which for Kant, like Hobbes, is a state of war. Kant’s theory of justice requires that equal limitation must be imposed on everyone’s freedom to resolve the crisis of coexistence in a common world. This problem is reinforced by another problem of “an externally mine and thine.” Since Kant’s theory of justice requires a judge rather than conflict to resolve the problems arising out of coexistence, it asks for a republican constitution where judicial decisions could be enforced.
Just laws limit everyone’s freedom to secure everyone’s freedom, thereby making it possible for free agents to coexist in accordance with universal laws. Kant reaches this conclusion on the basis of an ideal theory. To what extent this ideal theory can be applied to international relations (which, it seems, would call for a world republic). Kantian conceptions of international justice face the same crisis of coexistence of everyone’s freedom in a state of war. The biggest problem results from the presence

40 However, Walzer states, as a revision of this proposition, that domestic notions of capture and punishment are not suitable for international society because of the collective character of its members. Deterrence does not have much value because the number of actors are too few. Moreover, capture and punishment of individuals would require conquest of political communities which would be against the objectives of a just war. Only against Nazi-like states, such measures can be sought. Arms control, demilitarization, external arbitration and even temporary occupation of territory are appropriate forms of punishment against aggressor. These are a sort of collective penalties as they certainly involve derogation of state sovereignty to at least some extent. In addition, military defeat in itself is a punishment for aggressor. Ibid, p. 121.
of nonrepublican states. Laberge says, Kant addresses the problem on the basis of a nonideal theory. The principles of the law of nations are expressed in the form of articles which would lead to "perpetual peace."

The "Preliminary Articles" are:
1. No treaty of peace shall be held valid in which there is tacitly reserved matter for a future war.
2. No independent states, large or small, shall come under the dominion of another state by inheritance, exchange, purchase, or donation.
3. Standing armies (miles perpetuus) shall in time be totally abolished.
4. National debts shall not be contracted with a view to the external friction of states.
5. No state shall by force interfere with the constitution or government of another state.
6. No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible.

The "Definitive Articles" are:
1. The civil constitution of every state should be republican.
2. The law of nations shall be founded on a federation of free states.
3. The law of world citizenship shall be limited to conditions of universal hospitality.

According to Laberge's interpretation of Kantian nonideal theory, then first of all a world organization, constituting of both republican as well as nonrepublican states, should be established. This league of different states would prohibit use of force and intervention in internal affairs. Second, the penultimate goal of the nonideal theory is a panrepublican league of nations. This will be an alliance among democracies. The final goal is a world republic. This is the Kantian response to the present situation which is a modus vivendi between republican and nonrepublican states.

Teson offers another interpretation of Kantian answers to just arrangement of international society and the morality of international law. For Teson, Kant stood for an alliance of democratic states. Only democracies can be expected to respect domestic and international rule of law. Hence, only society of democratic states is morally right and only it has the potential to achieve perpetual peace. Peace will be secured because democracies do not fight each other. Only liberal constitution works towards freedom, peace and human rights; and a collective commitment of such a republican alliance is bound to secure peace.

Teson claims that Kantian tradition does not call for a world republic as the ultimate goal; on the other hand, Kant asks for maintaining separate states where tyrants can be kept away from the alliance. There are two reasons for doing this. First, the global

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42 Ibid, pp. 84-87.
44 Ibid, pp. 96-97.
freedom will be under jeopardy if a world republic in the end turns out to be an “evil empire.” Second, a world republic is less likely to take into account cultural, historical and other preferences of communities. However, an alliance of liberal states cannot be conceived in the present world in which liberal and illiberal states are bound to coexist. Progress in this direction will take considerable time. Kant’s preliminary articles of “perpetual peace” address this “intermediate stage” in which both types of states can coexist. Any sort of relationship between liberal and illiberal states in this transitional phase is “a modus vivendi dictated by considerations of prudence.”

Much of the work in this area is also based on “contractarian” account of justice where principles of justice are determined by a hypothetical contract or agreement reached between concerned parties under ideal conditions. John Rawls’s contractarian approach to justice has been most outstanding. Attempts have been made to apply his principles of social justice at the international level. Rawls sees society as a self contained “co-operative venture for mutual advantage,” and the terms of association are decided through a contract reached under ideal conditions (i.e. veil of ignorance). In The Law of Peoples Rawls presents his views on international law and relations. He argues about a second contract between “rational representatives of liberal peoples” again under the veil of ignorance to specify the Law of Peoples. The liberal political ideas of right and justice will be agreed upon. This might in turn result into recognition of a variety of principles like non-intervention, self-determination and right of self-defence. Under ideal theory this forms the basis for a society of liberal peoples. Now the problem his ideal theory confronts is the application of the Law of Peoples to those societies which are not liberal. He claims that tyrannical or dictatorial regimes should not be allowed to become “members in good standing of a reasonable society of peoples”. However, not all non-liberal regimes can be labeled as tyrannical or dictatorial. He says, “well ordered hierarchical regimes” which are “decent” yet not liberal should be accepted, as they are more likely to respect peace and human rights. A well ordered regime may differ from a liberal regime in mainly two respects. First, it may have a state religion but with people having freedom to practice different religions in private domain. Second, the well ordered regime may

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46 Ibid, pp. 105-110.
47 Rawls’s approach also includes “difference principle” which states that inequalities are justified only if they have to benefit the least advantaged.
lack representative institutions but there should be some mechanism to take account of the will of the people.\footnote{Ibid, pp. 54-70.}

Charles Beitz has made an attempt to apply Rawlsian ideas at the international level. However, his major emphasis is on distribution of natural resources and wealth. Beitz also claims that interdependence has caused the world to become a single society, therefore a second contract between the state representatives is not needed.\footnote{Charles R. Beitz, “Justice and International Relations” in \emph{International Ethics} (Princeton, 1985).}

According to John Charvet’s contractarian theory of international society, only weak moral obligations between states are possible in the present circumstances.\footnote{Charvet argues that morality rests on a hypothetical contract between individuals. Individuals perceive morality as a kind of cooperation for mutual advantage. Moral rules derive their meaning from law. Moreover, “[t]he authority of the norms is a communal or collective one. It is grounded in the will of each to pursue his good in association with the others, where the terms of association consist in the authoritative norms.” See John Charvet “International Society from a Contractarian Perspective,” in Mapel and Nardin, n.28, p. 118.} A more institutionalized international society is required to generate strong moral obligations, which is currently not the case.\footnote{Charvet says, “International society as a society of states certainly acknowledges authoritative rules and practices as codified in international law, and has developed institutions that possess some degree of collective authority. But the most important of these institutions cannot be said to dominate the individual states very effectively, the more powerful of which retain considerable freedom to interpret the rules to suit themselves. Ibid, p. 122.} In the long run international society might take the form of a world state, but right now attention must be paid to political arrangements for a multiplicity of states.\footnote{Charvet argues that since pragmatic reasons come in the way of a world state, international society has to be understood as a contract between states. Ibid, p. 114.}

Charvet, like Kant, proposes a federation of liberal states, which would ensure sovereignty, territorial integrity and establishment of a liberal regime in each member state. Liberal federation must also ensure right to equal resources between them. However, Charvet claims that principled coexistence is not possible with states which do not adhere to the liberal vision that participants in a cooperative arrangement are to be treated as free and equal. A nonliberal state, merely for prudential reasons, might accept what is seen as a liberal principle of cooperation to meet its external requirements. But in such a case, the nonliberal state would be contradicting its internal principles. Hence, it would not regard such a liberal principle as “authoritatively binding.”\footnote{Ibid, pp. 120-130.}

Brian Barry is another justice theorist who views international society from a cosmopolitan perspective. Brian Barry calls justice as impartiality. Barry clarifies his
conception of impartial treatment in terms of a hypothetical negotiating situation marked by equality and freedom. With regard to any rule or principle, he says, one must consider "whether or not it could reasonably be rejected by somebody who was motivated by the desire to find principles which others similarly motivated could not reasonably reject." 55

Barry explains four basic cosmopolitan principles of justice. First is the presumption of equality. All inequalities with respect to rights, opportunities as well as resources must be justifiable in such a manner that the least advantaged cannot reasonably reject them. The second principle deals with personal responsibility and compensation. It allows people to prosper differently if the cause of difference is their own doing (voluntary choice); however, victims of misfortunes are to be compensated provided they could not have avoided those misfortunes. The next principle calls for priority of vital interests. Unless the circumstances are so compelling, the vital interests of each person should be given preference over non-vital interests of anyone. The fourth principle stands for mutual advantage. It allows people to depart from the application of the first three principles if it is in the interest of everyone. Where there is a possibility of more than one arrangement, that one should be preferred which maximizes the advantage of those who are likely to gain least from the departure. 56

In the view of Barry, a world federal government would best suit the requirements of moral cosmopolitanism. 57 He suggests forming it on the model of the US. This world federal government would levy taxes from the rich and distribute them among the poor. Member states would be allowed to levy their own taxes. Apart from taxes from individuals, a world federal government would not be possible in the absence of proper arrangement of transfers of payments between states. Barry suggests, this task can be accomplished by an international authority that would levy taxes proportional to GNP of a state or charge fees for business transactions. However, such transfers should not be made if the ruling elite of the recipient state simply appropriate those transfers. Nevertheless, such transfers can be handed over to a trusteeship until

56 Ibid, pp. 147-149.
57 Barry has also considered links between moral cosmopolitanism (requiring all moral claims to be considered impartially) and institutional cosmopolitanism (requiring potentially strong supranational institutions. Ibid, pp. 144-145.
international intervention uproot corrupt governments. There is a moral duty to help
the poor even if foreign governments are not performing their jobs satisfactorily.\textsuperscript{58}

Barry claims that cosmopolitan principles do not accept communitarian arguments for
international diversity (multiculturalism) beyond a point. Moral cosmopolitanism
calls for universally applicable standards. He says, "morality is socially constituted
only to a limited extent. The principles of justice are valid for all societies." And
"[e]nthusiasts for ‘multiculturalism’ have a tendency to sentimentalize traditional
arrangements that are grossly oppressive and exploitative when looked at close up."\textsuperscript{59}

\textbf{CRIMES IN DOMESTIC CONTEXT}

Before addressing criminality in international politics, it is important to take an
account of crime in domestic setting. In modern times, crime is seen in terms of
violation of law, especially of criminal law.\textsuperscript{60} But crime has always existed in human
society; there have always been some people who have violated the established norms
and customs of any given society. Crime also involves violation of social norms.
Norms define the kind of behaviour, which is acceptable. However, not all violations
of any norm are treated as crime. Most of the transgressions of norms are referred to
as deviance. It follows that crime shares with deviance a complex relationship; this
relationship has been a matter of great debate among criminologists and
sociologists.\textsuperscript{61} Deviance covers a much wider range of human activities than crime.
This does not mean that scope of crime is limited. Crime also covers a variety of
activities ranging from petty thefts to mass murder.

People are expected to conform to values and norms of a society or group. When they
violate or transgress societal norms, society reacts by means of sanctions. Sanctions
refer to responses of society towards the behaviour or conduct of an individual or
group. Sanctions may take the form of reward or punishment. They are meant to

\textsuperscript{58} Ibid, pp. 153-161.
\textsuperscript{59} Ibid pp. 156-157.
\textsuperscript{60} In terms of legal definition given by Marshall and Clark, "[a] crime is any act or omission prohibited
by public law for the protection of the public, and made punishable by the state in a judicial proceeding
in its own name. It is a public wrong, as distinguishable from a mere private wrong or civil injury to an
individual." For them, crime is wrong against public order rather than moral or private order. Crime
can also be a breach of moral order if it is so provided in public law. A private wrong referred to as
"tort" or "civil injury" involves transgression that belongs to individual domain. See, William L.
Wolfgang, Leonard Savitz and Norman Johnston, \textit{The Sociology of Crime and Delinquency}, 2\textsuperscript{nd}
\textsuperscript{61} Criminologists tend to focus on that behaviour which violates rules of criminal law while
sociologists concentrate on transgressions of accepted norms of society.
enforce compliance with the social values. Punitive sanctions may not necessarily take the form of formal punishment like incarceration. Simple disapproval of someone or social boycott is also a form of sanction.

It is also generally held that criminal law incorporates social norms and proscribes that conduct which any given society regards appropriate for punishment. Acts for which society demands punishment are translated into criminal law. In other words, crime suggests violation of norms, which exceeds tolerance level of society. In this way, criminal laws reflect underlying social norms, which are defined and enforced by governments. From another perspective, criminal law may or may not reflect prevailing norms. In modern complex societies, violation of a rule of law and violation of a norm or custom may not necessarily be the same. A complex dynamics work in modern societies in defining criminality, attributing responsibility and legislating criminal law. These complexities have generated much scholarly debate.

An essential feature of crime is relativity i.e. the concept of crime changes with time and place. The conduct which is held as crime today, may not be so viewed in the future. Similarly, what is treated as crime in one society, may not be so regarded in another. Mainly because norms and values differ significantly in different societies and within a society in different periods, the way criminality is perceived also differs. Changing values and public consciousness within a society significantly affect the way criminality is defined and the conduct in question criminalized. Newer crimes are included in the fold of criminal law while earlier ones lose their criminality.

Another significant feature that should be kept in mind is that crime and deviance do not always have negative or harmful implications for society. All the major social and political reforms, at some point of time, were treated by majority as deviant and in

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62 Imprisonment entails involvement of formal structures of criminal justice system.
63 For instance in the context of India it can be claimed that both dowry and corruption in public life are punishable acts under law, but they also command widespread social acceptance.
64 For a discussion on differences between legal norms and social norms related to crime. See, Thorsten Sellin, “A Sociological Approach,” in Wolfgang, n.60, pp. 3-10. Sellin refers to them as “crime norms” and “conduct norms” respectively.
65 Even within a society at any given time, there exist different subcultural groups like those living in slums and ghettos, which adhere to very different set of values and norms.
66 Again, in the context of India, Sati Pratha (burning of widow) is one example. It was once a usual practice, but was subsequently prohibited as a result of reformist movement within Hindu community. Drug abuse serves another example. It was criminalized because of its very noticeable ill effects on human and social well-being. Computer hacking is the latest to join the group of new crimes. Computer hackers are treated as criminal who steal software and disrupt network of information technology.
some cases even criminal. These reforms were initiated against the well-accepted norms of society and were vigorously resisted by the people. The struggle for freedom and equality was seen in different periods in history as deviant.\textsuperscript{67} Innovation itself, in many ways, is viewed as deviance.

Understanding the concept of crime within a society requires one to look at different theories of crime. Theories abound. In criminology, the concept of crime has evolved over years and there are several perspectives through which one may analyse this complex phenomenon. A few of the mainstream approaches in criminology are presented here.

\textbf{The Classical School}

The classical school of criminology, which developed in the second half of the eighteenth century, was the first one which attempted a systematic study of crime. It rejected the claims that supernatural powers or the evil forces were the reasons behind the occurrence of crime. The Classical school vigorously advocated reforms in criminal laws against the prevailing arbitrary systems of justice. Beccaria and Jeremy Bentham were notable advocates of this school.

Beccaria argued that crime is the result of man’s free will. His explanation of human behaviour was based on hedonism. People tend to seek pleasure and avoid pain. He said laws and punishment for their violation should be codified in advance so that people would know the consequence of their action. His efforts led to large-scale reforms of criminal codes throughout Europe. Beccaria’s recommendations were based on the utilitarian principle of “the greatest happiness for the greatest number”.

He regarded crime as an injury to society and claimed that the social utility of punishment is deterrence. Because Beccaria explained human behaviour on the basis of hedonism, he said punishment must match the crime. Pain of punishment should outweigh the pleasure derived from the crime.

\textbf{The Positive School}

The positive school (also known as the Italian school) emphasized on scientific study and empirical research based on proof and evidence. The focus shifted from crime to criminal. It rejected the view that free will is the cause of crime. Cesare Lombroso,\textsuperscript{67} in this respect, it must be mentioned that peoples’ fight against the colonial rule was also treated as crime during the colonial period in accordance with the prevailing laws.
Enrico Ferri, Raffaele Garofalo were the main proponents of the positive school. In 1870s, Cesare Lombroso, drawing on the work of Darwin, held that criminals are atavists i.e. they are evolutionary throwbacks. Criminals represent earlier stages of human evolution; hence, their physical features resemble those held by human beings in earlier stages of evolution. Therefore, in view of Lombroso, criminals are born and criminality is an innate or inherent quality of an individual. Positivists rejected equal sentencing for equal crimes. Moreover, Lombroso claimed that because criminals are not responsible for their action, treatment should replace punishment. The positive school was criticized for being "deterministic".

In addition, there have been many other explanations of crime. Psychogenic theories link crime with personality of the criminal. Psychological explanations of crime draw attention towards mental deficiency and levels of intelligence. Geographical theory takes into account factors like climate, temperature and humidity in explaining crime.

**Sociological Theories**

Different theoretical perspectives on crime came under criticism from sociologists who instead diverted attention to social forces in explanation of crime. Sociological theories of crime focused on social structures, social action, social interaction and social conflict. There are four major sociological approaches for explaining crime and deviance: functionalist theories, interactionist theories, conflict theories and control theories.

**Functionalist Theories**

According to functionalist theories, absence of moral regulation is the primary cause of deviance. Functionalist theories of crime locate crime and deviance in social structures. These theories argue that deviance results when there is disparity between aspirations of individuals and rewards achieved by them.

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68 He identified distinct anatomical features of criminals such as the shape of the skull and forehead, jaw size and arm length. Much later Sheldon (1949), Glueck and Glueck (1956) made similar attempts to link criminality with physical types. They argued that the people with muscular build are more likely to commit crimes than those with slim or fleshy bodies.

69 Like physical theories, psychological explanations of crime also locate criminality within the individual. Scholars like Hans Eysenck have examined psychological profiles, personality types and mental states of criminals. They hold that certain mental traits severely hinder the socialization process of individuals and predispose them towards crime. The concept of psychopath was developed to explain that certain people are prone to violence and show little remorse. Most of the psychological studies have been conducted in prisons or mental asylums.
Emile Durkheim advanced the concept of *anomie*, a state of normlessness, in his explanation of deviance. Under conditions of *anomie*, which are typical of modern societies, traditional norms and values lose their worth and new ones are yet to be accepted by people. In the absence of clear standards to regulate human behaviour, people are unable to choose the right conduct.\(^70\) Durkheim argues that both crime and deviance are social facts and are inevitable in modern societies. A consensus over norms and standards of conduct is unlikely among members of society. Durkheim also highlights positive implications of crime on society. He says crime serves two important functions. First, crime ushers much needed changes in society. Newer ideas and ways of life bring about innovative changes in society. Durkheim terms it adaptive function. Second, crime helps in marking a distinction between good and bad behaviour in society. Deviance generates collective responses, which in turn promote social solidarity and enforcement of accepted norms.\(^71\)

Robert K Merton further developed the concept of *anomie* to explain how social realities negate the meaning of accepted norms. In industrial societies, success is seen in terms of material prosperity. Material progress is supposed to be achieved by hard work. Values accord priority to hard work for achieving material progress. It is assumed that any one irrespective of its position or status can achieve success through hard work. But in reality every one does not have equal opportunity to succeed. Those who are in lower strata of society find themselves unable to prosper. As there is tremendous pressure to succeed, people are compelled to adopt any means to attain their desired goals. Hence, deviance results from disparity between means and goals. Merton says there are five possible responses when individuals face crises resulting from disparity between socially accepted goals and available means of achieving them:

*Conformists* are those who accept both the socially accepted goals and means without taking into account the possibility of success. Even if the chances of success are bleak, they follow conventions. Most of the people belong to this category. There are *innovators* who accept goals but are ready to use any means available to achieve them. They may adopt illegal or illegitimate measures to pursue their goals. On the

\(^{70}\) To Durkheim, *anomie* is the prime reason for suicides.

\(^{71}\) Durkheim says "Crime is, then necessary; it is bound up with fundamental conditions of all social life, and by that very fact it is useful, because these conditions of which it is a part are themselves indispensable to the normal evolution of morality and law." See Emile Durkheim, "The Normal and the Pathological," in Delos H. Kelly, *Deviant Behaviour: A Text-Reader in the Sociology of Deviance*, 2nd ed. (New York, 1984), p.88.
other hand, there are ritualists who conform only to accepted means but are unable to
derive any meaning of the values behind them. They simply follow standards of
behaviour while ignoring the prospects of doing so. Retreatists abandon both social
values and means. Hippies, drug addicts and “drop-outs” are part of this group. There
are Rebels who also reject existing values and means but work to replace these with
new ones.72

Later functionalist theorists focused on collective deviant behaviour. They diverted
their attention towards norms and values of subcultural groups, which contradict
mainstream values. Cloward and Ohlin argue that boys who are most likely to adopt
delinquent behaviour are those who have somehow internalized middle-class values
and wish to move forward to enter that class. However, these boys cannot achieve the
goals they aspire. Such boys are particularly vulnerable to join gangs that promote
delinquent behaviour. The delinquent gangs are mostly formed in subcultural
communities, where there are less opportunities to pursue desired goals. They reject
values and norms of society and involve themselves in non-conforming activities.73

Functionalist theories, to explain deviance, establish a link between lack of
opportunities and aspirations to achieve success. Through this link, these theories
analyse conformity and deviance. These theories have come under criticism because
they are based on the assumption that every one in society aspires for middle class
values. It is held that poor accept the reality and adopt themselves accordingly.
Similarly, poor do not wish the same level of success as rich do. Secondly, it would
be a mistake to assume that the tensions between opportunity and aspiration exist only
for poor. Other groups are also prone to criminal activities as can be seen in highly
sophisticated crimes committed by rich.

Interactionist Theories

Interactionist theories see deviance as socially constructed. These theories reject the
notion that certain behaviours are inherently deviant. Interactionist theorists, instead,
explain how and why particular types of conduct are defined as deviant and why some
are called deviants.

72 This way Merton explained the cause of an increase in crime rate in affluent societies. By taking note
of prevailing inequalities and lack of opportunities on the one side and higher expectations on the other,
Merton highlights relative deprivation as an important cause of deviance. Robert K. Merton. “Social
Structure and Anomic,” in Kelly, n.71, pp.139-148.

73 Richard A. Cloward and Lloyd E. Ohlin, “Differential Opportunity and Delinquent Subcultures.” in
Kelly, n.71, pp. 151-161.
Edwin H Sutherland\textsuperscript{74} held that crime is learned in society through interaction with others. According to his differential association theory, several subcultures exist within a society, and individuals coming into contact with them are influenced with their norms. Those individuals who are in association with people following deviant norms are also likely to become criminals. In view of Sutherland, criminal behaviour is learned like any other behaviour. In this respect, primary groups like peers have the most influence. The statements of his theory are as follows:

1. Criminal behavior is learned
2. Criminal behavior is learned in interaction with other persons in a process of communication
3. The principal part of the learning of criminal behavior occurs within intimate personal groups
4. When criminal behavior is learned, the learning includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple; (b) the specific direction of motives, drives, rationalizations, and attitudes.
5. The specific direction of motives and drives is learned from definitions of the legal code as favorable or unfavorable.
6. A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law.
7. Differential associations may vary in frequency, duration, priority, and intensity.
8. The process of learning criminal behavior by association with criminal and anticriminal patterns involves all of the mechanisms that are involved in any other learning.
9. While criminal behavior is an expression of general needs and values, it is not explained by those general needs and values, since noncriminal behavior is an expression of the same needs and values.\textsuperscript{75}

Another interactionist approach is the labeling theory of deviance.\textsuperscript{76} Labeling theories see deviance resulting from the process of interaction between deviants and non-deviants. These theories in explaining deviance consider why some people are labeled as deviants. In their view, the process through which labeling is done reflects power structure of society. Powerful in a society are able to impose their values and norms on others. Powerful have forces of law and order. They define rules in terms of which certain behaviours are categorized as deviance. Rich create such rules for poor, men

\textsuperscript{74} Edwin Sutherland for the first time used the term "white-collar crime" to refer to criminal activities of more affluent and wealthy segments of society. White-collar crime covers a range of activities like tax evasion, embezzlement, financial fraud, illegal sales and practices, and manufacture of dangerous products. Although people show more concern with violent crimes, white-collar crimes have far more serious consequences. And it is very difficult to gauge the extent and prevalence of white collar crimes in society. Official crime statistics remain silent about such crimes. Mostly these types of crimes are committed by middle class who can use their position, authority and status in illegal ways. It is well established that law enforcement agencies adopt a more lenient attitude towards white-collar crimes than towards petty crimes of the poor, despite the fact that white-collar crimes cause enormous loss to society in several ways.

\textsuperscript{75} Edwin H. Sutherland, "Differential Association Theory," in Kelly, n.71, pp. 128-130.

\textsuperscript{76} Labeling theory begins with the assumption that no acts are inherently deviant. Definitions of crime and deviance are defined and imposed by powerful through laws and rules. Police, courts and prisons all serve to confirm such definitions of deviance.
for women and majority for minority. The characteristics of conduct are insignificant. What behaviours are defined deviance becomes important.

Howard Becker explains how deviant behaviour is defined through labeling. For him, behaviour itself is not deviant, but there are processes independent of the behaviour which determine what is deviant. He says, "deviant behaviour is behaviour which people so label". The social processes play the key role in identifying who is to be labeled as deviant. Individuals' manners, education, background and origin all play a part in the process of labeling. 77

How labeling affects the individual's sense of self is explained by Edwin Lemert. He provides an account of the impact of labeling on one's identity. In his view, deviance is very common in society. But in many instances deviant acts are simply overlooked by others. Such examples may include violation of traffic rules or small-scale theft. Lemert terms this as primary deviance. In all likelihood, primary deviance is tolerated, but only in some cases, acts are labeled deviant. Accepting of the label by the individual leads to secondary deviance. Under such circumstances, the label becomes central to an individual's identity. The individual starts behaving according to the label. 78

Leslie Wilkins refers to deviancy amplification in explaining the implications of labeling. He argues that by labeling behaviour as deviant enforcement agencies provoke more of that behaviour. In such situations, the individual actually incorporates the label into his identity. Acceptance of the label by a person generates more reactions from the enforcement agencies. Hence, efforts to control deviance produce more of the behaviour which they seek to check.

Conflict Theories

Conflict theories 79 adopt a completely different approach from other theoretical perspectives on crime and deviance. They place emphasis on relationship between deviance and politics and on inequalities and conflicting interests of different classes. Scholars like Taylor, Walton and Young have developed conflict theories drawing inspiration from Marxist thought. In their view, deviance is deliberately created in society. They highlight the role of politics in defining deviance. It is held that those

79 Conflict theories of deviance are also known as the "new criminology".
who challenge the existing social order are likely to be seen as deviants. In fact, deviance is a political act in response to the inequalities of the capitalist society. Deviance can be understood in terms of power structure of society and attempts of the ruling class to maintain inequalities within it. Similarly, Stuart Hall argues that the state as well as the media uses deviance as a tool to divert public attention from structural problems like unemployment and lower wages.

The conflict theories have led other criminologists to take a critical view of the formulation and application of laws in society. They observe how laws are used as tools to oppress weak and to maintain order in society. For them, laws are not neutral which are applied equally to everyone. In the same way, these scholars analyse criminal justice system, which, in their view, reflects the same power structure. The ways in which laws are enforced are equally important to understand. The ruling class also breaks laws, but members of this class are seldom brought to justice. Instead, law enforcement agencies remain reluctant to act against powerful. The object of their attention is members of lower class. Hence, everyday and less-serious crimes occupy public attention rather than grave and much more serious white-collar crimes committed by the affluent. This explains why efforts of crime control are directed against drug abusers, prostitutes and petty thieves.

New left realism also derives elements from Marxist tradition, but it differs with conflict theories in that it recognizes the importance of crime statistics. It proposes a more policy-oriented approach. New left realists criticize other sociological perspectives for undermining public perception of crime and resulting fear. New left realists hold that crimes are very real and instead of abstract debates there is a need for more informed and effective crime control policies. However, they regard victim surveys to be more reliable than official crime statistics. Here the emphasis is on victims and on effective social policies to control crime. There are particular groups in society who are more vulnerable to risks of crimes. The problems are more acute in impoverished areas and among marginalized groups. Subcultures that are cut off from

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81 Among all official statistics, statistics about crime are supposed to be most unreliable. Crime statistics are based on records obtained by the police. It is well known that a great majority of crimes are not reported to the police and in many instances police even refuse to submit a report. The crimes not covered in the official statistics are known as the "dark figure" of unrecorded crimes. Nevertheless criminologists take interest in the way official crime statistics are prepared. To substantiate official crime statistics, victim surveys are conducted to take account of victims' actual experience of crime.
wider society adopt the path of criminality. Instead of coercive measures, new left realism advocates “realistic” solutions based on effective social policies to control crime. For instance, it is held that failure of racial integration leads to rise in rates of crime by blacks. They favour radical changes in policing procedures. Crime control agencies should be more responsive to the communities they are policing. They even propose locally elected police to garner trust of local communities.82

Control Theories

Control theories differ significantly from other theoretical perspectives. Control theorists stress on links between lack of social control and criminal activity. They argue that it is deterrence that prevents individuals from committing crime. Control theory places little importance on motivations of individuals. On the other hand, it is held that individuals act rationally and opportunities tempt people towards criminality. All are equally likely to commit crime provided they get opportunity. Control theorists hold that modern societies marked by growth of consumerism and increase in wealth provide ample opportunities for crimes. Modern societies provide a variety of “suitable targets”.

Travis Hirschi, the most famous control theorist, posits that individuals do cost-benefit analysis before initiating any criminal act in order to calculate the rewards and risks involved in it. Hirschi argues that there are four types of bonds between individuals and society, which generate law-abiding behaviour. These bonds are attachment, commitment, involvement and belief. Strong bonds with society promote social control and conformity. Conversely, weak bonds cause deviance and crime. According to Hirschi, inadequate socialization results in low level of self-control among delinquents.83 Official policies also take into account prescriptions of control theory. Modern crime control policies concentrate on reducing opportunities for criminals through effective surveillance. Here the focus is on preventing situations having potential of being exploited by criminals.84

Closely associated with the control theory is the theory of broken windows advocated by Wilson and Kelling. This theory clearly establishes a link between initial signs of

82 Walklate, n.80, pp.49-70.
83 Travis Hirschi, “A Control Theory of Delinquency,” in Kelly, n.71, pp. 204-211.
84 Such official policies recommend prevention through a series of practical measures like installation of closed circuit television (CCTV) in public places and use of more effective locking system for houses. These measures are to restrict the ability of a criminal.
deviance (disorder) and actual crime. It argues that if a single broken window in a
neighbourhood is not repaired on time, it sends a message to potential criminals that
enforcement mechanism is weak and the community lacks commitment to check
disorder. The single broken window prompts further disorder. Soon the process of
decay begins where law-abiding citizens start abandoning the area and in their place
come more deviants and criminals. Theory of broken windows advocate zero
tolerance policing in which even petty offences like vandalism, loitering and public
drunkenness have to be dealt with harshly. Maintenance of order is seen as most
crucial in preventing occurrence of serious crimes. Strict handling of low-level
offenders like beggars, homeless, and drug addicts by police acquires importance in
this approach. 85

However, zero tolerance policing has come under severe criticism. It is held that it
empowers the police to define “social disorder” in their own way. Police may assume
any activity as a sign of disorder. As a result, a decline in crime rates is accompanied
by a rise of incidents of police abuses. 86 Nevertheless, target hardening measures and
zero tolerance policing have attracted attention of many policy makers. These policies
are also said to have achieved some success. But these measures do not take into
account the underlying causes of crime. As such these policies are designed to protect
only certain segments of society.

Feminist Perspectives

Many theories of crime and deviance have been criticized by feminists for sidelining
women in the discipline. Feminists have highlighted the gendered assumptions
implicit in both the theories and criminal justice systems. Feminism points out the
types of violence committed against women as well as the deviant behaviour by
women. 87

85 Zero tolerance policing was adopted in many large American cities. In New York it is supposed to
have achieved success, where crime rates dramatically fell.
86 It was felt in New York where blacks were unnecessarily harassed by the police.
87 Crime statistics reveal that most of those found guilty of crimes and those in prisons are male. Most
of the violent crimes are committed by male. Crimes in which women are most likely to be involved
are shoplifting and prostitution. It is also important to note that their domestic role provide them ample
opportunity to commit crimes within home. It is also noted that law enforcement agencies treat women
more leniently than men. The same is considered to be true when criminal courts pass sentences after
conviction. Female offenders are less likely to be sent to prisons, or if they are sent to prisons, they are
most likely to serve a shorter period in incarceration.
Feminists analyse the implications of popular perceptions of “femininity” in society on the criminal justice machinery. There are certain deviant behaviours where women are judged more harshly. Women receive severe treatment when they are alleged to have violated accepted norms of sexuality. Women who are seen as promiscuous generate strong reactions from enforcement agencies. Such women are taken to be “doubly deviant” because they have violated not only law but also norms of female sexuality. Therefore, criminal justice system takes less interest in particular offence but more in the lifestyle of concerned women. Feminists have also pointed out crimes committed by women to discard the traditional notion that links violence with masculinity. There are types of crimes like sexual harassment and rape where women are predominantly the victim. Until recently, the possibility of rape within marriage was not even recognized by courts of law. It was held that matrimonial relations give husbands the right to force themselves on their wives. Even otherwise, legal procedures involved in bringing a rapist to justice are very complex, lengthy and humiliating for women. Rape generates fear psychosis among all women, even those who are not rape victims. Homosexuals also have to suffer violent crimes and harassment. Homosexuality is largely viewed as a stigma and in most of the cases it is felt that homosexuals deserve violence against them.

CRIME PREVENTION AND CRIMINAL JUSTICE

The ways in which criminality is defined in a given society also determine the policy responses which are designed to deal with it. For instance, if crime and deviance are seen as resulting from inequality and lack of opportunities, policy responses are directed towards removing inequalities. Similarly if crimes and deviance are seen as direct outcome of poverty and unemployment, social policies are formulated to address those concerns like bridging the gap between rich and poor, providing better avenues to under-privileged and providing employment opportunities to youth.

On the other hand, when crime and deviance are projected as problems of moral degeneracy, erosion of societal values and lack of self-control resulting from individual’s free will, stringent “law and order” approaches are adopted to combat criminality. Here focus shifts to effective policing and deterrence. It also involves

89 Rape trial requires medical examination, proof of penetration, identification of rapist, questioning of woman’s consent and examination of victim’s sexual history.
prevention of crime through protection of potential “targets” and sophisticated surveillance systems. Public perception of crime also affects the policy responses. People are more concerned with violent crimes, street crimes, robbery, burglary and rape than with white-collar crimes, corporate crimes or organized crimes. Extensive media coverage of violent crimes also causes much public outcry. Governments eager to show their commitment to uproot crimes deploy more police forces and strengthen law enforcement agencies with more resources and funds. Police are regarded as an essential component of crime prevention. It is also true that more policing provide at least some psychological relief to people. Conversely, the concept of community policing has been advanced to make policing more responsive to the needs of community. Community policing calls for involvement of different economic and social groups. The basic objective here is the integration of criminal justice systems, government agencies and local community in planning and implementation of social policies.

Rendering justice once a crime is committed involves consideration of several issues like attribution of responsibility, punishment of offenders and compensation to victims. There are other issues involved here which seek to prevent crime in future through substantive changes in social policies. Criminal justice system involves several agencies including police, criminal courts, and correctional institutions or prisons. This is not to claim that criminal justice machinery comes to function only after the commission of crime. In fact, it remains always active to maintain law and order and to prevent or deter occurrence of crime in society.

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90 Crimes committed by large corporations and industries are referred to as corporate crimes. Common corporate crimes are environmental degradation, violations of safety standards and large-scale financial frauds. Directly or indirectly corporate crimes affect a much large part of human population but that is not easily noticed by common citizens. The common or petty crimes are more noticeable mainly because of the proximity between the criminal and the victim. Such proximity lacks in the case of corporate crimes where differences in time and space would greatly enhance the distance between criminal and victims. Another possibility is that victims may not know how to respond to such crimes. Large corporations wield great power and influence and they can cause changes in public policies in ways that may prove to be detrimental for the health, safety and well-being of people. It is more so because globalization has greatly enhanced their reach.

91 In many respects, organized crime is like any other business, the only difference being the illegal activities. Most common forms of organized crime are drug trafficking, smuggling, gambling, prostitution, extortion rackets and black marketing. These types of criminal activities depend heavily on use of violence and intimidation. At the level of organization and planning, organized crime is like any other legitimate business. Organized crime also provides goods and services. Although initially organized crimes had developed within specific cultural settings, they are increasingly becoming transnational.
Once an offender is identified, then comes the question of punishment. Scholars have divergent views over the purpose and effectiveness of punishment.\textsuperscript{92} Many criminologists and policy makers advocate stringent punitive or retributive justice. Retributive justice has its roots in Kant's deontology. Similarly, others call for stronger deterrence. Deterrence is based on utilitarian principles (social utility of punishment). In order to "get tough" with criminals, they argue in favour of expansion of prison facilities and longer incarceration. They hold that longer sentences of imprisonment serve as a strong deterrent to crime.

On the other hand, in modern times, many scholars and penal reformers have drawn attention towards reformation of criminals. They argue that prisons should seek to reform criminals so that they can be rehabilitated into society. This in their view is a more effective way to prevent crime in the long run. It is commonly held that persons in prisons are deprived of their normal relationships with families and friends. Once cut off from the outside world, prisoners tend to accept altogether different norms and values, making it extremely difficult for them to adjust within society after release. They might come to regard deviant behaviour as normal. Prisoners especially those who are serving long sentences or who are in overcrowded prisons learn very habits and values which they are supposed to renounce. They come into contact with hardened criminals and acquire criminal skills about which they were unaware earlier.

Advocates of penal reform argue in favour of restorative justice rather than retributive justice. The primary objective of restorative justice is to raise awareness among criminals about the harmful effects of their deeds on the society. Criminals are asked to serve sentences within the society instead of an isolated building. Restorative justice seeks to engage offenders with society in a meaningful way. Offenders might be called to perform community services or to assist the victims of their crimes.

Yet there is another dilemma concerning the utility of prisons. While imprisonment may not deter hardened criminal, it certainly deters others who are outside the prison. In other words, harsh conditions of prisons have an impact on potential offenders. In this context, to have a real deterrent effect, the prison conditions should be very severe. However, such unpleasant conditions will render reformative goals impossible to achieve. On the other hand, if prisons are conditioned to fulfill reformative goals,\textsuperscript{92} Scholars also differ over the appropriate mechanisms of punishment like duration of imprisonment, utility of prisons, probation, parole, community service and capital punishment. Studies conducted so far have been unable to confirm with certainty the effectiveness of different modes of punishment.
they lose much of the deterrent effect. Nevertheless, prisons are perceived to serve one very important function i.e. incapacitation of offenders. They keep dangerous criminals away from society.

DEFINING INTERNATIONAL CRIMES

How criminality is perceived in international politics? How international law defines crimes. There is an equally important question. What would be those internationally wrongful acts that fall below the threshold of criminality?

Michael Walzer regards aggression as a criminal act. He views aggression as a violation of territorial integrity or political sovereignty of an independent state. In his words, "[a]ggression is remarkable because it is the only crime that states can commit against other states; everything else is, as it were, misdemeanour." 93 It seems he is suggesting that aggression is not only an international crime, but is the only international crime. However, his definition clarifies an essential characteristic; to qualify as an international crime the act or conduct in question must be against the society of states. In domestic context crime is understood as a deliberate act against society and hence requiring intervention of state. It is unlike a civil suit where the matter involves contest between two individual parties. In criminal cases what is at stake are the values and interests of the whole society. 94

Cherif Bassiouni, the noted expert of international criminal law, has identified twenty-five international crimes. These are:

Aggression; Genocide; Crimes against Humanity; War Crimes; Crimes Against United Nations and Associated Personnel; Unlawful Possession, Use and Emplacement of Weapons; Theft of Nuclear Materials; Mercenarism; Apartheid; Slavery and Slave-Related Practices; Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment; Unlawful Human Experiment; Piracy; Aircraft Hijacking and Unlawful Acts of International Air Safety; Unlawful Acts Against the Safety of Maritime Navigation and Safety of Platforms on the High Seas; Threat and Use of Force Against Internationally Protected Persons; Taking of Civilian Hostages; Unlawful Use of the Mail; Unlawful Traffic in Drugs and Related Drug Offences, Destruction and/or Theft of National Treasures; Unlawful Acts Against Certain Internationally Protected Elements of the Environment; International Traffic in Obscene Materials;

93 Michael Walzer, n.31, p.51.
94 There are reasons to apply legal qualifications rather than the sociological ones to define international crimes. First, sociological analysis deals more with explanations of crimes and even of law. Some of these explanations (e.g. strain, lack of opportunities) might be useful for the issues related to justice, but not in identifying crimes. Secondly, even with respect to justice, the procedural (equality before law) justice dominates in the realm of international.
He has used the term "international crimes" to include offences which would appear to be transnational or treaty-based crimes. Bassiouni argues that a number of seemingly unrelated crimes in his list are linked by four factors that reflect "the policy of international criminalization":

(a) the prohibited conduct affects a significant international interest (including threats to peace and security);
(b) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community (including conduct shocking to the conscience of humanity);
(c) the prohibited conduct involves more than one state (transnational implications) in its planning, preparation or commission either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
(d) the conduct bears upon an internationally protected interest which does not rise to the level required by (a) or (b) but which cannot be prevented or controlled without its international criminalization.

It becomes clear that the first two requirements, "significant international interest" and "egregious conduct," refer to most fundamental norms of international community. The other two requirements "transnational implications" and "prevention and control through international criminalization" suggest the need for bilateral or multilateral cooperation to tackle a particular criminal activity.

Bassiouni’s criteria of defining international crime appear to be debatable. An international crime is understood as a crime against the international community as a whole. Treaties are applicable only for states parties. Undoubtedly, treaties or conventions play a very important role in the process of international criminalization. It is evident in the role played by the Geneva Conventions in defining war crimes, the Genocide Convention in genocide and the Torture Convention in torture. It is through conventions that states express their intention to internationally criminalize a particular offence. In a way, such efforts also reflect changes in customary practices of states. Criminalization refers to formal and legal procedures through which acts or conduct are made punishable under law. But before the successful conclusion of the criminalization process acts cannot be labeled as crimes. For a crime to become an international crime, it must become part of customary international law i.e. when it

96 Ibid. p.33.
has already been criminalized. Furthermore, transnational characteristics are not an essential element of international crime; consider, for example, genocide, several categories of crimes against humanity and war crimes during internal armed conflicts. Even if these crimes are committed within a single political boundary and even if victims and perpetrators share the same nationality, these are still regarded as international crimes. As norms change over time, a transnational criminal activity may come to be recognized as an international crime. Both piracy and, in some respect, slavery were transnational crimes, which later came to be recognized as crimes against international community. Similar international trends appear to hold true for drug-trafficking and terrorism.  

Bassiouni has identified three sources of international criminal law viz., customs, conventions and general principles of law. He believes that international conventions play the most important role in “creating” international crimes”. His list is based on a total of 274 international treaties. However, he accepts that except the jus cogens crimes, where there is an international obligation upon states to prosecute offenders, other crimes are crimes in the sense that international cooperation is required to handle them. The maxim “aut dedere aut judicare” (extradite or prosecute) holds true for both categories of crimes, but in the case of a treaty crime, a state is under no obligation to extradite or prosecute in the absence of a treaty. In terms of qualification of legal definition of crime, crime is a public wrong. It is “a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.” International crime has to be understood as an act against international community as a whole. For that sources of public law has to be located in customary law (even those treaties and general principles of law that have acquired the status of customary law). Because crime is considered as an act against the whole society, intervention of state is required. Public prosecutor comes into play. Punishment is meant to protect the

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97 It should be noted that terrorism is less regarded as a transnational crime and more as a crime against humanity or a crime against peace and security of mankind.
98 He has also referred to other collateral sources of international criminal law, which are international and regional human rights law; regional norms on inter-state cooperation in penal matters; emerging international criminological and penological considerations; and general principles of criminal law recognized by major legal systems of world. Bassiouni n.95, pp.8-17.
99 See, Marshall and Clark, n.60.
In the absence of a supranational government, universal jurisdiction provides the answer for an international crime.

It follows then only *jus cogens* crimes (i.e. crimes identified on the basis of customs) can properly be called international crimes for they have become part of customary international law universally applicable to all states irrespective of treaty obligations. However, there is some controversy among international legal scholars as to which international crimes have risen to the level of *jus cogens*. Generally aggression, genocide, war crimes, crimes against humanity, piracy, slavery and torture are accepted as *jus cogens* crimes. Even the specific content of each of these crimes is a matter of debate among scholars.

The International Law Commission (ILC) of the United Nations in its Draft Codes of Crimes and Draft Principles of State Responsibility has used several terms to refer to proscribed conduct under international law. These are “international crimes”, “crimes of state”, “crimes under international law” and “international delicts”.

Article 19 of ILC’s Draft Principles on Responsibility of States better explains the nature of international crime. It states:

1. An act of a state which constitutes a breach of an international obligation is an international wrongful act, regardless of the subject matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
   (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
   (b) a serious breach of an international obligation of essential importance for the safeguarding the right self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

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100 "The crime arises when the restoration of the *status quo* is insufficient satisfaction for the offence, and it is believed that ‘the State should punish that man’.” See, ibid.

101 The term *"jus cogens"* refers to the status of norm in international law. *Jus cogens* norms regarded as peremptory and nonderogable and they occupy the highest position in the hierarchy of all other norms. Bassiouni himself says, “The implication of recognizing certain international crimes as part of *jus cogens* carries the duty to prosecute or extradite; the nonapplicability of statutes of limitation for such crimes; and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.” Bassiouni n.95, pp.38-41.

102 Article 19, Draft Code of Principles of State Responsibility, UN Doc. A/49/10 (1994). The reason why statutes of the ad hoc tribunals are not considered here is that they have been linked to specific conflicts and do not comprehensively reflect nature of international criminality.
(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Thus Article 19 presents a typology of internationally wrongful acts on the basis of the degrees of seriousness of the acts. A simple breach of an international obligation is recognized as an international wrongful act. On the other hand, an international crime is defined as a wrongful act that affects the fundamental interests of the international community and the act must be so recognized as a crime by the international community as a whole. Both the requirements of fundamental interests and recognition by the international community mean that the criteria of identifying international crimes have to be located in customary international law.

Although the definitions of international crimes in paragraph 3 are illustrative rather than exhaustive, it captures the nature of wrongful acts, which are fit to be called as international crimes. They are acts against international peace, right of self-determination of peoples, and fundamental human rights. Except the fourth definition dealing with protection of environment, which appears to be innovative, all other definitions are well rooted in rules of customary international law.

Yet there is another requirement that an international crime must be defined on “the basis of the rules of international law in force”. This suggests that acts must also be prohibited under relevant treaties. Here it must be noted that rules of international criminal law, whether deriving from customs or conventions are not always clear. Unlike domestic criminal codes where legality demands specificity in definitions of crimes, rules of international criminal law are not clearly elaborated. They have to be clarified from time to time by courts. This was done by the Nuremberg Tribunal though its charter was prepared by the Allied forces that criminalized aggression and crimes against humanity for the first time. Recently the ICTY in a landmark judgment clarified that war crimes can be committed in internal armed conflicts. It did so, on the basis of customary international law. Prohibition of war crimes in civil wars had no basis in conventional international law. Non-international armed conflicts fall outside the grave breaches regime of the Geneva Conventions. A similar role was

played by the UK’s House of Lords in the Pinochet case with respect to torture. Furthermore, the International Court of Justice has clarified, in an advisory opinion, that the underlying principles of the Genocide Convention “are recognized by civilized nations as binding on States, even without any conventional obligation.” One should note that the Genocide Convention does not explicitly provide for universal jurisdiction. Article VI of the Genocide Convention states:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Finally, paragraph 4 of Article 19 also clarifies the meaning of international delict, which is defined as an internationally wrongful act that falls below the threshold of criminality. International delict refers to violation that is placed between a simple breach and a serious breach of international obligation. It appears similar to deviance in domestic context.

Therefore, it becomes clear that criminality in the international context can be understood in three ways. First are the international crimes, which are regarded in international law as crimes against the international community as a whole rather than crimes against a particular state or a group of states. To qualify as international crimes acts must be so prohibited in the customary international law. Because they are against the international community, all states are authorized under international law to exercise jurisdiction over the offence irrespective of the nationality of the offender or victim, or the territory where crime occurred.

Second are the transnational crimes. These crimes refer to criminal activities that transcend national boundaries. Money laundering, drug trafficking and even cyber crimes are examples of this category of crimes. Their suppression requires international or inter-state cooperation. Domestic interests motivate states to cooperate to prevent a particular transnational criminal activity. Transnational organized crime denotes institutionalized form of transnational criminal activity. Geographical locations are an important element in such criminal activities. In this respect, drug trafficking serves a very good example. Illicit narcotic crops are cultivated in one country, processed in another, trafficked through a third country.

An important question arises as how to identify transnational crimes in the absence of treaties. Such crimes have been defined on the basis of domestic legislation where different states affected by a particular transitional criminal activity enact similar criminal laws to tackle them. In its operation and function, transnational organized crime is very much similar to any other multinational corporation.
sold in a fourth country and illegal proceeds derived from it might be transferred to yet another country.

Manuel Castells examines the characteristics of transnational crimes in the context of globalization. He explains how different criminal organizations are forging strategic alliances and are becoming transnational in scope. He points out that these criminal organizations coordinate their activities and take advantage of forces of globalization like information and communication technologies. The transnational criminal networks engage in a number of illegal activities like trafficking in narcotics, small arms, immigrants, human organs, even nuclear material, counterfeiting, and money laundering. Generally, these criminal networks establish their bases in countries having weak criminal justice machinery.\textsuperscript{106}

Third are the treaty-based crimes where states are bound by a treaty to prevent a particular criminal activity. Transnational crimes are also referred to as treaty-based crimes. But a treaty-based crime may not have transnational characteristics. Here apartheid and enforced disappearance serve as an example. It is also true that in many cases states agree to a treaty to suppress specific transnational criminal activities. This threefold distinction does not suggest clear-cut categorization. In fact, many transnational crimes are also treaty-based crimes. Several crimes have their sources in custom as well as convention. Finally, international delicts are violations of norms and rules that fall below the threshold of criminality, similar to deviance in domestic context.

Here is a reference to explanations of criminality in international politics. In this respect, application of traditional theories of crime to explain criminality in the realm of international is useful. Particularly important are sociological approaches to crime because they highlight the significance of context in examining crime. Sociological approaches explain causes of crime in terms of power structure of society, social interaction, subcultural values, and labeling.\textsuperscript{107}


\textsuperscript{107} Sociological approaches place emphasis on differences in power, values and interests in explaining crime. There is no dearth of literature in international relations that seek to analyze aspects of international politics in the same framework. However, there is a problem in applying domestic analogy as society of states is markedly different from domestic society. International society, as examined by Hedley Bull, is anarchical. Even whether or not international society exists is a matter of great debate among scholars. Hence, to what extent concepts like \textit{anomie} (state of normlessness) can be applied to international politics, and in what ways subcultural values can be equated with prevailing conditions in many parts of Asia and Africa, pose significant conceptual problems.
Distribution of wealth and power in international politics determines the opportunities available to different states and communities. Such economic inequalities might compel some to adopt illegal activities to sustain people’s needs. This is evident in societies dependent on illicit drug production and states that provide safe havens to hide proceeds of illegal business activities.

Accepting that crime is learned, in the same way other conformist behaviour is learned, one may analyse how tyrants and dictators learn from each other genocidal politics and other strategies like ethnic cleansing. This can also be seen in systematic violation of human rights by states as a policy option. Power elites of different states adopt such policies taking inspiration from similar policies applied elsewhere.

Functionalist theories of crime and deviance are another approach to look at international crimes. Functionalist theories focus on structural tensions and absence of moral regulation to provide an account of crime and deviance within society. Durkheim uses the term anomie to explain how modern society causes breakdown in traditional life.\textsuperscript{108} Robert Merton further drew attention to strain felt by individuals due to conflict between social values and realities of life. In the context of international politics, this sort of conflict is clearly evident whenever international norms seem to be standing against realities of international politics, or where there is clear tension between the legitimate sources of income and available means to achieve them. Similarly, while international norms may demand states to adhere to internationally protected human rights norms, realities of international politics might press the same states to pursue policies having just the opposite effect. The consequences of gap between social values and socially accepted goals acquire prominence in this perspective. Merton says,

“The-end-justifies-the-means” doctrine becomes a guiding tenet for action when the cultural structure unduly exalts the end and the social organization unduly limits possible recourse to approved means. Otherwise put, this notion and associated behaviour reflect a lack of cultural coordination. In international relations, the effects of this lack of integration are notoriously apparent. An emphasis upon national power is not readily coordinated with an inept organization of legitimate, i.e. internationally defined and accepted, means for attaining this goal. The result is a tendency toward the abrogation of international law, treaties become scraps of paper, “undeclared warfare” serves as a technical evasion, the bombing of civilian populations is rationalized, just as the same societal situation induces the same sway of illegitimacy among individuals.\textsuperscript{109}

\textsuperscript{108} This “normlessness” has been a common reference point among scholars of International Relations.

\textsuperscript{109} Merton, n.72, pp. 146-147.
Even subcultural theories of deviance are relevant here. These theories explain rejection of mainstream values by gangs and other groups. In the international context such subcultural conditions are said to be existing in several parts of Asia and Africa. Different ethnic groups and regimes in these regions reject widely held international norms such as protection of minority rights and establishment of democracy. They replace these mainstream norms with their own norms that accept non-conformity. There are other situations when the conflict of norms is evident. Norms of a particular society may contradict international norms. Here, the governments or policy makers may find themselves facing a dilemma as to which norms should be followed; for example, in an Islamic state like Saudi Arabia the modes of punishment might be treated as torture in accordance with the rules of international law.

Labeling theory is of particular significance in understanding criminality in international politics. It is based on the assumption that no conduct is inherently or intrinsically criminal. Labeling theory explains why certain actions are labeled as deviant or criminal, and why those who commit particular acts are labeled as deviants or criminals. Labeling theory also claims that such labeling reinforces deviant behaviour in the actor. Regimes which are defined as rogue or leaders who are termed as despots, come to regard their conduct as expected of them. They start behaving according to the characteristics of label. Pol Pot of Cambodia, Saddam Hussein and others are cases where labeling produced an effect which resembled the characteristics of label.

Again conflict theories examine crime and deviance through an analysis of structure of society. They place emphasis on the competing interests of different groups within society and on the efforts of elites to maintain and preserve their power and position within society. New Left Realism also shares with conflict theories certain basic assumptions but it diverts attention towards victims of crimes. New Left Realism stands for major policy responses to sensitize criminal justice machinery to the needs of local communities. This would require special attention to people facing problems of poverty, hunger and lack of basic facilities.

Control theories, on the other hand, view crime as resulting from lack of social control and deterrence. Theory of broken windows establishes a direct link between symptoms of disorder in society and actual commission of crime. These theories claim that to check growth of crime, the number of opportunities must be reduced and potential targets of crime must be well protected. They also hold that any incident
indicating sign of disorder must be suppressed immediately. This would suggest that any indication of international disorder must be addressed at the very beginning itself. Recent US intervention in Iraq is suggestive of this approach where there was immense pressure within the US to crush the regime of Saddam Hussein with great urgency.

In many instances, policy responses to crimes at the international level reflect similar approach as is evident in domestic settings. It is important to note that like violent crimes in states, popular fear about crimes in the international context revolves around genocide, armed conflicts, ethnic conflicts, and large-scale atrocities. Little attention has been paid to crimes as resulting from economic disparity, lack of resources, and questionable conduct of major powers in international affairs and corporate crimes (similar to white-collar crimes and corporate crimes in domestic settings).\textsuperscript{110}

**CRIMES AND JUSTICE IN INTERNATIONAL POLITICS**

How different conceptions of international justice respond to incidents of genocide, large-scale atrocities and grave violations of human rights? Richard Falk points out the moral dilemma faced by the international community in responding to human rights violations in conflict-ridden societies. Establishing peace and order in war-torn regions more often requires negotiated settlement with the very persons who unleashed the reign of horror in the first place. Tyrants, despots and military leaders are reluctant to relinquish power if they fear punishment afterwards.\textsuperscript{111} Amnesty or impunity seems to be obvious result of peace agreements. To what extent is it justified to demand criminal prosecution if it endangers fragile peace. How to reconcile the conflicting goals of order and justice in transitional societies is the most crucial ethical question. Apart from this, there are other morally relevant questions equally applicable to internal and international armed conflicts as well as in times of peace. One fundamental concern remains as to who should be held responsible – individuals, states or regimes in power – for gross violations of human rights? This involves

\textsuperscript{110} Like the official crime statistics of states, statistics of crime at the international level do not capture the real picture. While there is plenty of data regarding ethnic cleansing or genocide or even drug trafficking and money laundering, unrecorded crimes may include crimes committed by MNCs or crimes committed pursuant to foreign policy objectives of major powers.

consideration of individual and collective guilt. Sanctions, which are imposed to force states to correct their conduct to prescribed rules of international law, impose collective punishment where whole populations are made to suffer. Another problem concerns with the process of criminalization itself. Steven Ratner has identified three "arbitrary schisms" in the international criminalization of violations of human rights and humanitarian law. First is the legal distinction between atrocities committed during armed conflicts and in times of peace. Second is the legal distinction between atrocities committed in international armed conflicts and in internal conflicts. Third is the distinction between different types of atrocities in peacetime (i.e. crimes such as genocide, slavery, torture on one hand and incidents of summary executions on the other).

According to Michael Scharf, the international community responds in five ways in the aftermath of genocide: "(1) doing nothing, (2) granting amnesty, (3) creating a truth commission, (4) assisting in domestic prosecutions and (5) creating an ad hoc international criminal tribunal to try the offenders." While doing nothing suggests impunity for the offender, amnesty refers to the decriminalization of past offence. Other responses incorporate some sort of accountability mechanism for the offender. A variety of accountability mechanisms such as criminal tribunals, truth and reconciliation commissions and lustrations (disqualification from holding public posts) also reflect underlying conceptions of justice.

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112 All national law systems recognize individual criminal liability. Few common law systems also consider criminal responsibility of legal entities like organizations. International criminal law certainly recognizes individual accountability for international crimes. To some extent it also accepts responsibility of organizations. But as of now the concept of criminal liability has not been extended to cover states, though International Law Commission has proposed such an idea in its Draft Code of Principles of State Responsibility. See, UN Doc. A/49/10 (1994). At the most under international law states may be required to pay compensation to victims of crimes or damages to other states.


115 Scholars, policy makers and human rights activists have advocated a myriad of goals, which such institutionalized efforts, should bear in mind while coping with the past abuses. These include, among others, punishment of offenders, prevention of atrocities in the future, deterrence of further commission of atrocities, rehabilitation of victims of crimes, restoration of order in turbulent regions, reconciliation especially in cases of deep-rooted ethnic divisions, establishment of democracy, and peaceful settlement of disputes among warring factions.
Punishment of Wrongdoer

Those, notably international legal experts, human rights advocates and moralists, who stand for necessity of punishing offenders through prosecution rest their case on retributive justice and deterrence.¹¹⁶ They regard punishment of wrongdoer as an imperative for just world order. They claim that courts provide justice in an impartial and independent manner. Advocates of judicial accountability mechanism also hold that there can be no peace without justice. Allowing criminals to go free will inspire other potential abusers to instigate violence with impunity. Lasting peace requires punishment of those who organize, incite and plan large-scale violence. Hence, the criminal courts remain the most potent instruments of deterrence, and through these judicial institutions, the international community can promote international peace and order. Courts also enjoy legitimacy. Since they impart justice in an impartial and neutral way, they attract more acceptability among masses and are not seen with suspicion.

According to this view impunity and the failure of the international community to punish offenders are the main reasons for the outbreak of violence and resulting human suffering. Therefore, this view is highly skeptical of bartering of justice with peace, which in most cases leads to immunity of perpetrators from prosecution. Benjamin Ferencz notes, “[t]hose who seek to trade justice for peace will have neither peace nor justice”.¹¹⁷ Further Theodor Meron draws attention towards “individualization” and “decollectivization” of guilt through criminal justice processes. He says criminal trials succeed in identifying the real culprits and absolve the whole community from guilt and shame. In this way, they promote national reconciliation and peace, and check the impulse for retribution and violence.¹¹⁸ Orentlicher calls for selective prosecution to address requirements of transitional societies. She argues that there is duty to prosecute on the basis of principles of international law deriving from both customary and conventional sources when it

¹¹⁶ These appear to be contradictory notions of justice. While retributive justice is based on Kant’s deontology, deterrence has its roots in utilitarian-consequentialism. In Kant’s deontology wrongdoer must be punished for the simple reason that he has committed the crime. Utilitarians, on the other hand, would see the utility of punishment in deterring other potential offenders.
comes to most gruesome violations of human rights relating to physical integrity.\footnote{Orentlicher considers the obligations under international law to prosecute three most egregious violations of human rights involving torture, extra-judicial killings and enforced disappearances committed during previous regimes in states undergoing transition (where elected civilian governments have replaced dictatorships). She comes closer to Cesare Beccaria in claiming that deterrence is the primary objective of criminal prosecutions. She says, "criminal laws are most likely to deter potential violators when the threat of punishment is as nearly certain as possible." See, Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Right Violations of a Prior Regime," \textit{The Yale Law Journal}, Vol. 100, No. 8, June 1991, pp. 2537-2615.}

She rejects the commonly held view that appropriate balance between demands of justice and political stability cannot be reached. International law influences decisions of governments who are reluctant to hold trials out of political expediency. Both international law and international pressure serve to counter those who want impunity. Moreover, prosecutions in accordance with principles of international law are less likely to be seen as politically motivated or resulting from revenge. She also notes that international law does not obstruct national reconciliation efforts of governments. In fact, it informs governments about the kind of approach that must be adopted. Amnesty is not the only way to achieve reconciliation.\footnote{Orentlicher says, "[b]y drawing a bright line between crimes that must be punished and those for which amnesties are permissible, international law helps answer an agonizing question confronting many transitional societies." Ibid, p.2550.}

Human rights treaties like the International Covenant on Civil and Political Rights do not explicitly ask states parties to punish abusers. But, Orentlicher says, authoritative interpretations of these treaties clarify that a state party would not be fulfilling its treaty obligation of protecting human rights if it fails to investigate or prosecute serious human rights violations, especially torture, extra-legal executions, and forced disappearances. Furthermore, a state’s failure to punish also violates its obligation under customary international law. Other human rights conventions like the Genocide Convention and the Convention against Torture (the Convention Against Torture, and other, Cruel, Inhuman or Degrading Treatment or Punishment) explicitly provide for prosecution and punishment of human rights violations. The Convention Against Torture also provides for universal jurisdiction if states fail to bring perpetrators to justice.\footnote{Ibid, pp. 2566-2571.} Time and again the Human Rights Committee constituted to monitor state compliance with the Covenant has demanded that states must ensure investigation, prosecution, punishment of abusers as well as compensation to victims.

She also points out the legal status of prohibitions under the customary international law. She says within the UN, resolutions of the General Assembly and reports
prepared by Special Rapporteurs and Working Groups of the Commission on Human Rights confirm the view that States have a duty under customary law to punish perpetrators where violations infringe right to life, freedom from torture, and freedom from involuntary disappearance. Further a number of international instruments such as the Draft Declaration on the Protection of All From Enforced or Involuntary Disappearances and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions\textsuperscript{122} drafted under the aegis of the UN call states to bring to justice human rights abusers. Even if these developments are not conclusive proof of well-established customary practice, they are nevertheless, suggestive of an emerging customary norm that imposes a duty to punish gross violations of human rights.\textsuperscript{123}

How international law deals with special circumstances of transitional societies? Change of government does not relieve a state of its international obligations. The successor government has a duty to prosecute grave violations of human rights of previous regime. States simply cannot put aside their legal obligations to maintain peace with former military leaders. However, Orentlicher says, international law also does not require states to compromise with its national interests. In fact, international law does take into account peculiar circumstances of states that had been witnessing protracted conflicts. It does not ask states to prosecute everyone, who in some way, participated in the violations. That would be an impossible task for the judiciary. A balance between demands of justice and political stability can be achieved if prosecutions take place within “principled limits”.\textsuperscript{124} Customary international law accommodates concerns of such fragile democracies. She says:

\begin{quote}
...customary law would be violated by complete impunity for repeated or notorious instances of torture, extra-legal executions, and disappearances, but would not require prosecution of every person who committed such an offence. Prosecution of those who were most responsible for
\end{quote}

\begin{itemize}
\item \textsuperscript{122} All these developments were in reference to human rights situations in particular states or specific types of human rights violations.
\item \textsuperscript{123} Orentlicher n.119, pp. 2582-2585.
\item \textsuperscript{124} Orentlicher cites contrasting experiences of Argentina and Greece. The Alfonsin’s government plans of prosecution could not achieve success because trials ran much longer and because efforts were made to try even lower-ranking officers. Earlier it was thought that prosecutions would be limited to top-level commanders who were primarily responsible for carrying out the “dirty war” in Argentina. Extending the reach of trials to cover mid-level officers caused disenchantment in military. On the other hand, efforts of the Karamanlis government in the mid-1970s to prosecute Greek military police for torture committed during military rule proved more successful. The government clarified at the out set that the prosecutions would take place within a fixed time-period. A six-month deadline for high-level officials and a three-month deadline for filing prosecutions against other officials was fixed. All prosecutions took place on the basis of private complaints. Ibid, pp.2595-2598.
\end{itemize}
designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments' customary law obligation not to condone or encourage such violations, provided that criteria used to select potential defendants did not appear to condone or tolerate past abuses.\textsuperscript{125}

She says criteria for selecting offenders for the purpose of limited prosecutions should be based upon degrees of culpability. Prosecution of those most responsible for planning and carrying out systematic violations of human rights would conform to "common standards of justice."\textsuperscript{126}

Orentlicher also rejects the claims of those who prefer pardon over amnesty. Pardon does not affect the determination of guilt.\textsuperscript{127} Many regard pardon to be more favourable because it does not exclude prosecution. Without prosecution it would be impossible to know the truth about past crimes and to prove the guilt of violators. However, she makes it clear that a state would be violating its obligation under human rights treaties to punish gross human rights violations if the punishment does not match the gravity of the offence.\textsuperscript{128}

Orentlicher also considers the question of a state's derogation of its duties under international law in exceptional circumstances. This is the most likely scenario when former military leaders still wield enough power to topple the new civilian government. He says international law does not provide a clear answer. The customary doctrines of state of necessity and \textit{force majeure} allow states to derogate from their international obligations in compelling circumstances and preclude the wrongfulness of states' non-compliance. But fundamental human rights have acquired the status of peremptory norms. Hence they are nonderogable. But there is no clear answer as to whether a state's duty to prosecute and punish should also be seen as nonderogable. Orentlicher maintains that if prosecution is necessary to ensure respect for nonderogable rights, then rules permitting states to derogate from their obligation

\textsuperscript{125} Ibid, p. 2599.
\textsuperscript{126} She cautions against the risk of arbitrariness in selecting offenders that may undermine the principle of equality before law. She also draws attention towards negative criteria, which should be kept in mind. Offenders should not be exempted from prosecution on the ground of the defence of superior orders. And no attempt should be made to prosecute "a group of scapegoats" (most likely to be low-level offenders). Ibid, pp.2601-2603.
\textsuperscript{127} The question of pardon comes only after guilt has been established. In this case, the sentence of an offender may be suspended or reduced.
\textsuperscript{128} Orentlicher n.119, pp. 2604-2606.
to prosecute violations of the very same rights would have undesirable implications.\textsuperscript{129}

Payam Akhavan explains the deterrent effect of prosecutions. He demonstrates how the stigmatization associated with international criminal trials in the form of indictments, arrests and prosecution help in preventing ethnic violence and atrocities in the future. Taking into account the cases of the former Yugoslavia and Rwanda, he explains the role played by international tribunals in discrediting criminal conduct as well as "delinquent leaders". In both the cases large-scale violence could be attributed to deliberate incitement of ethnic hatred by leaders and political elites in order to achieve power.\textsuperscript{130} International criminal justice processes influence the decision-making of the leaders at both the conscious and unconscious levels. In the "rational cost-benefit calculation" of the leaders, the threat of punishment increases the costs of polices that incite ethnic violence, i.e. the costs of conduct that is regarded as criminal under international law simply outweigh the benefits that can be derived from it.

Further, the fear of international isolation and pariah status in an interdependent world also constrains the policies pursued by political elites. The stigma associated with indictment, arrest and trial also sends messages to potential abusers of power, thereby signaling the removal of certain policy options for long-term survival. At the unconscious level international criminal justice engenders inhibitions against crime or "a condition of habitual lawfulness", whereby leaders simply eliminate options that are considered illegal even if there is no risk of detection, i.e. "illegal actions will not present themselves consciously as real alternatives to conformity."\textsuperscript{131}

The idea of a permanent international criminal court with universal jurisdiction has found great favour within this approach.\textsuperscript{132} Cherif Bassiouni explains the social control mechanisms and instrumental functions of a permanent international criminal court in tackling impunity. While conceding that a standing international court cannot solve all the ills of the world and that other accountability mechanisms are also useful depending upon individual circumstances, he draws attention towards the utility of a

\textsuperscript{129} Orentlicher has also proposed the establishment of an international oversight body that would be empowered to register complaints from individuals apart from inter-state complaints to ensure that governments discharge their duties in prosecuting human rights violations. She says such a body should also be authorized to initiate an investigation if states fail to do so. Ibid, pp. 2606-2615.


\textsuperscript{131} Ibid, p. 12-13.

permanent court in setting standards and enforcing social values concerning individual conduct. The continuous "articulation and application" of proscriptive norms against war crimes, genocide and crimes against humanity, and the ability to impose sanctions will generate greater individual compliance with the values propounded by the court. In his view, the basic demerit of the present approach is the "randomness and selectivity" in the application of proscriptive norms. The universal application of the norms and the resulting clarity and consistency in social expectations by means of a permanent court will force greater individual conformity and help in the "internalization" of these values among individuals.133 Bassiouni argues that international criminal law can be enforced either through an ideal "direct enforcement system" or through an "indirect enforcement system". There are only two examples of the former, namely the Nuremberg Tribunal and the Tokyo Tribunal. To him a direct enforcement system is one which would be "a fully integrated system of international criminal justice" without requiring the authority of states to carry out its orders. He does not even regard ICTY and ICTR as models of direct enforcement system because they also depend on state cooperation for enforcement of its orders. Despite the fact that both the tribunals may seek the Security Council's assistance in cases of non-compliance, they still fall short of fully integrated system. Prosecution of international crimes has to be carried out through indirect enforcement systems, which are based on inter-state cooperation in penal matters.134 According to Benjamin Ferencz ad hoc arrangements are "primitive and unsatisfactory way" to provide justice and "[i]nternational law must be known in advance and applied equally to everyone. What is needed as a deterrent to international crimes is an impartial, competent and permanent criminal tribunal."135 These views have come under heavy criticism from those who question the ability of positive law in resolving international crises. Leaders or dictators holding considerable power in any region will be reluctant to relinquish power if they fear prosecution. Henry Kissinger claims that criminal trials cannot address key issues such as power-sharing arrangements among different groups or the establishment of

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134 Bassiouni has discussed six modalities of inter-state cooperation in penal matters. They are: extradition, mutual legal assistance in penal matters; transfer of prisoners; seizure and forfeiture of illicit proceeds of crime; recognition of foreign penal judgments; and transfer of penal proceedings. See, Bassiouni, n.95, pp.13-14.
democracy. He says that individual societies should be given preference to address past abuses in their own ways. Every society has its unique requirements and only it is in a position to deal with its past. He is highly suspicious of the prospect of a permanent international criminal court exercising universal jurisdiction.\textsuperscript{136} Alfred Rubin claims that international law and treaties cannot put an end to conflicts and wars. This can be seen in the failures of the Kellogg-Briand Pact of 1928 and the UN Charter to settle international disputes through peaceful means. All the attempts to prohibit threat or use of force through law have yielded little results. And moral concepts like justice cannot be achieved through legal means. While highlighting the limitations of international law, he argues that some social problems are better solved within the parameters of municipal law i.e. at the national level and in many cases they are resolved through political means rather than through legal processes.\textsuperscript{137} He has also questioned the abilities of lawyers and judges to appreciate moral issues and to assess the root causes of armed conflicts. In his view, lawyers “are not trained in morals as they are trained in rhetoric.”\textsuperscript{138}

**Transitional Justice**

According to Barnett Rubin, transitional justice entails special “measures by which a society accounts for past abuses as it moves from a condition of dictatorship or conflict, where the perpetrators of violence enjoy impunity, to one of civil peace, where the state seeks to provide justice and security to its citizens.” Transitional justice is also “exceptional” in the sense that neither laws of warfare nor ordinary laws of peacetime are applicable. It is relevant only for a certain phase – a specific period in history.\textsuperscript{139}

Those who favour non-judicial accountability mechanisms focus on the immediate and emerging requirements of the ethnically and politically divided societies. According to this approach, over-emphasis on prosecutions might prolong conflicts causing more bloodshed and human suffering. Here the focus is on the special needs of emerging democracies and the interests of common people, especially of victims


\textsuperscript{138} Ibid, pp. 787-788.

and survivors. The truth and reconciliation commissions are considered as a “middle path between an uncompromising insistence on prosecution on the one hand, and a defeatist acceptance of amnesty and impunity on the other.”\textsuperscript{140} The truth commissions are intended to perform a variety of functions: to establish the truth regarding the atrocities committed and to record the events in a genuine manner so as to remove all the earlier misconceptions; to pardon those who made a full and honest confessions of their guilt; and to provide for the relief and rehabilitation of victims. Many states like Chile, Argentina and South Africa have experimented with truth and reconciliation Commissions. In South Africa it ended decades of apartheid and paved way for democracy.\textsuperscript{141} One of the most important aspects of recording correct history is that it recognizes the wrongfulness of acts and narrows down the moral space that instigated the abuses in the first place. It helps in changing public perception and collective consciousness about the evils of large-scale and systematic violence. Truth commissions also provide an opportunity to victims to tell about the sufferings. Catharsis in turn helps in healing process.

Civil and political sanctions against alleged offenders also represent transitional justice. These efforts were evident in erstwhile communist countries. Disintegration of the Soviet bloc led to the fall of communist regimes in many East European states. Many former communist leaders and officials accused of human rights violations were removed from the office. Many were barred from contesting elections and holding public offices. The primary purpose was to remove those who committed violations of human rights from positions of influence and power or to render them incapable in influencing affairs of the state. These measures helped in peaceful transition towards democracy without making the situation volatile.\textsuperscript{142}


\textsuperscript{141} The South African Truth and Reconciliation Commission consisted of three committees: the Human Rights Violation Committee, the Amnesty Committee and the Reparations and Rehabilitation Committee. Unlike the Chilean model which provided almost blanket amnesty to perpetrators, the Commission in South Africa granted amnesty on an individual basis and that too in exchange for truth. Though individuals were pardoned for their crimes in return for truthful confessions, the provisions of the Commission did not allow for blanket amnesty to all the offenders. Amnesties were conditional depending upon individual circumstances and were granted only for official acts. Private acts of revenge or acts committed for personal gains were not eligible for amnesty. It is argued that the establishment of the Commission was the only viable solution as other options could have possibly derailed the fragile prospects of peace in South Africa. Ibid, pp.650-667.

\textsuperscript{142} Czechoslovakia, Hungary, Poland, Bulgaria and Albania enacted lustration laws in order to disqualify former civil servants, secret service agents and those who held positions of power from holding public offices. They were banned from holding positions in the parliaments, armed forces, judiciary, intelligence agencies and even state-owned banks. These lustration laws also provided for a
Rama Mani considers the issue of reconciling peace and justice in low-income post-conflict societies. She argues that international peacebuilders lack an “integrated multidimensional” approach in meeting the situation. Peacebuilders show more concern with direct injustices that involve war crimes and grave violations of human rights committed during conflicts.

Rama Mani views peacebuilding as a dynamic process requiring a balance between negative peace (cessation of hostilities) and positive peace (removal of underlying causes of violence). She claims that what is required is an integrated approach that encompasses three distinct dimensions of justice. The three dimensions of justice about which she argues are: legal justice, rectificatory justice and distributive justice.

By legal justice, she means restoration or rebuilding of rule of law in war torn societies. It should be done on an urgent basis because it assures people that everyone is equal before law. It also allows courts to settle disputes that otherwise would have been resolved through conflicts. Another very important aspect of the rule of law is that it paves way for other forms of justice. Rectificatory justice addresses direct injustices committed against individuals during conflicts. Violations of human rights, war crimes and crimes against humanity committed during conflicts or during the reign of a dictatorial regime are addressed by the rectificatory justice. Rama Mani holds that trials and prosecutions, truth commissions, non-judicial accountability mechanisms, removal from office, purges, lustration, compensation to victims are all different modes of rectificatory justice. Many of these measures suggest special requirements of transitional societies. Distributive justice involves considerations of equitable distribution of political and economic resources that are often the underlying causes of conflict. It entails removal of real or perceived

 sort of screening process of those seeking employment to ascertain whether they had collaborated, by any means, with the former secret police. However, the lustration laws had been criticized on the grounds that they were “based on a presumption of guilt rather than of innocence” and that they promoted “principle of collective guilt” by putting entire categories of people under sanctions. These laws did not make a distinction between degrees of criminal liability such as acts of high-ranking officials or lower-level officers. See, Ved P. Nanda, “Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights,” Denver Journal of International Law and Policy, Vol. 26, No. 3, Spring 1998, pp. 390-397.

143 Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War, (Cambridge, 2002). Her study is based on experiences of El Salvador, Haïti, Namibia, Mozambique, Cambodia, Rwanda, South Africa and Guatemala.


145 Ibid, pp. 4-6.
inequalities. Distributive justice is imperative to “prevent a recurrence of conflict and to build the foundations of peace.”

As all three dimensions of justice are “interdependent and mutually reinforcing,” they should be addressed simultaneously. She says the three dimensions of justice also correspond to these deficit areas of post-conflict peacebuilding. Legal justice is related with political/constitutional reconstruction, distributive justice with socio-economic programmes, and rectificatory justice with psychosocial rehabilitation.

Atrocities Regime

Atrocities regime is the response of IR theory to gross violations of human rights. Kenneth Abbott argues that a better understanding of atrocities regime will help in bringing “institutional improvements.” He engages contending schools of IR theory in explaining three main features of the atrocities regimes. These are:

The distinction between international and internal armed conflicts, the emergence of norms governing certain abuses outside of armed conflicts, and the increasing reliance on criminal responsibility and criminal tribunals.

Rationalists’ account would use elements of reciprocity and symmetry in explaining states’ adherence to humanitarian law in armed conflicts, states would agree to treat prisoners of war humanly in expectation that others would do the same. Conventions help in clarifying terms of cooperation and minimizing “mistakes and misperceptions.” Because of the risk that individual soldiers, despite states policy of compliance, may violate the rules, measures like “grave breaches regime” is needed, which deter violators by means of prosecutions. Consideration of symmetry in military capability is equally relevant. Where opponents do not have sufficient means to retaliate, rules are prone to be violated.

Symmetry and reciprocity also explain as to why a legal distinction between international and non-international armed conflict has been maintained. Insurgent armed groups or secessionists are unlikely to be in a position to reciprocate.

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146 pp.7-9.
147 The three interlinked deficit area as identified by Ramsbotham that post-conflict peacebuilding seeks to address are: political/constitutional incapacity, economic/social debilitation, and psychosocial trauma.
150 However, Conventions have “little independent effect on behaviour; they merely coordinate relations among states with preexisting cooperative interests.” New Conventions are agreed after major wars in the light of new experience. Ibid. p. 369.
of symmetry are equally less. Insurgent groups also lack organizational ability to discipline individual soldiers. More often they adopt altogether different combat tactics in their fights against superior forces. Certainly states do not want to restrain their own action in such situations. Therefore common Article 3 and Protocol II fall outside the grave breaches regime. Armed rebellion is also taken as a matter of survival by governments where they prefer “maximum flexibility of response.”

As regards the reasons why certain atrocities like genocide and crimes against humanity have been criminalized outside the context of armed conflicts, realists would argue that it serves the purpose of major powers. The ICTY was created because major powers did not want to intervene. Intervention would have required immense material and human resources. Further, realist would highlight the lack of enforcement of human rights norms. After the Nuremberg and Tokyo Trials no international prosecutions took place until the establishment of the ICTY. And domestic prosecutions were primarily directed against former Nazis.

On the other hand, liberals would highlight the role of private individuals and groups in the origin and development of humanitarian law. Liberals regard Henry Dunant as a “political entrepreneur,” who established the International Committee of the Red Cross (ICRC) to provide aid and relief to wounded and sick soldiers in times of war. Individuals like Henry Dunant and others guided by moral values and religious convictions (idea of modern “Christian nation”) were behind the signing of the first Geneva Convention. And it was the Red Cross, which pressed for the application of humanitarian law to internal conflicts.

Liberals would like to emphasize the contribution of individuals like Raphael Lemkin and NGOs such as Amnesty International in the development of human rights norms. Liberals claim that the transnational advocacy networks (TANs) play a crucial role as “political actors” to promote human rights. TANs help in linking human rights groups in different countries. They raise public consciousness, issues

\[151, \text{Ibid, pp. 369-370.}
\[152, \text{Ibid, p. 371.}
\[153, \text{Ibid, pp. 369-370.}
\[154, \text{Raphael Lemkin, who coined the term “genocide”, played an important role in mobilizing support for the Genocide Convention. In the wake Nazi atrocities, he vigorously appealed for the international criminalization of massacre of people on racial and religious grounds.}
\[155, \text{From the 1960s, Amnesty International has been involved in exposing cases of torture and human rights abuses throughout the world. Its contribution in highlighting cases of disappearances in Latin America is notable. It also rendered help in drafting the United Nations Convention against Torture and the 1994 Inter-American Convention on the Forced Disappearance of Persons.}
and pressurize governments. Like liberals, constructivists also hold that development of human rights norms is affecting the way sovereignty is perceived, making it possible for international efforts to address internal atrocities. They draw attention towards normative changes that are taking place. Impact of historical events like the Holocaust and the outrages committed upon human dignity in changing values is crucial in this respect.156

Finally, Abbott considers the issue of international criminal responsibility for proscribed conduct and use of courts to enforce rules. He says that realists would hold that such legal approaches serve the purpose of powerful states in controlling undesirable behaviour. International criminal tribunals may prove more cost effective than military interventions or sanctions. But for institutionalists, such legal processes reflect commitments states are ready to make. Costs of violating treaties outweigh benefits even for major powers. Judicial bodies help in removing ambiguities. Regime theory would emphasize the benefits of individual criminal responsibility and criminal courts as threat of prosecution deters “disfavored conduct” especially when other options like intervention appear to be costly. Regime theorists would also like to see the replacement of “decentralized enforcement” mechanism (prosecute or extradite system) which appears to be ineffective. States have little political incentive to prosecute foreign nationals if they are not directly affected by the atrocities. They also call for political independence of courts for impartial and effective enforcement of international norms.157

Liberals would view lawyers and legal experts as a “transnational, knowledge-based epistemic community.” By characterizing certain acts as crimes, this community involves judicial institutions. Legalization has political implications. Criminalization of atrocities provide legitimacy to responses that are otherwise regarded as unpopular. It also paves way for incorporation of international norms into domestic criminal codes. Constructivists would see enunciation of social values in criminal law. Criminalization deals with what society deems abhorrent. Courts are also “teachers of norms” guiding others about appropriate conduct.158

156 Abbott, n.149, p.372.
SUMMARY OBSERVATIONS

Justice in international politics is understood in distinct ways in different theoretical approaches. In the mainstream International Relations (IR) theory, the application of the concept of justice is found to be problematic. While classical realism holds that states are constantly engaged in pursuit of self-interest and in maximizing their power, neorealism explains international politics in terms of anarchy where states strive to maintain their relative power within the self-help system. Although neoliberal institutionalism and regime theory share some of the basic assumptions with neorealism, they see the possibility of cooperation and thus of normative considerations in relation among states. They claim that even in the absence of a central authority in international politics there are incentives for states to cooperate and to adopt "mutually advantageous courses of action." However, here the emphasis is more on resolving problems of international cooperation rather than international justice.

International political theory, on the other hand, places equal emphasis on justice besides sovereignty in international politics. It views international politics in terms of a society of states as opposed to realist conception of system of states. Further it attempts to reconcile divergent norms that appear to be contradictory in orthodox IR theory. This involves aligning sovereignty (non-intervention) based norms with those of human rights and democracy. However, the kinds of justice with which international political theory deals are "procedural and formal" rather than "social and distributive." Social or distributive justice entails recognition of specific political, social or economic rights while formal justice deals with equality before law i.e. legal rules to be applied in a fair manner to everyone. According to Hedley Bull, international justice is more commutative or reciprocal than distributive. Commutative justice involves mutual recognition of rights and duties through bargaining. Distributive justice, on the other hand, involves decision of the society as whole to advance the common good. International law occupies a central place in international political theory. However, in this approach, international law is regarded more as a social process than a body of rules. Because it is social process of decision-making, it is open to social, moral and political considerations, extraneous to legal rules.

Like international political theorists, justice theorists also believe in international society; but unlike international political theorists, justice theorists advocate
social/distributive justice, world government and cosmopolitanism. While many justice theorists apply Kant to address problems of coexistence in a common world and to achieve perpetual peace, others favour “contractarian” account of justice where principles of justice are determined by a hypothetical contract or agreement reached between concerned parties under ideal conditions.

Next comes the question of crime. In domestic context, crime is seen in terms of violation of laws and also of social norms. Rendering justice once a crime is committed involves consideration of several issues like attribution of responsibility, punishment of offenders and reparation to victims. Retributive justice and deterrence demand severe punishment for wrongdoers. On the other hand, restorative justice seeks to engage offenders with society in a meaningful manner. To define criminality at the international level a three fold distinction is needed. Because a crime is an act against law and also against society, an international crime has to be understood as an act against international community as a whole. For that sources of public law has to be located in customary law (even those treaties and general principles of law that have acquired the status of customary law). It follows then only *jus cogens* crimes (i.e. crimes identified on the basis of customs) can be properly called international crimes for they have become part of customary international law universally applicable to all states irrespective of treaty obligations. Transnational crimes refer to criminal activities that transcend national boundaries. Their suppression requires international or inter-state cooperation. Here domestic interests motivate states to cooperate with each other to prevent a particular transnational criminal activity. Treaty based crimes are those crimes where states are bound by a treaty to prevent a particular criminal activity. Finally, international delicts are violations of international norms and rules that fall below the threshold of criminality, similar to deviance in domestic context.

Different conceptions of justice have been advocated to address international criminality. Many international legal experts, human rights activists and moralists advocate punishment of offenders through judicial accountability mechanism. They stand in favour of retributive justice and deterrence. For a just world order, punishment of wrongdoer is considered as an imperative. This view holds that impunity and the failure of the international community to punish offenders are the main reasons for the outbreak of violence and resulting human suffering.
Other scholars favour transitional justice. They call for non-judicial accountability mechanisms like truth and reconciliation commissions to meet the requirements of transitional societies moving from dictatorship towards democracy. They claim that over-emphasis on prosecution might prolong conflicts causing more bloodshed and human suffering. This approach draws attention towards immediate requirements of the ethnically and politically divided societies. It seeks to adopt a "middle path" between prosecution and impunity.

There are others like Rama Mani who stand for an integrated approach encompassing there distinct dimensions of justice. They are legal justice (rebuilding of rule of law in war torn societies), rectificatory justice (addressing direct injustices committed against individuals) and distributive justice (equitable distribution of political and economic resources). Finally, atrocities regime is the response of the IR theory to gross violations of human rights. Kenneth Abbot argues that a better understanding of IR theory may help in bringing institutional reforms in any international regime meant to address large-scale atrocities. He claims that contending schools of IR theory help in explaining how elements of reciprocity and symmetry in international relations may promote states' adherence to humanitarian law, how private individuals and transnational advocacy networks act as political actors in advocating human rights norms and what role major powers play in the origin and development of humanitarian norms.