Chapter 8 Alternative Justice Mechanisms, Compliance and Fragmentation of International Law

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This chapter examines the effect of transitional justice discourse on current debates regarding international obligations to exercise criminal jurisdiction and the role of ‘alternative justice mechanisms’. It then looks at the feasibility of stretching international law to regulate difficult scenarios of post-conflict criminal policy and the risk of fragmentation posed by such an approach. Ultimately it concludes that, while certain legal solutions to competing mechanisms for dealing with international crime may be viable, international criminal law has its limits and the resort to bogus alternatives and unsuitable legal regulation of discretion is to be avoided.

In reflecting on the significance of truth commissions and other ‘alternative justice mechanisms’ for the kind of fragmentation problems analysed by the International Law Commission in recent years, several relevant points come to mind, among them norm-relationships, lex specialis and the role of ‘special regimes’. It quickly became apparent however that there are two underlying issues that deserve particular attention. The first is the conceptual vantage point we adopt when talking of ‘choice’ between supposedly interchangeable ‘alternatives’. The second relates to the potential wider consequences for international criminal law if the proposed legal solutions to the seemingly intractable dilemmas that this ‘choice’ raises are implemented. These two issues will shape this discussion of fragmentation. A vital connecting thread between them is criminology, which

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shall be mentioned only in passing but in the hope that it sparks further discussion.

What might be termed a conceptual blurring has occurred, much of which has its roots in recent discourse of ‘transitional justice,’ outlined in Part 2. As a result, retribution, a theoretical justification of punishment, is often presented as if it were a policy goal of post-conflict prosecutions. Other justifications and policy goals of punishment meanwhile (chiefly prevention) are measured against, or even substituted by, more abstract goals such as reconciliation, democracy, peace and the good society. Conventional wisdom and untested assumptions remain rife in the transitional justice debate, particularly as regards the benefits and dangers of prosecuting international crimes and the role of ‘alternatives’ to prosecution. The legitimacy and utility of ‘Alternative Justice Mechanisms’, discussed in Part 3, are now commonly determined against this backdrop. The shifting and often confused conceptual foundations of the debate continue to fashion a sea of bogus alternatives and euphemisms through which policymakers, victims and their representatives try to navigate. These are perhaps the natural growing pains of a young discipline. Challenges will continue until such time as empirical study and theoretical analyses catch up with the speedy and important advances made in the creation of international criminal law and institutions. All laws, criminal or civil, national or international, of course have their limits. Equally, it is neither new nor undesirable that judges will use policy considerations to shape legal principles and aid their interpretation of criminal legislation. As for punishment, it has always had many and varied immediate and ultimate goals, which are continually disputed. Nonetheless, debate on how particular societies must or should respond to international crime needs to proceed from a coherent and transparent starting point.

Radical legal solutions have been proposed to the problems of competing ‘alternatives,’ attempting to move the policy debate squarely into the arena of international criminal law. Part 4 looks at the viability of the main suggestions, which are the focus of much academic exploration and typically involve (a) converting certain criteria that are currently used by some prosecutors in the exercise of their discretion into international legal norms; (b) reference to exceptional circumstances and necessity either to limit the applicability of norms that would ordinarily oblige a state to exercise its criminal jurisdiction, or to provide the state with a defence if it violates that obligation; and (c) interpreting the law such

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2 For present purposes this refers to genocide, grave breaches and analogous violations of the laws and customs of war, crimes against humanity and torture. ‘International criminal law’ of course includes transnational crime such as the treaty-based crimes of ‘terrorism’ and slavery, as well as drug trafficking, money laundering and crimes under the law of the sea.

3 At least from the perspective of the common lawyer and those within mixed or civil traditions open to a non-traditional view of the judicial role, see J.H. Merryman, *The Civil Law Tradition* (1985), Ch. VII, at 23-5, and 34-8.