Article

Parallel Courts in Post-Conflict Kosovo

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I. INTRODUCTION

In Kosovo[1] today, two parallel judicial systems each claim absolute and exclusive jurisdiction over the province. One system is sponsored by the

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1. Most place names in this Article are given in both Serbian and Albanian, as is the common practice within the United Nations and other international organizations operating in Kosovo. However,

United Nations Interim Administration Mission in Kosovo ("UNMIK"), the other by the government of Serbia ("Serbia"). The UNMIK courts are new creations, staffed mostly by Kosovo Albanians and a few members of the minority Serb population, but controlled primarily by the international UNMIK administration.[2] For the United Nations, these courts are the incarnation of its claim to have established rule of law under principles of non-discrimination and ethnic integration. For Serbia, they are illegitimate occupiers' courts, symbolizing the continued foreign domination of Serbian territory.

The Serbian parallel courts[3] are courts-in-exile, transplants of the official Kosovo courts that existed before the NATO bombing and the UNMIK administration. To Serbia, they represent the original and legitimate courts of Kosovo and are an expression of Serbia's continuing claim to sovereignty over the province. To the United Nations, they are an obstacle to the resolution of Kosovo's still uncertain political status, since its "Standards for Kosovo" require that "parallel structures have been dismantled"[4] when UNMIK yields administration to a permanent government.

Kosovo's parallel courts raise a classic question of post-conflict justice: How should a transitional government and its courts address the legacy of the past regime?[5] "In the public imagination, transitional justice is commonly linked with punishment and the trials of ancien régimes,"[6] yet Kosovo's parallel courts represent the under-recognized reality that this legacy is not just a matter of historical events, but rather, permeates the very structures of transitional societies, including the legal system itself.[7] Shaped in settings of violence and repression, post-conflict legal systems like Kosovo's maintain core features of these settings even after the conflict itself has formally ended. The very existence of the dual systems in Kosovo is a product of the Serbian-Albanian conflict. In their opposing claims to sole jurisdiction and their corresponding stance of mutual non-recognition, the parallel courts replicate,

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because it would be cumbersome to refer to "Kosovo/Kosova" throughout the Article in light of the frequency with which I use the term, I will refer solely to "Kosovo" throughout, as is also common practice in the U.N. and other organizations. This choice is purely a pragmatic one and is not intended to have political or other implications.

2. S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999); U.N. Mission in Kosovo, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, U.N. Doc. UNMIK/REG/2000/6 (Feb. 15, 2000), *available at* http://www.unmikonline.org/exam/testdata/doc/5948d29e_06.pdf; U.N. Mission in Kosovo, *On Assignment of International Judges/Prosecutors and/or Change of Venue*, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), *available at* http://www.unmikonline.org/regulations/2000/reg64-00.htm.

3. Although these sets of courts are in a structural sense parallel to each other, and could thus technically both be called "parallel courts," it is common practice in Kosovo to use this term only for the Serbian courts. The UNMIK courts, in contrast, are never referred to as such. Accordingly, in order to be as clear as possible about which courts I am referring to for readers within and without Kosovo, I refer throughout this Article to the "Serbian parallel courts" on the one hand, and to the "UNMIK courts" on the other. Like the other linguistic choices in this Article, this one is purely pragmatic and is not intended to have any political or other implications.

4. Press Release, U.N. Mission in Kosovo, *Standards for Kosovo*, U.N. Doc. UNMIK/PR/1078 (Dec. 10, 2003), *available at* http://www.unmikonline.org/press/2003/pressr/pr1078.pdf.

5. *See generally* RUTI TEITEL, TRANSITIONAL JUSTICE (2002).

6. *Id.* at 27.

7. M. Cherif Bassiouni, *Introduction* to POST-CONFLICT JUSTICE xv (M. Cherif Bassiouni ed., 2002).

and thus perpetuate, the divisions and disputes of the conflict that produced them, serving as a potential catalyst for ongoing divisions and violence.

Indeed, the legacy of parallel courts in Kosovo hampers everyday decisions, as well as the pursuit of justice on a larger scale. For the people of Kosovo, these parallel systems create legal uncertainty and conflict on a basic, day-to-day level. Judgments from one system are not recognized by the other, nor do the two systems share court files, cadastral records of title to land, or records of births, deaths, marriages, or divorces. To ensure enforcement of a divorce, a land sale, or a civil judgment, a Kosovo resident must pursue her claims in both systems. This presents a confusing, costly, and complex proposition that gives rise to conflicting judgments and to speculation and arbitrage. Because neither system recognizes the other's judgments, criminal suspects may face trial in both sets of courts. There are accusations of ethnic bias in some cases concerning inter-ethnic violence and crime, and fears that inter-ethnic disputes over land ownership are being fueled by the maintenance of parallel and mutually exclusive sets of property records.

For all concerned, the parallel systems stand for the larger political stalemate over Kosovo's fate. Kosovo cannot claim to be self-governing while Serbia also purports to govern it. Nor can Serbia claim Kosovo as an integral part of the Serbian state so long as the Serbian government is effectively cut off from the basic institutions controlling the province. Negotiations are currently ongoing to determine Kosovo's final status, whether that will be autonomy, independence, or some other form of association with Serbia or another state.[8] As it does so, the parallel courts issue is a synecdoche of the obstacles it faces: of the intractable political conflict over sovereignty that resists compromise, of the persistent ethnic divisions that defy integration, and of the stubborn gaps between ideal and reality within both judicial systems.

While Kosovo's parallel systems are an extreme example of a past regime's legacy expressed as a full-fledged alternative court system, legal legacies of repressive norms, compromised courts, or ad hoc local tribunals are commonplace in transitional and post-conflict societies. Nonetheless, in recent years, the international community has focused its energies in another direction: to securing criminal justice in post-conflict societies for atrocities of the worst kind, such as genocide, war crimes, and crimes against humanity. While this is a laudable goal, it is far from the only transitional justice concern these societies face. Compensation for injuries and deaths, disputes over property rights, and the ad hoc and local measures that communities take to meet these needs when the state legal system is in flux: arguably these immediate concerns are as important to rebuilding post-conflict societies as high level criminal prosecutions of former political leaders. But while criminal prosecutions have received the untiring efforts of some political institutions and non-governmental organizations, the international community

8. Press Release, U.N. Office of the Special Envoy to Kosovo [UNOSEK], *Pristina, Belgrade Delegations Meet in Vienna to Discuss the Future Status Process for Kosovo*, U.N. Doc. UNOSEK/PR/2 (Feb. 21, 2006), *available at* http://www.unosek.org/pressrelease/UNOSEK_PR%202_2006-02-21.pdf; News Coverage, UNMIK, *Kosovo: UN Envoy Puts off Presenting Final Status Proposal till After Serb Poll in January* (Nov. 10, 2006), *available at* http://www.unmikonline.org/news.htm#1011.

has not yet fully engaged itself in exploring ways of addressing these other transitional justice concerns.[9]

Beyond the transitional justice context, Kosovo's parallel courts are also an example of the legal pluralism that has developed in other divided societies. Such a comprehensive parallel court system seems to be unique to Kosovo, but in many other states, communities have established their own judicial systems, claiming their own jurisdiction and following their own rules. The underlying social and political tensions associated with plural systems and the legal questions concerning recognition and enforcement of judgments are common to these systems as well. How, for example, should Mexico treat decisions from Zapatista courts? What about the judgments of religious authorities in Iraq, Pakistan, Nigeria, or France? How can long divided societies like the Greek and Turkish administrations in Cyprus incorporate each other's judicial determinations if they are eventually unified? In analyzing the issues raised by the parallel courts in Kosovo, we may develop principles that are relevant for other states.

These problems are not purely political, but also legal. The fundamental underlying tension in Kosovo, as in other conflicted societies, is political—here, competing claims to sovereignty over the province. Whether the Serbian parallel legal system should continue to exist is likewise a political decision that will be resolved eventually in the political realm, whether by negotiation and compromise or by force. But the Serbian parallel system has issued legal decisions for seven years already and continues to do so. As long as people in Kosovo continue to rely on those decisions, past or present, whether those judgments can and should be recognized and enforced are legal questions that must be addressed.

These questions should be addressed separately from the ultimate political question of sovereignty as much as possible, on a purely legal level. Although there is a tendency to treat post-conflict and transitional legal settings as unique,[10] in this situation, the ordinary systems for recognizing and enforcing foreign judgments and extra-judicial legal determinations offer seasoned approaches for grappling with the questions of legitimacy and fairness presented here. These systems were developed, after all, precisely in order to deal with contentious inter-state disputes in cases of overlapping claims to jurisdiction.[11] Whether the Serbian parallel court judgments could be legally recognized, therefore, is a question that can be analyzed through comparative and conflict of laws approaches, looking to established procedures for recognition and enforcement of judgments. Here, although it may appear that there can be no mutual recognition while both systems claim exclusive jurisdiction over Kosovo, in fact, there are multiple models for recognition between overlapping systems. Some of these models would not

9. Bassiouni, *supra* note 7, at xv-xx (concluding, however, that it is appropriate to prioritize criminal justice); Anja Matwijkiw, *A Philosophical Perspective on Rights, Accountability and Post-Conflict Justice: Setting up the Problem*, *in* POST-CONFLICT JUSTICE, *supra* note 7, at 155. *See generally* TRANSITIONAL JUSTICE (Neil J. Kritz ed., 1995).

10. *See generally* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

11. Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 5-9 (1988).

require the courts to recognize each other's legitimacy as judicial institutions per se, nor to recognize the relevant political entities' claims to exclusive sovereignty and jurisdiction over the territory.[12]

This is not to suggest, of course, that the political and legal realms operate entirely separately from each other. To the contrary, it is my contention that the existence of political interests in the results of legal processes is an entirely ordinary thing, particularly in the field of recognition of judgments. Rather than posing a counter-argument against the use of legal processes to address the question of the parallel court judgments, the existence of political tensions presents exactly the sort of situation for which these legal processes were developed and designed. As such, these processes regularly tolerate the stress introduced by such political pressures. The sense, rather, in which the political and legal are separate and should be treated separately is that the determination of the legal status of these decisions need not predetermine the ultimate political judgment on Kosovo's sovereignty, nor does this ultimate political judgment need to take place in order for the status of the parallel judgments to be laid to rest. Likewise, should a decision on Kosovo's sovereignty be reached before the parallel judgments have been addressed, that decision need not predetermine the recognition of those judgments either. While the political and the legal are always in some sense interrelated, the particular legal question of the status of parallel court judgments can be determined independently of the particular political question of Kosovo's sovereignty.

In considering whether and how to recognize the Serbian parallel courts' judgments, Kosovo faces a tension between two competing goals: promoting certainty in the finality and consistency of those judgments and ensuring their essential fairness. To best promote legal certainty, Kosovo should establish mechanisms that maximize recognition of judgments, thereby eliminating the risks of conflicting judgments and of unenforced decisions. However, if the Serbian parallel courts employ discriminatory procedures or issue arbitrary judgments, broader recognition of those judgments will merely lend them undeserved legitimacy. There is, accordingly, a countervailing incentive to scrutinize Serbian parallel judgments before recognizing them, or not to recognize them at all.

A balance between these two values—certainty and fairness—lies at the core of existing international and national legal frameworks for recognition and enforcement of judgments. The trade-off between the two values is by no means absolute, but in general, establishing measures to protect one of these goals does tend to result in some cost to the other. Subjecting judgments to increased levels of scrutiny to ensure their fairness inevitably introduces delays and unpredictability in their enforcement, in rough proportion to the complexity of the procedures and the stringency of the tests employed for that purpose. The proper balance between these competing goals depends on an assessment of the likelihood that one or the other concern will arise, and of the impact that it is likely to have, both on individual litigants and on the society and judicial system as a whole.

12. *See* discussion *infra* Part III.

In determining whether to adopt one of these models, Kosovo's post-conflict, transitional status provides the context in which those models must be weighed. Likewise, the aims of transitional justice provide a normative imperative for applying the available models creatively and purposefully. While the content of transitional justice norms such as "rule of law" is hotly debated, as are the appropriate mechanisms for achieving such norms, there is no doubt that the aim of transitional justice is at heart transformative, seeking to "advance legitimacy in periods of political flux."[13] There is also by now general agreement that, particularly in post-conflict contexts, achieving any degree of this transformation through law requires accepting that this justice will inevitably be "imperfect and partial," guided by "pragmatic principles."[14] Indeed, Ruti Teitel has argued that the aims of transitional justice have evolved from "the ambitious goals of establishing rule of law and democracy" to the "concededly more modest" ones of "maintaining peace and stability."[15]

In Kosovo, the current approach of formal non-recognition, moderated by sporadic, unpredictable acknowledgment of judgments in particular cases for reasons of equity or compassion, creates legal uncertainties that inflict real harm upon the people of Kosovo and exacerbate the underlying political and social tensions. Resolving the issue of recognition of judgments on purely legal, apolitical terms by following well established and generally recognized models would, in contrast, provide an immediate solution to the people who are relying on Serbian parallel judgments in their private lives. If accomplished before the negotiations on Kosovo's political status are completed, it would also provide a foundation for political compromise on the broader questions of sovereignty. In this context, even if a legal solution were to achieve nothing more than to take the issue of the parallel courts off the political bargaining table and out of the realm of social conflict, that would itself be a productive end.

This Article undertakes an assessment of Kosovo's parallel courts and of the existing legal models for recognition and enforcement of judgments, with the aim of proposing an appropriate framework for recognizing the judgments of the Serbian parallel courts.[16] Part II describes the workings of the parallel

13. Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893, 897 (2003). *Cf.* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2322-23 (2003).

14. Teitel, *supra* note 13, at 897.

15. *Id.* at 898; *see also* Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE, *supra* note 7, at 55.

16. Throughout this Article, I address the problem from the perspective of solutions UNMIK or a subsequent independent or autonomous Kosovo administration might adopt in order to provide at least some recognition of judgments. Although the problem of conflicting judgments affects Serbia and other states as well as Kosovo, it is relevant to those states only on a completely different scale and in a completely different context. For Kosovo, this is a core problem of transitional justice and the legitimacy of its judicial system. It is primarily within Kosovo that these judgments have their effect and it is UNMIK and the eventual post-U.N. Kosovo institutions that will have to determine how to reconcile these judgments. For Serbia and other states, in contrast, transitional justice norms are less relevant. For these other states, the parallel court judgments are but one of the sets of judgments that the courts must choose whether to recognize and enforce. Nonetheless, at a general level my analysis may also be relevant for Serbian institutions determining how to treat UNMIK judgments, if modified to take account of the relevant Serbian law and Serbian interests in Kosovo.

Also, this Article focuses solely on the parallel courts themselves and on the recognition of their judgments. All parallel administrative structures of other kinds, including security forces, education, and

systems, based in part on my own first-hand research in Kosovo, including interviews with Albanian and Serb judges and lawyers and with members of the international community working on the relevant legal issues.[17] In Part III, I consider prominent legal models for recognizing decisions in civil disputes that have been reached outside of the state's court system, and in Part IV, I review the more difficult concerns posed by criminal judgments and the more limited models available to address them.

In my assessment, the proper balance between promoting legal certainty and ensuring fairness in Kosovo weighs more strongly in favor of promoting legal certainty in the civil context. In the criminal context, ensuring the fairness of the Serbian parallel judgments should be the preeminent concern. In addition, on the civil side, a robust set of models provide for generous recognition of civil judgments and present determinative factors that would allow Kosovo to mitigate the political and social costs associated with such recognition. In contrast, in the criminal realm, the models are few, the approaches to recognition relatively stingy, and the political and social problems associated with recognition in Kosovo are intractable and difficult to circumvent. Accordingly, I propose a civil judgments model that would allow for categorical recognition of most Serbian parallel civil decisions, while in the criminal context I reluctantly conclude that categorical recognition is not feasible and that the criminal judgments must instead be assessed on a case-by-case basis.

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health care, are outside the scope of this article. The only areas of administration that I address are those that represent the recording and enforcement of court judgments, such as the cadastral records that reflect court judgments recognizing sale of property and the personal records that set down family law decrees on matters such as divorces and child custody. For a discussion of the full range of parallel structures, see DEP'T OF HUMAN RIGHTS AND RULE OF LAW, ORG. FOR SEC. & CO-OPERATION IN EUR. MISSION IN KOSOVO, PARALLEL STRUCTURES IN KOSOVO (2003) [hereinafter OSCE PARALLEL STRUCTURES REPORT].

17. A brief note on methodology: In addition to the legal and document-based research for this article, I conducted interviews with eleven people during a visit to Kosovo in May 2005, some of which serve as the basis for the description of the parallel courts' current activities in Section II.D. I have identified most interviewees here by name, title, and workplace. However, all interviewees spoke in their personal capacities and not as representatives of their respective institutions. Some interviews were conducted directly in English, while others were conducted in Serbian or Albanian through translators. I selected my interviewees primarily on the basis of their experience with the UNMIK and Serbian parallel courts and with the related legal issues. They represent a number of different communities and legal institutions, including the relevant ethnic communities, lawyers, judges, and members of the international institutions operating in Kosovo. The number and selection of interviewees were limited in part by the unwillingness of many to speak about this topic because of its political sensitivity, while others would agree to discuss the matter only on an anonymous basis. Accordingly, these interviews are not intended to serve as a representative sample of the legal community in Kosovo, but rather are simply the reporting of knowledgeable individuals on their experience and observations. The interviewees do not endorse and are not responsible for the analysis or conclusions in this article; these are mine alone. Insofar as possible, I have cited multiple sources for the information obtained through these interviews and have cited anonymous sources only when the information was not available from another source.

It is important to note that although such interviews are the subjective accounts of individual members of Kosovo's legal community, this is nonetheless the most up-to-date information available about the Serbian parallel system. All the official reports on the subject are several years old and, significantly, rely on similar interviews for their information. Nonetheless, wherever possible I have confirmed the reports of my interviewees with references to the official reports. Throughout, citations to reports represent a historical record of the situation as of 2003 or earlier, while citations to interviews represent the views of some members of Kosovo's legal community in 2005.

From this analysis, there emerge some factors to be considered in developing models for recognition of judgments from outside the state-run court system, such as correspondence to existing legal models, convergences and divergences between the systems, and other concerns. The concluding section of the Article discusses these principles for other divided and transitioning states facing a problem of parallel courts.



Map of Kosovo[18]

18. United Nations Cartographic Section, Peacekeeping Map: UNMIK (Kosovo) (2004), http://www.un.org/Depts/Cartographic/map/profile/kosovo.pdf. Kosovo comprises an area of less than 11,000 square kilometers, approximately one-third the size of Belgium. It has roughly two million residents, majority Albanian, with minority Serb, Roma, Turks, and other ethnicities. Most people live in

II. THE PARALLEL COURTS

A. *Political History*

The current situation in Kosovo had its birth in the province's cataclysmic violence in 1998 and 1999, its gestation in the decade of discriminatory government that preceded it, and its inception some time long ago, preserved and obscured in contradictory historicized mythologies.[19] The story of the courts in Kosovo is both representative of and shaped by the history of the region's political system as a whole.

Kosovo, together with the rest of the Balkans, has had the misfortune of being a contested territory on the border of competing empires for centuries. All this time, it has served as a strategic prize to be quarreled over, snatched, relinquished, and regained by powers its own peoples could not hope to control. Of importance for the current conflict, Kosovo was the site of a crucial defeat of the Serbs by the Ottomans in 1389, initiating 500 years of Ottoman rule and crystallizing Kosovo's place as hallowed ground in Serbian nationalist ideology.[20] The modern struggle for Kosovo began in 1912, when after some years of Albanian revolt against waning Ottoman control, the Serbian army conquered Kosovo. During World War I it was occupied by the Austrians, and in 1918, when the victorious powers divided the majority Albanian region of the Balkans between the new states of Yugoslavia and Albania, Kosovo went to Yugoslavia.[21] Armed and political struggles over whether the province should be part of the new federation, part of Albania, or independent, ensued for a number of years.[22]

During the Cold War, under Tito's rule, Kosovo's political fate shifted. It gradually acquired increasing powers of self-government within Yugoslavia, with the most significant step being its acquisition of the status of an autonomous province and self-government under the 1974 Yugoslav constitution. Within the Yugoslavian legal system, Kosovo's system overlapped with the federal one, sharing, for example, its criminal procedure code but operating under its own civil and criminal codes. Some Kosovo Albanians began seeking status as a republic in the 1980s, which would have

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rural areas. The majority Albanian population occupies most of Kosovo, while the minority Serb population inhabits the northern portion of the province ranging from north of the Ibar river that runs through Mitrovicë/Mitrovica up to the border with Serbia, as well as a number of discrete enclave communities in other parts of the state. Although UNMIK documents typically provide place names both in Serbian and in Albanian, this U.N. map provides place names only in Serbian. Also, note that this map pre-dates Montenegro's independence.

19. This succinct description of Kosovo's history is not intended to be comprehensive nor to take any position on Serbian or Albanian historical, political, or cultural claims to Kosovo. Rather, it is meant only to present some necessary background for the legal analysis that follows. Of necessity in such a brief account, this discussion does not touch on many aspects of Kosovo's history, ancient and modern. For fuller histories of Kosovo and of the genesis of the current situation, see generally MISHA GLENNY, THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS, 1804-1999 (1999); ROBERT D. KAPLAN, BALKAN GHOSTS: A JOURNEY THROUGH HISTORY (2005 ed.); NOEL MALCOLM, KOSOVO: A SHORT HISTORY (1999); and TIM JUDAH, KOSOVO: WAR AND REVENGE (2000).

20. KAPLAN, *supra* note 19, at 35-39; MALCOLM, *supra* note 19, at 62-63.

21. GLENNY, *supra* note 19, at 416; KAPLAN, *supra* note 19, at 44-45; MALCOLM, *supra* note 19, at 264-65.

22. GLENNY, *supra* note 19, at 416; KAPLAN, *supra* note 19, at 44-45; MALCOLM, *supra* note 19, at 272-78.

meant formally "detaching it from Serbia and conceding that it had the right to secede."[23] Throughout this period, Serbs left Kosovo in large numbers, and rumors of Albanian violence against Serbs were rife.[24]

Kosovo's position, and the position of its inhabitants, changed dramatically after Slobodan Milosevic's rise to power on a groundswell of Serbian nationalism between 1987 and 1989. After Milosevic gained power, he swiftly moved to revoke Kosovo's autonomous status.[25] Although the numbers of Albanians and Serbs did not change, what had been the Albanian majority in Kosovo became an Albanian minority in Serbia at large. Serbia then instituted what has been described as an "apartheid" regime limiting Albanian status and participation in public life.[26] It banned the use of the Albanian language in courts, schools and other areas of public life and fired most Albanians from their positions in the government, including the judicial system. In response, many Albanians boycotted what remained of the place allowed them in the formal government and in society, for example, by educating their children in makeshift private schools.[27]

In addition, the Albanians were the first to establish a parallel government in Kosovo. Kosovo nationalists declared independence in 1990, following the revocation of Kosovo's autonomous status,[28] and throughout this period, many Albanians refused to participate in Serbian elections, instead electing their own shadow parliament. However, this system did not include parallel courts.[29]

As Yugoslavia imploded, Kosovo remained outside the fray until 1996, when the Kosovo Liberation Army ("KLA") launched its first armed attack. The violence between Serbian police and the KLA escalated, culminating in the NATO bombing campaign and the Serbian offensive of 1999. After NATO began bombing Serbian forces in the region in an effort to force their retreat from Kosovo, those forces instead swept through the province, pushing the Albanian population into Macedonia, Montenegro and Albania.[30]

B. *Source of the Parallel Courts*

When NATO air strikes eventually forced the Serbian military across the border into Serbia proper, much of the Serb population went with it. This was the population that had governed the province for the previous ten years, and as they left, they took with them the symbols, tools, and institutions of

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23. GLENNY, *supra* note 19, at 624.

24. *See id.* at 624-25.

25. *Id.* at 653.

26. Ian Fisher, *Combative Milosevic Displays a Flair for Courtroom Tactics*, N.Y. TIMES, Feb. 20, 2002, at A4.

27. GLENNY, *supra* note 19, at 653; JUDAH, *supra* note 19, at 61-73.

28. GLENNY, *supra* note 19, at 653.

29. Interview with Adem Vokshi, Chairman of the Kosova Chamber of Advocates, in Mitrovicë/Mitrovica (May 27, 2005) [hereinafter Vokshi Interview] (speaking in his personal capacity). Like the others interviewed for this article, Mr. Vokshi's contribution of factual information does not imply any endorsement of the author's analysis or conclusions. For a brief note on the methodology of these interviews, see *supra* note 17. *See also* JUDAH, *supra* note 19, at 70-73 (describing parallel government, education, and health systems but not courts).

30. GLENNY, *supra* note 19, at 654-58.

governance, stripping the university and other public buildings bare. From the courts, this meant not only the official court seals and stamps, but also many of the judges, attorneys, and other personnel. Indeed, it was not just the courts themselves that were removed, but the whole administrative structure, including the property cadastral records and also the records of births, marriages, divorces, and deaths. There were already copies of these records in Belgrade, but the departing Serbs also took some of the original records from Kosovo, so that in some instances there is now a copy in Belgrade and an original with the Serbian parallel court or administrative office, while the UNMIK courts do not have a copy at all. Of course, in some instances records were lost or destroyed in the mayhem.[31]

In effect, the courts of Kosovo picked up and moved wholesale to Serbia. There, the Serbian government reinstituted them, reasserting its jurisdiction over its prior territories. The municipal and district courts of the Kosovo city of Priština/Prishtinë[32] were moved to the city of Nis in Serbia proper, those of Mitrovicë/Mitrovica to the Serbian city of Kraljevo, and so on. Accordingly, when the U.N. began its administration of Kosovo in 1999, the province lacked an internally operating judicial system. Eventually, as the Serb enclaves were established within Kosovo, some of the Serbian parallel municipal courts and the associated cadastres set themselves up there, but the district courts remained in Serbia proper, safely across the border from UNMIK jurisdiction and NATO's Kosovo Force ("KFOR") troops.[33]

Thus, what are now the Serbian parallel courts were in fact the formal courts of Kosovo, before the Security Council established the UNMIK civil administration in Kosovo through Resolution 1244. Accordingly, the Serbian parallel and UNMIK courts' competing claims to legitimacy are ultimately grounded in the conflicting political claims to sovereignty over the province. The Serbs did not create a new judicial system, but rather, reconstructed their prior one and did not concede that they had lost jurisdiction, defrocked by the combined force of NATO's military might and the UN's political power. For its part, the U.N. has created for Kosovo both new courts and new laws, backed by the moral authority of responding to humanitarian need and by an uncertain relationship to international law.[34]

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31. Interview with Kaplan Baruti, President of the District Court of Mitrovicë/Mitrovica and President of the Association of Judges, in Mitrovicë/Mitrovica (May 24, 2005) (speaking solely in his personal capacity and not as a representative of the Court or the Association) [hereinafter Baruti Interview]; Interview with Knut Rosandhaug, Executive Director, Housing and Property Directorate, Housing and Property Claims Commission, in Priština/Prishtinë (May 27, 2005) (speaking solely in his personal capacity and not as a representative of the Directorate) [hereinafter Rosandhaug Interview]; Interview with Lyubomir Pantovic, defense attorney, in Mitrovicë/Mitrovica (May 27, 2005) (speaking solely in his personal capacity) [hereinafter Pantovic Interview].

32. For an explanation of my treatment of place names throughout this Article, please see *supra* note 1.

33. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 17-19.

34. NATO's justification for its use of force in Kosovo was humanitarian intervention, which has not traditionally been considered an adequate justification for the use of force under international law. This incident, along with cases of non-intervention such as Rwanda's genocide, has since become the catalyst for arguments in favor of recognizing an exception authorizing use of force for humanitarian purposes. *E.g.*, Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003). The U.N.'s governance of Kosovo is also on uncertain legal ground,

C. *Development of the Parallel Systems*

Of course, the Serbian parallel courts have not continued to operate just as they did before 1999. They do claim the same competencies and jurisdiction, apply Serbian law, approve documents with the same stamps and insignia, and use the same names and titles. But they have changed in response to the transformation in their political status and in the socio-political reality that surrounds them.

In the early months of UNMIK's administration, the Serbian parallel courts were the only courts operating on behalf of Kosovo, whether located within the province itself or in Serbia proper. Even as UNMIK began to promulgate laws for Kosovo, the Serbian parallel courts continued to apply the law of Serbia, pronouncing judgment under the ostensible authority of the Serbian government. At this time, the Serbian parallel courts carried out the full range of competencies that they had before UNMIK: criminal and civil cases, including on the civil side all manner of litigation, family matters such as marriages and divorces, and affirmation of contracts including, significantly, contracts for the sale of real property. Although Albanians and Serbs had separated themselves into two societies, both Albanians and Serbs had only the Serbian parallel structures to turn to in order to resolve their legal problems.[35]

For the last seven years, the Serbian parallel courts and the other Serbian parallel administrative offices serving judicial, adjudicative, and record-keeping functions have continued to operate. The Serbian parallel judicial system is divided between one set of courts ensconced within the Serb enclaves in Kosovo itself, and another set operating within Serbia on behalf of their assigned regions in Kosovo. Only municipal courts (the lowest level, first instance courts) operate within the enclaves in Kosovo itself, and it is said that some of these courts act as a referral service for the courts in Serbia as

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although it does not directly contravene established international law as NATO's campaign did. Kosovo was the first instance in which the Security Council relied on Chapter VII as a basis for establishing U.N. administration over a territory. In the political and legal vacuum caused by Serbia's withdrawal from the province, some form of transitional administration was likely both necessary and directly related to the Security Council's Chapter VII authority to address threats to international peace and security. There is, however, a reasonable argument that the extent and duration of the civil administration in Kosovo extends beyond the scope of that authority. Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 76-78, 83-85 (2001) (arguing that this type of administration is within the Security Council's authority but acknowledging that it is not a settled question and considering the counter-arguments).

35. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 5. Of Kosovo's other, smaller minorities, most tend to live either in their own discrete communities or in the Serbian enclaves, although the Turk minority is reportedly well-integrated into Kosovo Albanian society. These minorities do not exert much political influence and do not operate under their own legal system, instead making use of both the Serbian parallel and UNMIK systems. ORG. FOR SEC. & CO-OPERATION IN EUR., TENTH ASSESSMENT OF THE SITUATION OF ETHNIC MINORITIES IN KOSOVO 31-33 (2003) [hereinafter OSCE TENTH MINORITY ASSESSMENT]; Interview with Alice Thomas and Francesca Marzatico, International Legal Advisors, Ombudsperson Institution in Kosovo in Priština/Prishtinë (May 25, 2005) (speaking solely in their personal capacities and not as representatives of the Ombudsperson) [hereinafter Thomas & Marzatico Interview].

much as proper courts in their own right. In Serbia proper, both municipal courts and district courts (the second tier court) hear cases and appeals.[36]

Meanwhile, the province of Kosovo has been administered for the last seven years by UNMIK as a protectorate under U.N. Security Council Resolution 1244.[37] From the complete shambles of 1999, Kosovo's judicial system has been recreated, reorganized, and restaffed, mostly with Kosovo Albanians, but also with some Serbs, and, strategically, with international judges and prosecutors in the Supreme Court and in other key positions. There are now UNMIK courts established for every district of Kosovo.[38] UNMIK has been facilitating the development of Provisional Institutions of Self-Government, with the intention of eventually turning over all governance in Kosovo to these institutions, including the judiciary. In 2006, Kosovo began international negotiations over its final status, and since then, UNMIK has turned over control of certain institutions, such as the Ombudsman's office, to local authorities.[39] While a December 2005 UNMIK regulation established a Ministry of Justice as one of the Provisional Institutions of Self-Government, at this time, that Ministry was still "preparing to gradually take over the majority of the justice-related reserved powers"[40] held by UNMIK, and UNMIK still issues regulations, controls appointment of judges, and administers the courts directly in most respects.[41]

The relationship between the UNMIK courts and the Serbian courts has been one of a shifting balance of power. Initially, UNMIK courts were unknown to the population, and the Serbian parallel courts represented the familiar, established judiciary. At times, the Serbian parallel courts and UNMIK courts within Kosovo have operated side by side, causing no inconsiderable confusion for parties who arrived at the courthouse to find themselves confronted by two sets of courts. In the Serb enclave of Zubin Potok, for example, the Serbian parallel court for some time had its office on the same floor of the same building as the UNMIK court and was marked by a sign reading simply: "Certification of Contracts, Authorisations; Tuesday and Friday 9-11 AM; Municipal Court of Mitrovica Sub-Office Zubin Potok."[42] Over time, as UNMIK courts have been established within many of the enclaves, the actual activities of the Serbian parallel courts located within

36. Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29; Interview with Daniel Deja, Chief of Party, and Enver Fejzullahu, Senior Staff Associate, Justice System Reform Activity in Kosovo, in Priština/Prishtinë (May 25, 2005) (speaking in their personal capacities) [hereinafter Deja & Fejzullahu Interview]; U.N. HIGH COMM'R FOR REFUGEES & ORG. FOR SEC. & CO-OPERATION IN EUR., NINTH ASSESSMENT OF THE SITUATION OF ETHNIC MINORITIES IN KOSOVO, para. 30 (May 31, 2002), *available at* http://www.unmikonline.org/press/reports/MinorityAssessmentReport9ENG.pdf [hereinafter OSCE NINTH MINORITY ASSESSMENT].

37. S.C. Res. 1244, *supra* note 2.

38. EUR. PARL. ASS., Res. 1417, art. 5(ii) (2005).

39. OMBUDSPERSON INSTITUTION IN KOSOVO, SIXTH ANNUAL REPORT 2005-2006, at 4 (July 11, 2006) [hereinafter OMBUDSPERSON SIXTH ANNUAL REPORT].

40. *Id.* at 19.

41. *Id.* at 18-19; U.N. Mission in Kosovo Home Page, http://www.unmik.org (last visited Dec. 2, 2006). The respective roles and authorities of UNMIK and the Provisional Institutions of Self-Government concerning the judiciary are not well-defined. *See, e.g.*, U.N. Mission in Kosovo, *Constitutional Framework for Provisional Self-Government*, art. 9.4, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001) [hereinafter Constitutional Framework].

42. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 17-18.

those areas have diminished correspondingly.[43] However, the UNMIK courts are still inactive within some enclaves, leaving the Serbian parallel courts to fill the void. Throughout Kosovo and in Serbia proper, the Serbian parallel courts continue to operate today.[44]

D. *The Parallel Systems' Current Role*

The Serbian parallel courts no longer play the all-encompassing role that they did in the first days and months of UNMIK's administration. Over the past seven years, the UNMIK courts have taken over many of the ordinary legal functions of the province. Nevertheless, the Serbian parallel system continues to fill crucial gaps in the functioning of the UNMIK administration, especially for the Serb minority, but for the rest of the population as well.

Insofar as the recognition of Serbian parallel court judgments is concerned, what is most important is that their judgments from the past seven years represent a legal edifice of contracts, marriages, criminal convictions, and other decisions that Kosovo cannot readily discard. The most recent report on the Serbian parallel system indicates that it heard roughly 8000 cases and claims between June 1999 (at the end of the NATO bombing) and January 2003, and that it had approximately 780 cases pending as of January 2003, of which 700 had been filed during the UNMIK administration. These cases ran the gamut of subjects, including both civil and criminal matters.[45]

Both Kosovo and Serbia have civil law, code-based systems. Accordingly, the existence of parallel legal systems does not present a problem of conflicting lines of precedent, as it would in a common law system, because the results in each case are binding only on the parties. Indeed, in each case the judge applies the relevant provisions of the applicable legal code directly to the case in question, without consideration of prior case law. Of course, these are not the same codes: The Serbian parallel courts apply the law of Serbia, while the UNMIK courts apply a combination of old and new laws, with some pre-dating the dissolution of Yugoslavia and others implemented after the beginning of UNMIK administration.

1. *In Civil Cases*

In civil matters, the Serb community currently uses the Serbian parallel structures far more than the Albanian population, which tends to rely on the UNMIK system as much as possible. However, all Kosovo residents,

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43. For example, the internal Serbian parallel courts no longer operate in the formal court buildings, but are relegated to private offices and, it is said, even in some instances to private homes. Pantovic Interview, *supra* note 31.

44. OSCE TENTH MINORITY ASSESSMENT, *supra* note 34, at 33; Vokshi Interview, *supra* note 29; Pantovic Interview, *supra* note 31; Deja & Fejzullahu Interview, *supra* note 36.

45. As of May 2002, Serbian parallel courts were still hearing cases for the entire territory of Kosovo, with thirty-four judges working in a variety of municipal courts within the enclaves in Kosovo and some number of municipal and district courts operating within Serbia proper. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 17-21. In May 2005, those I interviewed opined that, from what they had observed, the Serbian parallel courts within Kosovo had a reduced caseload and a narrower range of competencies than in the past. Vokshi Interview, *supra* note 29; Pantovic Interview, *supra* note 31; Deja & Fejzullahu Interview, *supra* note 36.

regardless of ethnicity, have to use the Serbian parallel system for certain crucial matters in which UNMIK has not attained competency or received international recognition. Furthermore, the UNMIK system suffers from a confusing patchwork of new and old laws and from the absence of pre-1999 records, hampering its effectiveness and inducing Albanians as well as Serbs to turn to the Serbian parallel system for some concerns.

Many Serbs have continued to use the Serbian parallel system for matters that are internal to the Serb community, such as contracts, marriages, and litigation in which both parties are Serb.[46] However, this reliance is not necessarily a political statement. Many Serbs do not feel comfortable traveling outside their enclaves because of security concerns, and while there are UNMIK courts for every district in the province, UNMIK has established courts in only some of the enclaves within those districts.[47] It has proven difficult for UNMIK to attract Serb prosecutors and judges, due both to security problems and to social pressure, and this has both slowed the process of establishing courts in Serb-dominated areas and contributed to the problem of Serbian mistrust of Albanian-dominated institutions.[48] There are also simple but substantial pragmatic and convenience costs associated with going to the often unfamiliar and distant UNMIK courts.[49] In areas where the UNMIK courts have come to be viewed as effective, they have reportedly received increasing numbers of Serbian cases.[50] However, while the problems of violence, social pressure, and mistrust of the UNMIK courts' fairness and effectiveness were most acute in the early years of UNMIK administration, they continue today.[51]

In contrast, the Albanian population, generally averse to the indicia and institutions of the prior regime, has shifted its civil claims gradually to the UNMIK courts, to the extent that the courts have proved themselves capable of handling claims and cases. In addition, just as Serbs are reluctant to travel into Albanian dominated areas, so many Albanians hesitate to travel into the Serb enclaves, for similar reasons of security and inconvenience. As a result

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46. Vokshi Interview, *supra* note 29; Pantovic Interview, *supra* note 31. Eighty percent of Serbs surveyed in 2005 indicated that they followed Serbian law rather than Kosovo law. INT'L FED'N FOR ELECTION SYS. & U.S. AGENCY FOR INT'L DEV., MEASURING AND IMPROVING CITIZENS' UNDERSTANDING OF THE JUSTICE SYSTEM: PUBLIC OPINION SURVEY IN KOSOVO 2005, at 21 (2005), *available at* http://www.ifes.org/publication/8471b8e4a755a9e35938d86f563a81e8/kosovo_survey.pdf [hereinafter 2005 PUBLIC OPINION SURVEY].

47. OMBUDSPERSON INSTITUTION IN KOSOVO, FOURTH ANNUAL REPORT 2003-2004, at 12, 18-19 (July 1, 2004) [hereinafter OMBUDSPERSON FOURTH ANNUAL REPORT].

48. For example, in 1999, UNMIK hired two Serb judges and two Serb prosecutors to work at the court in North Mitrovica, a Serbian area, along with four Albanian judges and some Albanian prosecutors. Within a month, all the Serbs had quit, reportedly due to pressure and threats from members of the Serbian community not to cooperate with UNMIK. Since then, UNMIK has succeeded in hiring two Serb judges for the Mitrovica court. Baruti Interview, *supra* note 31.

49. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 22; Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31; Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29.

50. Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29.

51. For example, in a 2005 public opinion survey, only 18% of Serbs surveyed indicated confidence in the UNMIK courts. Seventy-nine percent of Serbs surveyed expressed the view that there was bias and inequality in the system. 2005 PUBLIC OPINION SURVEY, *supra* note 46, at 14.

of these disincentives, most Albanians use the Serbian parallel courts only for those matters which the UNMIK courts are not competent to handle.[52]

There are still several crippling limitations to the effectiveness of the UNMIK courts that push Kosovo residents of all ethnicities to make use instead of the Serbian parallel courts and administrative structures. On the one hand, presently the UNMIK courts and administration are functioning within Kosovo itself, so that Kosovo residents of whatever ethnicity can accomplish virtually any legal or bureaucratic task for purposes of enforcement within Kosovo through those courts, whether it be seeking a civil judgment, pursuing a divorce, participating in a criminal trial, or getting an UNMIK travel document or license plates.[53]

However, these judgments and documents are not necessarily effective outside Kosovo. They are not recognized by Serbia, nor by a number of other neighboring states. In order to enforce a civil judgment against a Serb defendant; in order to travel on a Serbian passport that is good for ten years and recognized by all states, instead of an UNMIK travel document that is good for two years and recognized by only some states; in order to drive one's car legally in some neighboring states; in order to have one's divorce, property sale, or inheritance recognized in Serbia; and in order to have one's criminal conviction or acquittal recognized as final in Serbia, Kosovo residents, whether Albanian or Serb, must pursue their interests through the Serbian parallel system.[54]

But of course, UNMIK does not recognize Serbian parallel court and administration judgments either, so to have one's judgment, license plate, divorce, and so on recognized by the UNMIK administration that currently controls Kosovo (and by the KFOR and police forces that enforce the law there), all residents of Kosovo, whether Albanian or Serbian, must pursue their interests through the UNMIK system.[55] Accordingly, the only way to have one's legal document or judgment recognized everywhere is to pursue it through both systems independently.

Another limitation on UNMIK effectiveness is that UNMIK does not have many of the pre-1999 Kosovo records. Some were taken to Serbia, some were destroyed, and some are still in the possession of the Serbian parallel

52. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 18-19; Baruti Interview, *supra* note 31; Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29. In contrast to Serbian views, *see supra* note 46, 98% of Albanians report following Kosovo law. 2005 PUBLIC OPINION SURVEY, *supra* note 46, at 21. In addition, the majority of Albanians indicate "at least a fair amount of confidence in the legal system's [i.e. the UNMIK courts'] ability to maintain law and order and protect rights," and only 11% of Albanians indicated any level of disagreement with the statement that "the judicial system in Kosovo is unbiased and treats all persons equally." *Id.*, at 14, 21.

53. Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29.

54. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 6; Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29.

55. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 5; OMBUDSPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 53-54; OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 11; Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29. Note that non-recognition is not identical with non-toleration. While UNMIK has not recognized parallel courts or other parallel structures as legitimate, it has tolerated their existence and activities at varying levels at varying times, in the sense of not acting to eliminate them or prevent their activity. *Cf.* DANIEL SERWER & YLL BAJRAKTARI, UNITED STATES INSTITUTE OF PEACE, KOSOVO: ETHNIC NATIONALISM AT ITS TERRITORIAL WORST (2006), *available at* https://www.usip.org/pubs/specialreports/sr172.pdf.

courts in the enclaves. Regardless, if a matter requires confirmation of a legal document from before 1999, such as the criminal record statement required to obtain a visa, one must go through the Serbian parallel system to acquire that document.[56] The UNMIK courts can request documents from Serbia by an indirect route through the UNMIK administration, but this process is far more cumbersome than direct resort to the Serbian parallel system, and Serbia has ignored UNMIK requests in some cases.[57]

Furthermore, under UNMIK's rule, the law in force in Kosovo now is a hodgepodge of different sources: regulations issued by the Special Representative to the Secretary General (the "SRSG") trump, followed by the pre-1989 law of the Socialist Federal Republic of Yugoslavia to the extent that it is not discriminatory, codes drafted and approved by the provisional legislature and the SRSG, and international law.[58] This mélange of sources of law, together with UNMIK's failure to adequately distribute and translate its new regulations, have created substantial uncertainty as to what the law is on any given subject.[59]

Finally, the UNMIK courts have suffered from the understandable problems of a new court system: a backlog of cases, lack of staffing on every level, an inexperienced judiciary and bar in need of training, lack of compliance with judgments, and so on. This has resulted in lengthy delays in proceedings, accusations of partiality, and an inability to execute judgments. There are also charges of widespread corruption, resulting at least in part from inadequate salaries. Although the UNMIK system is fully effective in principle, in practice there remain vital lags in its operation, and the Serbian parallel courts are in many instances operating as a stopgap.[60]

Generalizing broadly, the net result is that Albanians tend to use the UNMIK system for most civil matters, except when they need recognition from Serbia or another UNMIK-unfriendly government, or when the UNMIK system flounders, and then they turn to the Serbian parallel system. Serbs by and large use the UNMIK system for anything involving interaction with UNMIK or the broader Albanian community, but frequently use the Serbian

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56. This reality has given rise to a new cottage industry. Because some Albanians are not comfortable traveling to Serbia or to the enclaves to visit the Serbian parallel courts/administration, there are Serbs who, for a fee, will travel to the requisite court or office to acquire or file the necessary document. Pantovic Interview, *supra* note 31; *see also* OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 22.

57. OMBUDSPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 53-54; OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 21; Baruti Interview, *supra* note 31.

58. U.N. Mission in Kosovo, *On the Law Applicable in Kosovo*, U.N. Doc. UNMIK/REG/2000/59 (Oct. 27, 2000).

59. In a 2005 public opinion survey, 77% of Kosovo residents surveyed said they "did not know how to obtain information about the law" in Kosovo, and 80% "did not know that UNMIK publicly announces any new regulations." 2005 PUBLIC OPINION SURVEY, *supra* note 46, at 9-10. *See also* OMBUDSPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 12-14. For an assessment of UNMIK's legal system, see GJYLBEHARE MURATI, THE INDEPENDENCE OF THE JUDICIARY AND ITS ROLE IN THE PROTECTION OF HUMAN RIGHTS UNDER UN ADMINISTRATION USING THE CASE OF KOSOVO 6-9, *available at* http://www.esil-sedi.org/english/pdf/Murati.PDF; OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 8-9.

60. OMBUDSPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 12-23; OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 8-14.

parallel system for civil matters internal to the Serb community or likewise for any civil question requiring Serbian authentication for outside recognition.[61]

Although the overall pattern of civil cases in the Serbian parallel system has been one of a decreasing caseload and narrowing role, the thousands of Serbian parallel civil judgments over the last seven years underpin many of the economic and social arrangements of Kosovo society. Even if the Serbian parallel system were to disappear entirely today, that legacy would remain, and it must somehow be absorbed into Kosovo's official legal system.

2. *In Criminal Cases*

Criminal prosecutions in the Serbian parallel courts operate according to a different dynamic than the civil cases. Rather than being instigated by litigants' choice of the Serbian parallel court venue like the civil cases, they are an exercise of police authority by the Serbian state. As such, they pose a direct challenge to UNMIK's control over Kosovo's always precarious stability and security. While UNMIK has generally ignored the Serbian parallel courts' civil judgments, it has taken steps to eliminate, so far as possible, the exercise of criminal jurisdiction by the Serbian parallel courts. In 2003, KFOR ordered the Serbian parallel courts in the enclaves to stop handling criminal cases.[62] Since then, it appears that the Serbian parallel courts within Kosovo have stopped hearing criminal cases, at least for the most part, and perhaps entirely.[63]

The Serbian parallel district courts in Serbia, however, have reportedly continued to hear criminal cases, asserting jurisdiction over defendants who have crossed into Serbia proper and are arrested there, as well as holding trials in absentia in a few instances.[64] Particularly in cases involving inter-ethnic crimes and war crimes, these trials have severe social ramifications, especially because the defendants in the Serbian parallel courts are virtually always

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61. Overall, the Serbian parallel courts in the enclaves now reportedly deal primarily with family matters and civil and commercial lawsuits against businesses that are based in Serbia and do some business in Kosovo or otherwise involve the Serb community. While there are Serbian parallel property cadastres, it is said that property sales are more typically registered with the UNMIK authorities now than with the Serbian parallel system. The Serbian parallel administrative offices also facilitate travel documents, license plates, and keep records of court decisions and property and personal transactions certified by the courts. Rosandhaug Interview, *supra* note 31; Vokshi Interview, *supra* note 29; Pantovic Interview, *supra* note 31.

62. Interview with Michael Scheutz, Chief, Rule of Law Section, Department of Human Rights and Rule of Law, Org. for Sec. & Co-operation in Eur., in Priština/Prishtinë (May 27, 2005) (speaking solely in his personal capacity and not as a representative of the OSCE). Notably, although the Serbian parallel court judges interviewed for the 2003 OSCE report contended that the number of criminal cases in the Serbian parallel system was diminishing, the majority of pending cases filed after 1999 were criminal: 527 out of 702. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 19-21.

63. While most individuals I interviewed asserted that the Serbian parallel courts within Kosovo had entirely stopped hearing criminal cases, there was one report that at least some criminal cases continue. Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29; Deja & Fejzullahu Interview, *supra* note 36.

64. While most interviewees agreed that the Serbian parallel courts located in Serbia continue to hear criminal cases, there was one report that they have also stopped hearing criminal cases. Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29; Deja & Fejzullahu Interview, *supra* note 36.

Serb.[65] Inter-ethnic cases are not likely to be great in number, in light of the division between Kosovo Albanian and Serb communities. However, when instances of inter-ethnic violence do occur, they can set off a volatile response, as evidenced by the rioting and attacks on the Serb community instigated by media-driven rumors of Serbian involvement in the drowning deaths of three Albanian children in March 2004.[66] In an atmosphere of heightened inter-ethnic tension, each such case has a disproportionate impact, undermining Serbs' confidence in UNMIK's ability to ensure their personal security and in its ability to provide justice for invasions of that security.[67]

The parallel criminal systems create risks for defendants as well, as criminal defendants tried in one system do not thereby find themselves protected against a second prosecution in the other.[68] As in the civil cases, even if the Serbian parallel courts were to stop hearing all criminal cases now, the legacy of past criminal judgments would somehow need to be addressed by the UNMIK system, which would need to determine whether to re-try defendants within its jurisdiction whose cases have already been heard in the Serbian parallel courts. However, in doing so, it would face the challenges discussed in the Subsection on civil cases above, as well as others particular to the criminal context. The Kosovo Ombudsperson reports that the effectiveness of the UNMIK courts in criminal cases is limited by systemic lack of cooperation from victims and witnesses as a result of law enforcement's failure to protect them, by inadequate jail space for those convicted and sentenced to prison time, as well as by problems of corruption within the judicial system.[69]

3. *Political Significance*

Of course, it is not only possible but ordinary for multiple judicial systems to co-exist in the same territory, as occurs, for example, in some federal systems. However, this requires agreement regarding jurisdiction and recognition of judgments, as well as some degree of comity, none of which is present here. To the contrary, not only has there been no consensus on these issues, but the two systems are explicitly founded on non-recognition and represent competing claims to sovereignty over Kosovo.

The political strategizing that surrounds the parallel courts is one indication of their political significance. As one example, in order to maintain its foothold in the province, the Serbian government has been paying substantially higher salaries to the judicial officers working in the Serbian parallel courts within Kosovo than to those working in the ordinary court

65. Few Albanians are comfortable crossing the border into Serbia proper, due to continuing security concerns, so that de facto most defendants who are subject to the jurisdiction of the courts in Serbia proper are Serbs. Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29.

66. OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 19-20; *Kosovo Reflects on Riots of One Year Ago* (Voice of America broadcast Mar. 16, 2005), *transcript available at* 2005 WLNR 4085156; Neil Barnett, *Albanians Posed as Serbs to Stoke Ethnic Fires in Kosovo*, SUNDAY TELEGRAPH (London), Mar. 28, 2004, at 26.

67. OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 10-11.

68. *See* discussion *infra* Part IV.

69. OMBUSDPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 22-23.

system in Serbia, thereby inducing them to remain at their posts.[70] For its part, while UNMIK has tended to ignore the Serbian parallel court system by and large, it has tried to persuade Serb judges and lawyers to transfer to the UNMIK system. To this end, it has held certain positions open for Serb candidates, for example, and established courts and offices within the Serb enclaves.[71]

It is also important to recognize that while the functioning of these two systems side by side has created problems for both Serbia and UNMIK, it has offered some benefits to both sides as well. For Belgrade, it has served as an expression of a continuing claim to administration in Kosovo that is symbolic and practical, but not so obtrusive a challenge to UNMIK authority as to spur a confrontation. It serves also as a continuing commitment to the Serbs in Kosovo that they will not be abandoned by the state. For although the Serbian parallel courts claim jurisdiction over all of Kosovo, in fact they function like courts everywhere and take only those cases that come to them, and those who bring the cases are generally, although not exclusively, Serb.[72]

For UNMIK, these courts and other aspects of the Serbian parallel administration have long filled a gap in UNMIK capabilities by serving the needs of a discrete, often hostile population that also poses the logistical problem of an additional working language.[73] For a long time, UNMIK had its hands full attempting to administer the province for the relatively cooperative Kosovo Albanian population, and only recently has it been in a position to consider fully extending its reach to the Serb population.[74] While UNMIK has been making efforts to integrate Serbs into its administration, to some extent the existence of this Serbian parallel administration has been a benefit to UNMIK by providing some continuity in government in a land that UNMIK took over largely from a state of chaos.

While for the most part UNMIK and Serbia are at a stalemate over the Serbian parallel courts, in a couple of exceptional instances they have resolved some narrow part of the conflict. In July 2002, Serbia and UNMIK reached an

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70. It is not certain whether Serbia continues to do so today. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 21; *see also* Pantovic Interview, *supra* note 31; Baruti Interview, *supra* note 31; Deja & Fejzullahu Interview, *supra* note 36; Vokshi Interview, *supra* note 29.

71. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 17; OSCE TENTH MINORITY ASSESSMENT, *supra* note 35, at 29-32. UNMIK has not issued any direction to its courts as to how to handle judgments or communications coming from the Serbian parallel systems. It did establish a working group to address the problem in 2003; however, there has been no officially reported action since then. In 2003, the OSCE proposed a three-pronged approach to diminishing the role of the Serbian parallel system, including reducing demand through a public awareness campaign, reducing supply by assessing the Serbian parallel court caseload for future transfer and by improving working conditions for Serb judges within the UNMIK system, and enforcing policy by recognizing Serbian parallel court judgments up to the date when UNMIK opened courts in several Serb enclaves in 2003. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 5-9.

72. Pantovic Interview, *supra* note 31; Vokshi Interview, *supra* note 29; 2005 PUBLIC OPINION SURVEY, *supra* note 46, at 8, 21 (indicating that 41% of Serbs surveyed "do not recognize the [UNMIK] courts in Kosovo," and 80% of Serbs surveyed "follow Serbian law").

73. While UNMIK and Provisional Institution of Self-Government documents are to be issued in both Albanian and Serbian as well as English, this is still aspirational in many instances, and there are often significant delays in translation. *See* OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 8-9; *see also* Thomas & Marzatico Interview, *supra* note 35.

74. In a 2005 public opinion survey, public opinion survey, only 18% of Serbs reported having confidence in UNMIK. 2005 PUBLIC OPINION SURVEY, *supra* note 46, at 14.

agreement to permit Serbian parallel court judges to transfer to the UNMIK courts if they so desire. Under this agreement, Serbia continues to pay the judges' higher Serbian benefits and pensions so that the judges do not incur the severe financial penalty of losing their pensions by switching teams. This was an entirely pragmatic compromise with the purpose of resolving one obstacle to the integration of Serb judges into the UNMIK system: that no one was going to be willing to give up their own personal financial security to facilitate UNMIK's political goals.[75] In another rare instance of cooperation, one U.N. agency, the Housing and Property Directorate ("HPD"), reached an agreement with the Serbian government permitting HPD access to all of Serbia's records, including those from the parallel system, access that is not available to UNMIK otherwise. A contributing factor in this agreement is that rather than addressing the highly politicized questions of ethnic discrimination in pre- and post-1999 land transfers, HPD has a narrow, technical mandate: confirming the accuracy of claims of title as of 1999 against Serbian records and outside sources.[76]

These instances of cooperation are highly unusual, representing a complete departure from the usual policy of non-recognition and non-interaction. But while the success of each endeavor seems to be tied to the particular circumstances and is the result of political negotiations and strategies that are inaccessible to the external observer, there is at least one observable commonality. In each case, an issue was isolated from broader political concerns and treated as a discrete pragmatic question to be resolved independently. This provides some basis for optimism concerning an approach to the question of recognition of Serbian parallel court judgments that treats it as a narrow legal issue to be resolved independently of the associated political questions, according to legal rather than political principles.

III. CIVIL JUDGMENTS

Viewed from the perspective of a post-conflict administration, recognizing and enforcing the Serbian parallel court systems' civil judgments might help to promote transitional goals of instituting rule of law or at least establishing social stability.[77] First and foremost, doing so would be to the immediate benefit of the people of Kosovo who have been relying on these courts for their personal matters, large and small. It would institute legal certainty for the thousands of decisions made in the Serbian parallel system and forestall any opportunity for unscrupulous parties to take advantage of the potential for inconsistent rulings to defraud others trapped between the two

75. Other conditions of the agreement included HPD's promise to "use its best endeavours" to resolve the recruited judges' and prosecutors' property claims, UNMIK's assurance of "individualized security assessments" for the recruits, and Serbia's assurance that they could return to positions in Serbia in the future. OSCE TENTH MINORITY ASSESSMENT, *supra* note 35, at 22. What Serbia got out of the bargain, apart from relief from the burden of paying recruited judges' salaries, is unclear. An OSCE report indicates that eleven Serbian judges had moved to the UNMIK system as of late 2003, while my contacts indicated there were fewer than eleven in the UNMIK system as of May 2005. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 21; Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31.

76. Rosandhaug Interview, *supra* note 31.

77. *See generally* Teitel, *supra* note 13.

systems.[78] On the larger social and political scale, such recognition could help to restore confidence in future judgments and in the legal system as a whole, as well as relieving one element of pressure on the ongoing negotiations over Kosovo's political status. If accusations of systemic unfairness or discrimination should arise, the consequences of such a result for confidence in the transition toward rule of law would force revisitation of these conclusions. At this point, however, without indicators of such problems, the reports of injustice focus on the gaps in enforcement created by non-recognition between the systems.

In this context, there is an important difference between the parallel courts' civil and family law judgments, which are addressed in this Section, and the judgments that concern property and criminal law, addressed in following Sections. The substance of parallel court judgments on civil and family law relate for the most part to private business and personal disputes and not, as do the property and criminal judgments, to the catalysts of the Serbian-Albanian conflict or the goals of transitional justice.[79] The transitional justice concerns raised by recognition of the Serbian parallel courts' civil judgments thus relate primarily to the role of the parallel courts as institutions and the social and political effects of non-recognition, rather than to the substance of the judgments at issue.

Viewed from the perspective of ordinary law, Kosovo's parallel courts present a particularly acute and politicized version of an everyday legal problem not particular to the transitional justice process: whether and how to recognize legal decisions reached outside the auspices of the state-run judicial system. Indeed, courts face this issue all the time, when a plaintiff files an action seeking to enforce an arbitration award, a foreign judgment, or an out-of-court settlement agreement, or when a defendant raises such a judgment or agreement as res judicata barring a second claim on the same facts.

In the civil context, there are several legal models for recognizing these judgments in ways that will safeguard the rights and interests of the involved parties, as well as the core concepts of justice from which the judicial process derives its legitimacy. Of these, arbitration awards and settlements attain their legitimacy from the consent of the parties to resolve their dispute through arbitration or agreement, rather than from the inherent jurisdiction vested in a judicial institution. In addition, the fact that such out-of-court resolutions are recognized demonstrates that states can and do recognize certain private

78. Of course, the risk that litigants will try to game gaps in recognition between systems to their advantage is inherent in any systems lacking complete mutual recognition. In Kosovo, there were allegations that miscreants had carried out fraudulent land transfers by playing on the lack of common property records and mutual non-recognition of property transfers to claim and transfer title to land they did not actually own. While it would certainly have been possible to carry out fraudulent transfers under such circumstances, no one with whom I spoke was in possession of specific evidence to substantiate or disprove these allegations. *See* interview with Dara Katz, Senior Human Rights Advisor (Property), Human Rights and Rule of Law, Org. for Sec. & Co-operation in Eur., in Priština/Prishtinë (May 26, 2005) [hereinafter Katz Interview]; Baruti Interview, *supra* note 31. The OSCE has also identified this as a risk of a formal policy of non-recognition. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 22 ("[S]ome might take advantage of the uncertainty and stop paying alimony, or stop paying off loans, or attempt to seize transferred property").

79. *See generally* DANIEL LEWIS, UNHABITAT, CHALLENGES TO SUSTAINABLE PEACE: LAND DISPUTES FOLLOWING CONFLICT (2004).

judgments without ceding general jurisdiction, much less territorial sovereignty, in doing so. These models also offer a principle—consent—against which to assess the fairness of recognizing such judgments that could be applied to the Serbian parallel court decisions.

The models for recognizing foreign judgments, arbitration awards, and out-of-court settlements also offer useful technical solutions that could be adapted to Kosovo's situation. In reviewing these decisions, courts confront the same kinds of concerns that arise now in Kosovo: conflicting judgments, questions about jurisdiction, concerns regarding the impartiality and fairness of non-state tribunals, and so on. The factors that other states have identified as being determinative for deciding recognition in any given case provide guidance as to the kinds of cases that can profitably be recognized and the appropriate considerations and trade-offs in doing so. The processes and standards that they have adopted are relevant for the Serbian parallel judgments in Kosovo as well.

Finally, because these mechanisms have received widespread acceptance amongst European states and in the European Union, they also represent models that have already been legitimized and accepted by the international community in which both Serbia and Kosovo are eager to participate.[80] Using models that are accepted as the norm within Europe therefore provides an external incentive for all the concerned parties—Serbia, Kosovo, and the international community itself—to accept the proposed resolution.

While the technical details contained within these models help to illustrate how Kosovo could go about recognizing the parallel court judgments if it chose to do so, in the end, it is not these details that are crucial but rather the fact that there are such models that can facilitate recognition of the parallel court judgments while mitigating the risks of doing so. In short, the following models confirm that the Serbian parallel civil judgments are susceptible of legal recognition and enforcement, in spite of the obstacles to doing so:[81]

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80. Press Conference, Serbian Government, Citizens Favour Serbia's Membership in EU (Nov. 6, 2006), http://www.srbija.sr.gov.yu/vesti/vest.php?id=28598; The Officer of the Prime Minister of Kosovo, EU-Kosova Relations, http://www.ks-gov.net/pm/?menuid=9&subid=4&lingo=2.

81. In selecting the models to review here, I have looked to European, U.S., and international law. The rules accepted in the European Union and in European civil law states represent Kosovo's immediate legal community and comprise systems that are relatively consonant with its own. Within Europe, French law provides an approach that is grounded in a shared civil law structure, but at the same time offers some counterpoint to the heavily German-influenced Yugoslavian law that Kosovo has largely retained for now. Because the U.S. rules on foreign judgments apply to all foreign states rather than solely those to which it has a close relation, its concerns and solutions provide a useful contrast to European approaches. Finally, where there is international consensus in the form of a multilateral convention, I have taken account of this as well.

Ordinarily, it would be appropriate to look first to the law of the concerned state. However, unwilling to make use of the Serbian laws that were in place at the time of the conflict in 1999, Kosovo has reverted temporarily to the pre-1989 law of the Socialist Federal Republic of Yugoslavia (SFRY) for its law on recognition of civil judgments, among others. As such, the law currently in force in Kosovo does not represent the modern approach to these issues, which has developed considerably more detailed rules and streamlined proceedings over the last 20 years. Nor does it represent current or future preferences on these issues: the adoption of the pre-1989 law was merely an interim measure by the Special Representative of the Secretary General (SRSG) to place some law on the books, and the provisional legislature is in the process of drafting new laws and codes across all areas of the legal system. Finally, because Kosovo is not a state, it is not a party to the relevant international treaties on these subjects. Accordingly, while I do review the relevant provisions from the SFRY law currently applicable in Kosovo, I do not discuss those provisions at any length.

- *Arbitration*: Recognition of international arbitration awards is primarily governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[82] which has been ratified, acceded, and succeeded to by over 130 states, including most if not all European states and all the states that were once part of the former Yugoslavia.[83] The rules for recognition of domestic arbitration awards comprise part of the civil code and civil procedure code of most civil law countries, and the U.S. federal system is governed by the Federal Arbitration Act. There is considerable convergence amongst these rules as well. For domestic arbitration, I consider French and U.S. law.[84]

- *Out-of-Court Settlements*: Recognition of out-of-court settlements is governed by domestic civil codes, by civil procedure codes, or by common law, and is based upon principles of contract law. Again, I review the law of France and the United States.[85]

- *Foreign Judgments*: Recognition of the judgments of other member states in the European Union is governed by European Council Regulations.[86] For contrast, I also review the Uniform Foreign Money-Judgments Recognition Act and the Revised Uniform Enforcement of Foreign Judgments Act, which have been adopted by a majority of U.S. states.[87] I also review the provisions of the former Socialist Federal Republic of Yugoslavia law currently applied in Kosovo that address recognition and enforcement of foreign judgments.[88]

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82. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 3, *adopted* June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 2 [hereinafter New York Convention].

83. *See* UNCITRAL Status of Convention on the Recognition of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConventionstatus.html (last visited Nov. 8, 2006) (listing countries that have signed, ratified, acceded, or succeeded to New York Convention).

84. On the French side, this encompasses the French Code of Civil Procedure and the French Civil Code; on the American side, the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-08, 301-07 (2000).

85. *See* CODE CIVIL [C. CIV.] (Fr.); 15A AM. JUR. 2D *Compromise and Settlement* § 1 (2000).

86. Council Regulation 805/2004, Creating a European Enforcement Order for Uncontested Claims, 2004 O.J. (L 143) 15 (EC) [hereinafter Uncontested Claims Regulation]; Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1 (EC) [hereinafter Civil/Commercial Judgments Regulation]; Council Regulation 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338) 1 (EC) [hereinafter Matrimonial/Parental Judgments Regulation].

87. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1994) [hereinafter RECOGNITION ACT]; REV. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 149 (1994) [hereinafter ENFORCEMENT ACT]; VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 20:3, at 20-8 (2d ed. 2006).

88. Provisions under the SFRY law currently applicable in Kosovo concerning recognition and execution of arbitration awards and out of court settlements are too limited to provide the information necessary for this comparative analysis. Therefore, I focus here on the provisions concerning foreign judgments, which are more extensive. Law on Executive Procedure, Official Gazette of the Socialist Fed. Republic of Yugo. no. LU/1369/SE/ED (1982) (translation provided by author); Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077 (translation provided by author).

This Section begins with case studies of two recent civil cases that illustrate the issues at stake. It then proceeds topic by topic through the relevant aspects of arbitration, out-of-court settlement, and foreign judgment models, beginning with the question of sovereignty, then reviewing the respective default rules, and finally considering the grounds for non-enforcement of these judgments. By adapting certain aspects from several of the models, UNMIK or the Kosovo government could develop a workable mechanism for recognizing most Serbian parallel judgments in a way it deems appropriate.

A. *Two Civil Cases*

UNMIK has no official policy on recognition of Serbian courts' civil judgments, but its de facto position is that there has been and is to be no recognition.[89] However, in individual cases, compelled by the equities of the situation, UNMIK courts and other administrative bodies find themselves pressed to determine how to address Serbian parallel court decisions.[90]

In one currently pending case, for example, a Serb employee filed a claim in the Serbian courts within Kosovo for wrongful discharge against his former employer. After pursuing the claim in that system for four years, he received an adverse appellate decision that sent his case back for retrial in the trial court. Without withdrawing his first claim in the Serbian court, he then filed suit in the UNMIK court on the same grounds in 2005. When the defendant protested, producing the Serbian court judgments, the plaintiff asserted that he was not aware that he could file in the UNMIK courts until recently.[91]

In spite of the UNMIK policy, the judge hesitated to proceed with the case in the face of the prior Serbian parallel judgments. Principles of fairness to the defendant, which had already defended its interests for four years in the Serbian courts, seemed to demand that the judgments of the Serbian courts be recognized, particularly since the plaintiff voluntarily pursued his claim there in the first place and did not seem to claim that the Serbian parallel courts made errors of procedure or law in their judgments. Not only this, if the judge were to allow the case to continue, she would risk exacerbating the already complex situation in the end, when both courts would produce their separate

89. *See* OMBUDSPERSON SIXTH ANNUAL REPORT, *supra* note 39, at 13, 21.

90. The few official reports available on the parallel system describe civil cases raising similar issues to those discussed here. *E.g.*, OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 23 (explaining that a litigant was unable to enforce Serbian parallel court decision on compensation for expropriation in UNMIK court). The OSCE also reported that two individual Serbian parallel court presidents informed it that they had caseloads of hundreds of civil cases and inheritance proceedings between 1999-2003. *Id.* at 19-20. However, neither official judgments and other individual case records nor statistical or other general data are available for the Serbian parallel courts civil cases, so that it is impossible to offer any specific information on the number or nature of the civil cases in the system. This is not happenstance, of course, but one more product of the same dynamic that has created the legal and pragmatic problems discussed in this article: the mutual non-recognition between the systems.

91. Baruti Interview, *supra* note 31; Second Interview with Anonymous #11, in Priština/Prishtinë (May 26, 2005) (interviewee requested anonymity as a condition of providing this information).

judgments, one of which could be enforced in Serbia and the other in Kosovo, without regard for whether they might constitute a double penalty for the defendant.[92]

The UNMIK courts' inconsistent and unpredictable approach to recognition and enforcement of Serbian court judgments has exacerbated uncertainty, confusion, and opportunities for arbitrage. This is also illustrated by another Serbian parallel court case. Here, a Serbian parallel court in Kosovo issued a divorce and ordered the husband to pay alimony. When he failed to do so, the Serbian parallel court had no means to enforce the alimony judgment against him, so his ex-wife went to an UNMIK court to enforce it. That court refused to enforce the judgment on the grounds that Serbian parallel court decisions were invalid. However, at around the same time, the UNMIK offices in Leposavić/Leposaviq recognized the judgment as requested by the ex-husband for purposes of declaring him an unmarried person. When the plaintiff, thwarted in her effort to enforce the original divorce decree, then filed a new complaint for divorce on the same grounds and with the same conditions in the UNMIK court in Mitrovicë/Mitrovica, her ex-/husband successfully defended on the grounds that the divorce had already been recognized by UNMIK, and that to divorce him again would be in conflict with that determination.[93]

These cases illustrate that in the context of the Serbian parallel civil judgments, certainty and predictability are the dominant concerns. The parties in these cases do not contest the fairness of the Serbian parallel proceeding; rather it is the existence of the opportunity for multiple proceedings that creates confusion and harm. Indeed, the balance of interests is so much in favor of certainty in this context that arguably it would be better for UNMIK to adopt a rule—any rule—regarding Serbian parallel court judgments than none at all, so that at least its own approach would be internally consistent and it would be more difficult for parties to abuse legal processes. Fortunately, UNMIK has ample models to draw from in constructing a rule for addressing the civil judgments of the Serbian parallel courts.

B. *Bypassing Sovereignty as the Basis for Jurisdiction.*

A central obstacle to recognition of Serbian parallel civil judgments is not the characteristics of the judgments themselves, but UNMIK's determination to avoid taking any steps that would seem to affirm Serbian parallel court jurisdiction over the territory of Kosovo, either in the past or in the future. While state authority is an essential prerequisite for recognition of foreign judgments, it is not relevant to recognition of arbitration awards and out-of-court settlements. In such cases, the legal foundation for recognition of the judgment or settlement is the initial agreement of the parties to decide the matter by arbitration or contract, rather than any inherent, broader jurisdiction

92. Baruti Interview, *supra* note 31; Second Interview with Anonymous #11, in Priština/Prishtinë (May 26, 2005) (interviewee requested anonymity as a condition of providing this information).

93. First Interview with Anonymous #11, in Priština/Prishtinë (May 23, 2005) (interviewee requested anonymity as a condition of providing this information).

based in the authority of the state. By treating Serbian parallel court judgments either as arbitration awards or as out-of-court settlements, Kosovo could leapfrog the crucial question of sovereignty and facilitate the recognition of Serbian parallel judgments without conceding the Serbian parallel courts' legitimacy as such. Indeed, treating Serbian parallel court judgments as arbitration agreements or out-of-court settlements would signal exactly the contrary conclusion: that the courts do not have any independent jurisdiction, but rather, are dependent upon the acquiescence of the parties for any jurisdiction over civil matters.

Here, comparing the international and domestic rules on recognition of arbitration awards, out-of-court settlements, and foreign judgments reveals the contrast between the approaches:

Table 1: Recognized Bases for Original Tribunal's Jurisdiction

	N.Y. Convention on International Arbitration	French and U.S. Law on Domestic Arbitration	French and U.S. Law on Out of Court Settlements	E.C. Regs. on Member State Judgments	U.S. Uniform Acts on Foreign Judgments	Former SFRY Law on Foreign Judgments
Basis for original tribunal's or parties' jurisdiction	Parties' consent, as expressed in arbitration agreement[94]	Parties' consent, as expressed in arbitration agreement[95]	Parties' consent, capacity to consent, & authority over the relevant rights/objects[96]	Sovereignty: original court has jurisdiction under the relevant E.C. regulation[97]	Recognition Act: sovereignty: Foreign court has juris. Enforcement Act: Dependent on recognition[98]	Sovereignty: Official court decision or equivalent under law of foreign state[99]
Type of case that can be subject to such a judgment	Typically commercial disputes, but also some other non-criminal disputes[100]	Typically commercial disputes, but also many other non-criminal disputes[101]	Many non-criminal disputes[102]	Many non-criminal disputes[103]	Recognition Act: Solely money judgments Enforcement Act: Any judgment[104]	Many non-criminal disputes[105]

94. New York Convention, *supra* note 82, art. II(1).

95. N.C.P.C., arts. 1442-50 (Fr.); C. CIV., arts. 2059-61 (Fr.); *see generally* Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-08, 301-07 (2000).

96. C. CIV. art. 2045 (Fr.), 15A AM.JUR.2D *Compromise and Settlement* §§ 2, 9-10, 39 (2000).

97. Civil/Commercial Judgments Regulation, *supra* note 86, arts. 2-26; Matrimonial/Parental Judgments Regulation, *supra* note 86, arts. 2-3, 6-14. Because the regulation on uncontested money judgments deals primarily with default judgments, it sets minimum standards of notice and service to the defendant, rather than rules of jurisdiction. Uncontested Claims Regulation, *supra* note 86, arts. 12-18.

98. RECOGNITION ACT, *supra* note 87, § 4(a)(2)-(3); ENFORCEMENT ACT, *supra* note 87, § 2.

99. Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077, arts. 86-87; Law on Executive Procedure, Official Gazette of the Socialist Fed. Republic of Yugo. no. LU/1369/SE/ED, art. 12 (1982).

100. Non-commercial jurisdiction is determined by national laws. New York Convention, *supra* note 82, art. II.

101. *E.g.*, C. CIV. arts. 2059-60 (Fr.); N.C.P.C., arts. 1442 & 1448 (Fr.); Federal Arbitration Act, 9 U.S.C. § 2 (2000).

102. C. CIV. arts. 2044 & 2046 (Fr.); N.C.P.C., art. 127 (Fr.); 15A AM.JUR.2D *Compromise and Settlement* §§ 5, 38 & 40 (2000).

103. Civil/Commercial Judgments Regulation, *supra* note 86, art. 1; Matrimonial/Parental Judgments Regulation, *supra* note 86; Uncontested Claims Regulation, *supra* note 87, art. 2.

104. RECOGNITION ACT, *supra* note 87, § 1 (excluding taxes, fines, & family support); ENFORCEMENT ACT, *supra* note 87, § 1.

The Convention on Choice of Court Agreements underlines the notion that the parties' consent provides not just a possible but a desirable basis for recognizing and enforcing judgments. The Convention is the most recently concluded international consensus on the subject and has not yet entered into force.[106] When it does so, the Convention will extend the principle of consent to determining the jurisdiction of ordinary state courts, permitting parties to certain international disputes to select their preferred forum from among the courts of the states parties to the Convention by entering into exclusive choice of court agreements.[107] It will require courts to respect the choice of the parties insofar as possible under relevant law and provides for mandatory recognition and enforcement of judgments on that basis, albeit with some exceptions and limits.[108]

Furthermore, a recognition mechanism that extended the arbitration and out-of-court settlement recognition models from their usual contexts to the Serbian parallel courts' civil judgments would not be cut from whole cloth. Other states have used arbitration award and contract models to recognize the judgments of non-state institutions, such as the decisions of religious judges and tribunals.[109] In deploying these models, courts have grounded the legitimacy of religious institutions' legal decisions in the same basis as the legitimacy of arbitration awards and contracts: the consent of the parties. Indeed, a paramount consideration is assessing the genuine agreement of the parties to participate in and be governed by the relevant religious law. In doing so, courts have used the standard tools of contract law that are used to assess consent in the arbitration and settlement contexts.[110]

Nor does recognizing decisions from alternative institutions on the basis of the parties' agreement mean accepting any decision reached on that basis, even if fraudulent, made under duress, or otherwise fundamentally unjust. Instead, as will be discussed below, the rules for recognition of arbitration agreements and out-of-court settlements offer ample grounds for refusing to recognize a decision tainted by misconduct or malfeasance. The use of such rules in the context of these other, non-state tribunals and decisions is well-established and indeed, crucial to recognition and enforcement: Courts have refused to enforce religious decisions in cases where they found duress or other forms of pressure, a failure to meet minimal requirements of due

105. Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077, arts. 86, 93-94.

106. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Choice of Court Convention] (not yet in force).

107. *Id.* arts. 1-4.

108. *Id.* arts. 5-9.

109. U.S. and Canadian courts have used arbitration agreements and contract law to enforce rabbinic decisions on marriage and family issues and to recognize religious marriages that do not meet the formal requirements of the civil system. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 578-86 (2004) (U.S.); Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 73-77 (2005) (Can.). States have also used the recognition of foreign judgments model to recognize judgments of tribal courts and other entities with at least limited sovereignty. *E.g.*, Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1410-11 (1985).

110. Estin, *supra* note 109, at 585.

process, or where important elements of public policy are absent, such as consideration of the interests of the children in a divorce proceeding.[111]

Following these models, Kosovo could ground its recognition of Serbian parallel court civil judgments on the basis of the voluntary agreement of the parties to participate in the Serbian parallel proceedings, rather than in the asserted territorial jurisdiction of the Serbian parallel courts. In Kosovo's case, ascertaining such agreement would likely be approached most effectively in a categorical, formalistic way, presuming the acquiescence of the parties in all cases in which both parties actively participated, on the basis of the plaintiff's decision to file and the defendant's decision to appear in the Serbian parallel court. This approach would have the advantage of creating widespread legal certainty regarding Serbian parallel judgments instantaneously and of being easily applied to a large number of cases at once.

Of course, this consent would be in at least some cases a legal fiction. In the context of arbitration and out-of-court settlements, both parties have in fact agreed to the out-of-court resolution of their dispute with the option of an in court resolution before them. For cases heard in the early years of the UNMIK administration, the parties will often have had no alternative but the Serbian parallel courts, and so their consent can readily be presumed. In later years, however, at least some defendants will likely have had a preference for the UNMIK courts that they had no opportunity to express. Even under a categorical, formulaic approach that presumes willing participation, it would be possible to offer the opportunity for parties to request individual reconsideration of their cases, for example, if a defendant could present evidence of nonconsent such as nonparticipation or active protest of parallel court jurisdiction. However, based on the reports of those I interviewed and the formal reports and assessments of the situation in Kosovo, a formulaic approach seems likely to capture the reality that in most instances, the parties were in fact willing to make use of the Serbian parallel system to resolve their disputes.

This determination could, however, also be made in a case-by-case review of the indications of the parties' consent. This would have the advantage of permitting reconsideration of cases in which parties felt pressured to use the Serbian parallel courts or did not realize that they had an alternative. However, such case-by-case assessment would be highly burdensome, especially for an already backlogged judiciary. Furthermore, the courts are not likely to have access to independent evidence of the parties' intent beyond the testimony of the parties themselves, as it is unlikely that any record remains of the parties' positions at the time. This would make it difficult to find a basis for resolving conflicting claims. Accordingly, this approach might well introduce more uncertainty than it resolves, as well as offering opportunities for disgruntled litigants to use the review process to reopen their claims.

Applying a consent-based approach to the employment and divorce cases discussed above would provide a basis for recognizing the Serbian parallel court judgment in both cases. To the extent that it is possible to

111. *Id.* at 584-85.

ascertain consent after the fact, the parties seem to have voluntarily participated in the Serbian parallel proceedings, and it was not until an opportunity for forum-shopping arose that parties sought to remove themselves from those proceedings. Under either a categorical rule looking to whether the parties in fact took part in the case or a more detailed analysis of the agreement of these individual parties, Kosovo could base its recognition of the Serbian parallel judgments in these cases on the parties' agreement and bypass the question of Serbian parallel court territorial jurisdiction over their claims.

C. *Framework for Recognition: A Default Rule and Exceptions*

There is considerable consensus, especially among European states, on the standards and procedures for recognizing foreign judgments, arbitral awards, and out-of-court settlements. While states deploy a range of standards and procedures for recognizing foreign judgments, arbitral awards, and out-of-court settlements (as discussed in Section III.D below), most use the same basic framework: a default rule either for or against recognition, with certain exceptions. Where there is no law or agreement in place on recognition of foreign judgments, the default rule is against recognition, as it is concerning the Serbian parallel court judgments in Kosovo. As is occurring now in Kosovo, the legal uncertainty this creates and the associated social, economic, and judicial burdens have provided an incentive for states to develop a streamlined and determinative approach to recognition of these judgments and other agreements. [112] In passing laws regarding recognition of non-state judgments and agreements, therefore, states typically set a new default rule at the opposite extreme, mandating full recognition for legitimate judgments and agreements, and then limiting that recognition with enumerated grounds for non-enforcement:[113]

112. For example, both the European Council Regulations and the U.S. Uniform Foreign Money-Judgments Recognition Act refer to the interest in securing efficient common markets and interchanges. *See e.g.*, Civil/Commercial Judgments Regulation, *supra* note 86; RECOGNITION ACT, *supra* note 87, Prefatory Note, at 1.

113. The Convention on Choice of Court Agreements discussed above in Section III.A also takes the same approach. Choice of Court Convention, *supra* note 106, arts. 8-9.

Table 2: Default Recognition Rules

	N.Y. Convention on International Arbitration	French and U.S. Law on Domestic Arbitration	French and U.S. Law on Out of Court Settlements	E.C. Regs. on Member State Judgments	U.S. Uniform Acts on Foreign Judgments	Former SFRY Law on Foreign Judgments
Default Rule	Mandatory recognition of international arbitration judgments[114]	Awards are immediately final & enforceable by court order (Fr.)[115] Courts must recognize & enforce awards (U.S.)[116]	Settlements are as binding as other contracts & judgments & enforceable as private contracts (both)[117]	"Virtually automatic" mandatory recognition of judgments of E.C. member states[118]	Recog. Act: Foreign money judgments are "conclusive between the parties"[119] Enforce. Act: Judgments are enforceable by same standards & procedures as U.S. state court judgments[120]	SFRY court will recognize presented foreign court decisions from reciprocating states; such judicial recognition is necessary for enforcement[121]
Basis for non-recognition (discussed below)	Narrow enumerated grounds	Broader enumerated grounds	Grounds defined primarily by contract law	Narrow enumerated grounds	Broader enumerated grounds	Broader enumerated grounds

Establishing such a default rule, while efficient, would, of course, reverse the current presumption concerning the Serbian parallel courts in Kosovo. It also may appear at first glance to provide no opportunity to address UNMIK's concerns regarding conflicting judgments, partiality, and so on.

But while the default rules appear absolute and uniform, they do not determine the level of recognition that each model actually offers. Rather, as discussed below, the level of scrutiny applied to the judgment or agreement in determining recognition varies considerably between the models according to the process and grounds for contesting recognition. Indeed, precisely because the default rules are so strongly in favor of recognition, it is the exceptions that determine the true scope of the rule and define the relevant issues for whether a judgment should be recognized.

The benefit of establishing a pro-recognition default rule, of course, is creating immediate certainty in the judgments issued in the majority of cases and also increasing efficiency for litigants and courts alike in enforcing those judgments. Accordingly, this approach is most beneficial when there are many

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114. New York Convention, *supra* note 82, art. 3.

115. C. CIV. arts. 1476-78 (Fr.).

116. Federal Arbitration Act, 9 U.S.C. § 9 (2000).

117. C. CIV. arts. 2044, 2052 (Fr.); 15A AM. JUR. 2D *Compromise and Settlement* §§ 32, 37, 39 (2000).

118. Civil/Commercial Judgments Regulation, *supra* note 86, pmbl. ¶ 17. The E.U. requires mandatory, automatic recognition of the judgments of the courts of member states upon the mere presentation by the enforcing party of the relevant paperwork. Uncontested Claims Regulation, *supra* note 86, arts. 5-6, 20; Civil/Commercial Judgments Regulation, *supra* note 86, art. 41; Matrimonial/Parental Judgments Regulation, *supra* note 86, art. 21.

119. RECOGNITION ACT, *supra* note 87, § 3.

120. ENFORCEMENT ACT, *supra* note 87, § 2.

121. Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077, arts. 86-87, 92, 96.

cases that can properly be enforced under such a default rule, and only a few cases that will present grounds for non-enforcement. To some extent, therefore, the choice of default rule should depend on an assessment of the standard that is likely to accurately capture the majority of cases.

D. *Grounds and Procedures for Non-Recognition*

UNMIK's primary concern regarding recognizing Serbian parallel civil judgments is, of course, the sovereignty claims discussed above. But there are other concerns as well, among them the risk of recognizing conflicting judgments; fears that Serbian parallel proceedings have suffered from partiality, political decision-making or other lack of independence; and the potential effects on the rights of third parties affected by the judgment but unwilling or unable to participate in the Serbian parallel proceedings.

The models for recognition of foreign judgments, arbitral awards, and out-of-court settlements consider and address these concerns by providing a set of enumerated grounds on which courts can decline to recognize otherwise enforceable judgments.[122] While there is a broad range of enumerated exceptions amongst the different models, the exceptions that are common to at least two of the models (as described below) encompass the concerns that UNMIK has raised in considering the problem of the Serbian parallel courts:

a) conflict with another judgment;
b) lack of jurisdiction;
c) lack of opportunity for the defendant to participate;
d) public policy;
e) fraud; and
f) due process.[123]

Another consideration that is raised solely in the context of domestic arbitration agreements, but which deserves attention in light of the divided society in which the Serbian parallel courts operate, is the effect on the rights of third parties who did not have the opportunity to participate.

122. In the laws and agreements governing recognition of arbitration awards and of foreign judgments, there are a limited, enumerated set of exceptions that provide a basis for a party to contest recognition and enforcement. In the context of out of court settlements, the grounds for non-enforcement are based primarily in contract law. The validity of this set of exceptions has been recently confirmed in the Convention on Choice of Courts Agreements, the most recently negotiated multilateral consensus on enforcement of foreign judgments of courts chosen by the parties. With the exception of due process, the Convention's enumerated grounds for non-enforcement are identical to this set of common grounds. Choice of Court Convention, *supra* note 106, art. 9.

123. *See infra* Table 3.

Table 3: Grounds for Non-Enforcement

Grounds for non-enforcement:	New York Convention on International Arbitration[124]	French & U.S. Law on Domestic Arbitration[125]	French & U.S. Law on Out of Court Settlements[126]	E.C. Regulations on Member State Judgments[127]	U.S. Uniform Foreign Money Judgments Recognition Act[128]	Former SFRY Law on Foreign Judgments
Conflicting judgments	–	–	Conflicting judgment unknown to a party (Fr.)	Conflicting judgments: judgment is "irreconcilable" with certain other judgments concerning the same parties[129]	Conflicting judgments/prior agreement to settle	SFRY court has issued a conflicting judgment or has recognized a foreign court's conflicting judgment[130]
Jurisdiction	Outside scope of arbitration agreement	Invalid/non-existent; Outside scope of AA (Fr., U.S. modifies); Arbitrator exceeded powers (U.S.)	Failure to establish essential elements of agreement (U.S.); Parties lacked capacity or authority (U.S.); Made in execution of a void right (Fr.)	Conflict with special jurisdictional provisions only; otherwise, the recognizing/enforcing court does not have authority to reconsider jurisdiction and this issue must be litigated in the original court[131]	Lack of personal or subject-matter jurisdiction	SFRY court has exclusive jurisdiction[132]

124. New York Convention, *supra* note 82, art. V (all listed grounds).

125. C. CIV. arts. 1480, 1483 (Fr.) (all listed French grounds); Arbitration Act, *supra* note 84, §§ 10-11 (all listed U.S. grounds).

126. C. CIV. arts. 2053-56 (Fr.) (all listed French grounds); 15A AM. JUR. 2D *Compromise and Settlement* §§ 34, 39, 41 (2000) (all listed U.S. grounds).

127. Because the process for recognizing and enforcing uncontested claims is even more streamlined than the process for enforcing other judgments, the only ground for non-enforcement is a conflicting judgment. Accordingly, except for conflicting judgments, this chart reflects the grounds applicable in civil/commercial and matrimonial/parental cases. Uncontested Claims Regulation, *supra* note 86, art. 21; Civil/Commercial Judgments Regulation, *supra* note 86, arts. 33-37; Matrimonial/Parental Judgments Regulation, *supra* note 86, arts. 22-26.

128. The Revised Uniform Enforcement of Foreign Judgments Act does not provide specific grounds for non-enforcement, but rather, indicates that the judgment "is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a [court] of this state." ENFORCEMENT ACT, *supra* note 87, § 2. Because these grounds for non-enforcement vary state by state, this chart includes only the particular grounds set out by the Uniform Foreign Money Judgments Recognition Act. RECOGNITION ACT, *supra* note 87, § 4.

129. Civil/Commercial Judgments Regulation, *supra* note 86, arts. 33-37; Matrimonial/Parental Judgments Regulation, *supra* note 86, arts. 22(c)-(d), 23(e)-(f).

130. Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077, art. 90.

131. These special jurisdictional provisions deal specifically with insurance cases, consumer cases, cases designated for exclusive jurisdiction, and prior agreements by Member States concerning jurisdiction. Otherwise, the court is not permitted to review the original court's jurisdiction. Civil/Commercial Judgments Regulation, *supra* note 86, art. 35. However, the extensive rules on jurisdiction established earlier in the Regulation stand; it is simply that they cannot be reconsidered post-judgment. Rather, "[t]he reasoning underlying the general prohibition of a review of the original court's jurisdiction is that the court of origin is as well able to judge the applicability of the Brussels-Lugano regime as the court of the state addressed, and better able than the latter to apply its own law." 1 EUROPEAN CIVIL PRACTICE § 26.096, at 940-41 (Alexander Layton et al. eds., 2d ed. 2004). That is, enforcing the jurisdictional rules is primarily the responsibility of the original court, not the recognizing/enforcing court, underlining the importance of mutual confidence between the courts of member states.

Grounds for non-enforcement:	New York Convention on International Arbitration[124]	French & U.S. Law on Domestic Arbitration[125]	French & U.S. Law on Out of Court Settlements[126]	E.C. Regulations on Member State Judgments[127]	U.S. Uniform Foreign Money Judgments Recognition Act[128]	Former SFRY Law on Foreign Judgments
Lack of opportunity for defendant to participate	Lack of service or notice to defendant	All parties have not been involved (Fr.)	–	Lack of service or notice to defendant in default case	Lack of timely notice to defendant	"Irregularities" such as lack of service that deprived defendant of opportunity to participate[133]
Public policy	Public policy	Public policy (Fr.)	–	Public policy	Public policy	Contrary to SFRY social system[134]
Fraud	–	Fraud; corruption (U.S.)	Fraud; duress (Fr. & U.S.)	–	Fraud	–
Due process	–	Due process (U.S.)	–	–	Systemic unfairness/lack of judicial independence	–
Third parties' rights	–	3rd party can file objection in court (Fr.); 3rd party can move to vacate award in certain circuits (U.S.)	–	–	–	–
Other concerns	1.Constitution of arbitration panel violates arbitration agreement or the law; 2. Award has been set aside/ suspended or is not yet binding	1. Arbitrator invalidly appointed (Fr.); 2. Form of award (Fr.; U.S. modifies) 3. Material errors in subject matter (U.S. modifies)	1. Award not in writing (U.S.) 2. Illegality (U.S.) 3. Mutual mistake (U.S.) Error re: person or subject of dispute (Fr.) 4. Reasonable reliance on misrepresentation or omission during negotiation (U.S.)	–	Forum non conveniens	1. Lack of reciprocity[135] 2. Special rules for personal status cases[136]

Apart from the substantive grounds for contesting recognition, the other crucial issue is the process available to do so. In the European Union, confidence in member states' courts is relatively high in comparison to U.S.

132. However, in cases concerning marriage, the defendant can consent to recognition nonetheless. Law on Conflicts of Laws, July 23, 1982, Official Gazette of the Socialist Fed. Republic of Yugo. no. 43/82 at 1077, art. 89 (translation provided by author).

133. *Id.* at 1077, art. 88. In cases concerning personal status, this ground for non-recognition applies only to citizens. *Id.* at 1077, art. 94.

134. *Id.* at 1077, art. 91. This ground for non-recognition also applies only to citizens in personal status cases. *See id.* at 1077, art. 94.

135. Reciprocity is presumed unless there is reason to believe otherwise. There are exceptions for cases concerning marriage or parenthood. *Id.* at 1077, art. 92.

136. The treatment of cases concerning personal status varies depending on the citizenship of the parties, and there are additional opportunities for the parties to waive grounds for non-recognition. *Id.* at 1077, arts. 92-95.

confidence in foreign courts and Kosovo's confidence in the Serbian parallel courts.[137] As such, the process set forth in the E.C. regulations favors maximum efficiency: It is "virtually automatic;" the judgment shall be declared enforceable "immediately on completion of the formalities," without consideration of any of the grounds of non-recognition; and the defendant "has no right to make any submission on the application" before it is declared enforceable.[138] But in most other models, the initial proceeding is adversarial, and the defendant has the opportunity to object to recognition and enforcement and to raise grounds for non-recognition or non-enforcement in that initial proceeding.[139] In essence, the more uncertainty exists about the fairness of the original process and the impartiality of the original tribunal, the more scrutiny the state will build into the process of determining recognition.

1. *Contrast between E.U. & U.S. Foreign Judgment Models*

Here, it is worth comparing the contrasting rules applied by the E.U. and the U.S. in recognition of foreign judgments, for they demonstrate both the definitive role played by the exceptions to the general default rule and the essential relationship between ease of recognition and certainty about the legitimacy of the judgment. As to the first issue, the E.U.'s default rule in favor of recognition is reinforced by the highly streamlined, almost automatic

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137. Here, and at other points throughout this section, I refer to the relatively high level of confidence amongst European courts and to the relatively high level of agreement on the terms and conditions for recognition of judgment. Of course, the E.U. rules on recognition of judgments were top-down rules, created at the European Union level, and do not necessarily represent the subjective views of all members. However, there is no doubt that the E.U. system is "based on the principle of mutual trust between the legal systems and judicial institutions of the Member States . . . ." 1 EUROPEAN CIVIL PRACTICE, *supra* note 127, at 286. Nor are these comments meant to suggest that the process of implementing these E.U. regulations is necessarily complete or absolute. The regulations do, however, govern all members. *See* BERNHARD HOFSTÖTTER, NON-COMPLIANCE OF NATIONAL COURTS: REMEDIES IN EUROPEAN COMMUNITY LAW AND BEYOND 9-12, 41-42 (2005) (discussing the direct applicability of E.U. law and the responsibility of national courts to issue decisions "in conformity with Community law as interpreted by the ECJ" (emphasis omitted)). Accordingly, while each member state may not necessarily have a subjectively high level of confidence in the courts of another member state, it nevertheless receives the benefits of the safeguards for minimum baselines of process provided by the E.U. structures. It is also subject to the uniform requirements of the E.U. regulations in recognizing and enforcing member state judgments and to the authority of the European Court of Justice. These conditions put the European Union states in a different position from either the United States or Kosovo, both in terms of relative levels of confidence in the judgments they enforce, relative levels of willingness to enforce those judgments, and the kinds of safeguards that secure that willingness. For discussions of various aspects of the development and implementation of the E.U. recognition and enforcement rules, see, for example, Ronald A. Brand, *The European Union's New Role in International Private Litigation*, 2 LOY. U. CHI. INT'L L. REV. 277 (2005); Nicholas Bala et al., *Regulating Cross-Border Child Support Within Federated Systems*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 87, 102 (2005); Yvonne N. Gierczyk, *The Evolution of the European Legal System*, 12 ILSA J. INT'L & COMP. L. 153, 160-72 (2005); Catherine Kessedjian, *Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society*, 29 MELB. U. L. REV. 765, 793-96 (2005); 1 EUROPEAN CIVIL PRACTICE, *supra* note 127, at 276-371.

138. Matrimonial/Parental Judgments Regulation, *supra* note 86, art. 31; Uncontested Claims Regulation, *supra* note 86; Civil/Commercial Judgments Regulation, *supra* note 86, pmbl. ¶ 17 & art. 41.

139. New York Convention, *supra* note 82 (following procedure of state where the judgment is relied on); C. CIV. (Fr.) (no right of participation); 9 U.S.C. §§ 9-12 (right of participation); 15A AM. JUR. 2D *Compromise and Settlement* § 49 (2000) (right of participation); RECOGNITION ACT, *supra* note 87 (right of participation); ENFORCEMENT ACT, *supra* note 87 (follows procedure of enforcing state).

procedure described above, and a very narrow set of grounds for non-recognition, whereas the similar U.S. default rule is limited by an adversarial proceeding vesting considerable leeway in the judge to consider far broader grounds for non-recognition.

As to the second issue, at the most fundamental level, this contrast in procedures and safeguards is an expression of the essential difference between the relationship amongst the E.U. member states and the relationship between the United States and other foreign nations, a difference that bears upon the choice of an appropriate model for Kosovo. The E.C. Regulations are founded in the agreement of all member states to provide reciprocal recognition of each other's judgments. The enforcement procedures described above are limited to the relatively small number of states that are subject to a common legal regime enforced through E.U. institutions, including the decisions of the European Court of Justice, and that share relatively similar legal systems and other common interests and incentives to compliance. The United States, in contrast, is in a position far more analogous to Kosovo's. Lacking an agreement for reciprocity in recognition of its judgments, the United States applies its more stringent enforcement procedures to review the judgments of all foreign states without the benefit of common interests or similar legal rules and without the safeguards of an overarching legal and political structure.

In particular, the basis for the E.U.'s generous rule is two conditions that are manifestly absent in Kosovo: agreement on jurisdiction and mutual confidence, generated at least in part by the jurisdictional agreements and by final interpretation in a single court (the European Court of Justice).[140] The E.C. Regulations ensure the first by setting out extensive jurisdictional rules that must be met by the court issuing the original judgment for the judgment to be recognized, and achieve the second by coordinating these agreements on recognition with initiatives to create common minimum standards for procedural protections and some degree of harmonization of national laws.[141] The benefit of this approach is obvious. By shifting the burden of ensuring proper jurisdiction, procedural protections, and reasonably consonant substantive rules to the front end, the E.U. achieves efficiency and certainty in recognition practice. The trade-off is also obvious: The risk of enforcing repugnant judgments should those preliminary safeguards fail. But as discussed above, in the E.U. context, this risk is largely mitigated by the existence of legal and political structures ensuring compliance with the regulations' requirements.

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140. Civil/Commercial Judgments Regulation, *supra* note 86, pmbl. ¶¶ 11, 16.

141. *Id.* arts. 1(1), 2-24; Matrimonial/Parental Judgments Regulation, *supra* note 86, arts. 1, 3-14; KOEN LENAERTS ET AL., PROCEDURAL LAW OF THE EUROPEAN UNION, §§ 1-015 to 1-016 (Robert Bray ed., 2d ed. 2006). This is possible, of course, precisely because the scope of the common recognition is limited to E.U. member countries. The EC Regulations establish only three basic prerequisites for enforcement: The judgment must be from the court of a member state, it must be within the legal subject area of the regulation, and the original jurisdiction must have met the regulation's jurisdictional rules. Civil/Commercial Judgments Regulation, *supra* note 86; Matrimonial/Parental Judgments Regulation, *supra* note 86. Also, as noted above, the regulation on uncontested money judgments focuses on minimum standards of notice and service rather than jurisdiction. Uncontested Claims Regulation, *supra* note 86.

The U.S. Uniform Foreign Money-Judgments Recognition Act presents a useful contrasting rule, one aimed at facilitating recognition of judgments when the court has no prior assurance as to either the competence or jurisdiction of the court whose judgment is before it. The U.S. rule also creates a presumption in favor of recognition, but it is a much weaker one. While the European procedure for enforcement allows submissions by the defendant and consideration of the grounds for non-recognition only on appeal to a designated court, U.S. courts consider these matters in the initial proceeding. The U.S. rules give the court leeway to refuse to enforce the judgment not only for all the reasons listed above, but also for fraud, a prior agreement to settle out-of-court, if the original court was a "seriously inconvenient forum" (in cases in which jurisdiction was based solely on personal service), and significantly, if the original judicial system lacks due process or impartial tribunals overall.[142] This latter proceeding is much more burdensome, and the result much more uncertain, but the court at last gets an assurance of the workings of the other system during the proceeding itself.

Neither model for recognition of foreign judgments could be applied directly in Kosovo, for both depend on recognition of state authority for recognition of a state court's judgments. But the grounds for non-enforcement used in these models confirm the importance of UNMIK's concerns with conflicting judgments, safeguarding defendants' right to participate, and public policy. And the contrasts between the standards and procedures applied when states have more or less certainty about the other state's court system suggest the practical choices that UNMIK or a subsequent Kosovo government could use to calibrate its scrutiny of the judgments: automatic recognition and enforcement versus contested proceedings, the level of specificity governing judicial decision-making, and the range of grounds for non-enforcement.

2. *Contrast between Arbitration Award and Out of Court Settlement Models*

The grounds for non-recognition of arbitration awards and out-of-court settlements address additional concerns that are relevant to the Serbian parallel courts. In both models, enforcing courts focus on the validity of the original agreement between the parties. As discussed above, this represents the fundamental legal ground for the legitimacy of the decision.

But the two categories contrast starkly in how they approach the significance of the process provided in the initial proceeding. In the review of arbitral awards, the fairness of the process used to reach the award is crucial, both in terms of whether it comported with the parties' agreement and whether it adhered to due process standards. But in recognizing out-of-court settlements, process is irrelevant. Rather, out-of-court settlements could be reached by virtually any means—a roll of the dice, a bet, or reasoned negotiation—so long as neither party was coerced by fraud, duress, or reasonable mistake. Here, the trade-off between efficiency and certainty on

142. RECOGNITION ACT, *supra* note 87, § 4.

the one hand, and confidence in the fairness of the process on the other, is at its most absolute.

In assessing the applicability of these models to the cases described above, both the employment case and the divorce case, the primary risk is of conflicting judgments. There do not seem to have been allegations that the Serbian parallel court proceedings themselves presented a risk of fraud, due process violations, or conflicts with Kosovo's public policy. To the contrary, it is the tension between the dual proceedings that presents these risks. In both cases, it seems that the parties originally acquiesced to have their case heard in the Serbian parallel courts and that, again, it is the violation of that agreement by a party forum-shopping for a better result that presents a risk to the fundamental fairness of the proceedings.

The categories on which there is broad consensus between the models—agreement of the parties/jurisdiction, conflicting judgments, fraud, public policy, and an opportunity for affected parties to participate—seem to present ample safeguards for recognition of only those Serbian parallel court judgments that are essentially fair and legitimate. If UNMIK were to adapt one or more of these models, it could then calibrate its framework to the desired balance between promoting legal certainty and assuring the legitimacy of the judgments by making calculated decisions about the level of scrutiny to be applied, the procedures to be used, and the extent of judicial discretion.

E. *A Civil Judgment Model*

These mechanisms provide a robust set of models for Kosovo to draw from in recognizing at least some civil Serbian parallel court cases. For the parties in civil cases in Kosovo, the best approach may be to select particular aspects from each of these models, as they are determined to be most appropriate for Kosovo's unique circumstances. The arbitration award and out-of-court settlement models provide a basis for using the agreement of the parties, rather than the territorial jurisdiction of the Serbian parallel courts, as the legal justification for recognition. The default rule favoring enforcement, which is common to all the models, and the automatic initial recognition and enforcement process of the E.C. Regulations would together present the most immediately effective way of recognizing the entire category of civil judgments at once, thereby introducing substantial certainty to the majority of civil Serbian parallel cases. So long as the grounds for non-enforcement appropriately safeguard other interests by permitting affected parties to object on appeal based on conflicting judgments issued by UNMIK courts, a lack of opportunity for parties or affected third parties to participate, and other identified factors, this model would create substantial legal certainty with few apparent downsides, and without requiring recognition of Serbian parallel court jurisdiction per se. Particularly in the transitional justice context in which substantial legal, political, and social uncertainties are inevitable, promoting legal certainty and enabling ordinary people to go on with their everyday lives is no small benefit.

Of course, particularly in the highly contentious context of negotiations over Kosovo's political status, there is a risk that Serbia will treat any

recognition of parallel court judgments as recognition of territorial jurisdiction and political sovereignty as well, regardless of UNMIK's legal rationale. Such a risk, while real, is no greater than the ever-present risk that virtually any action might be mischaracterized by politicians for political gain. More importantly, recognizing the parallel judgments on one of these alternative bases will not result in any change to the positions of the parties over Kosovo's political status nor to the relative strength of their bargaining positions. Irrespective of UNMIK's position on the matter, in the ongoing negotiations over Kosovo's status, Serbia is claiming authority over Kosovo and points to the parallel courts in the Serb enclaves as one indicator of its ongoing role. Absent an open concession of Serbian sovereignty by UNMIK, recognition of parallel court judgments is unlikely to be a salient factor in the result.

Another position taken by Serbia is, however, highly relevant to this discussion—Serbia's demands that, even if Kosovo were granted independence, the parallel courts and administrative structures should not be dismantled but rather should continue to be active in the enclaves to protect the Serb minority's interests.[143] It is one thing to establish an entirely retrospective system for recognizing past judgments, with the imperatives of the parties' reliance on judgments already issued and executed, the desire to promote social stability, and the reality that many of these judgments were issued during a transitional period when UNMIK courts were either non-existent or relatively inaccessible. If, however, during the political negotiations over Kosovo's status the province accedes to Serbia's position on this point, it will be necessary to craft a forward-looking practice of recognition with a deliberate balance between the demands of certainty and fairness in light of the Serbian parallel courts' association with an enclaved Serb minority. At this point, the normative imperative for creative decision-making based on the exigencies of the transitional period will fade away, and Kosovo will find itself in a position much like that occupied by other societies tolerating long-term situations of legal pluralism, driven by the everyday concerns of accommodating ethnic and religious minorities.

A final concern that might be raised about general recognition of the Serbian parallel courts' civil judgments is the risk of ratifying systemic inter-ethnic discrimination within the court systems. To my surprise, while I inquired repeatedly about any incidents of systemic inter-ethnic discrimination in the Serbian parallel courts' civil and family judgments, none of those interviewed for this Article (who included Kosovo Albanians, Serbians, and members of the international community) claimed to know of any such cases, and I found no official reports suggesting that such problems had arisen. This is particularly striking since even dubious rumors of perceived discrimination are typically the subject of widespread discussion. It is also remarkable because, as will be discussed shortly, such concerns are not only present but central in the property and criminal contexts.

143. *UN Positive After Kosovo Meeting*, BBC NEWS.COM, Feb. 21, 2006, http://news.bbc.co.uk/1/hi/world/europe/4731142.stm.

While it is impossible to know how much confidence should be placed in collective silence on the subject, in Kosovo's social context, it is plausible that there could in fact be a difference in treatment of civil and family cases as compared to property and criminal matters. Because Serbs and Albanians have lived in discrete communities for some time now, there are far fewer inter-ethnic families, businesses and other social and economic arrangements than there once were, and thus there are likely more intra-Serb and fewer inter-ethnic family, civil, and commercial cases in the Serbian parallel system as well. In contrast, land seizures and violence have been an integral part of the inter-ethnic conflict in Kosovo, and so contentious cases concerning these issues might be expected to carry on. In the same light, because land ownership and inter-ethnic violence are highly charged issues in Kosovo, such cases might be deliberately targeted by litigants or court officials in the parallel system to serve political ends, and once within the system, they could be more likely targets for discriminatory treatment in the courts, as they are in the society as a whole.[144]

If accusations of systemic unfairness or discrimination within the Serbian parallel courts' civil process should develop, the specter of enforcing systematically discriminatory decisions and the consequences of such a result for confidence in the transition toward rule of law would force revisitation of these conclusions. But at this point, without indicators of such problems, the reports of injustice focus on the gaps in enforcement created by non-recognition between the systems and militate toward recognition.

F. *An Exception for Property*

One exception to this general approach in the civil judgments context is disputes over title to land.[145] Property transactions and claims are an area in which the risk of inconsistent judgments and records is relatively high. The war in 1999 created uncertainty about title to land on a range of levels. Most importantly, there were several massive, unplanned movements of peoples in a short time span,[146] and many of the cadastral records were taken, lost or destroyed.[147] Since 1999, the parallel systems have been operating in tandem to certify land sales, creating separate cadastral records for the same territory. There seems to be a general consensus amongst those working on these issues that the Serbian parallel cadastral offices have been offering only provisional

144. OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 18-24.

145. There was general consensus among those with whom I spoke, and in particular amongst those working on property issues, that this set of cases raised a different and far more complex set of legal questions that were not commensurate with other civil cases and should be treated separately. Rosandhaug Interview, *supra* note 31; Vokshi Interview, *supra* note 29; Katz Interview, *supra* note 78; *see also* OMBUDSPERSON FOURTH ANNUAL REPORT, *supra* note 47, at 10-11.

146. Since the initial flight of the Albanian population south and then the reverse wave of Serbs northward into Serbia proper, there has been additional consolidation of the Serb population into enclaves and departures from the area, as well as movements of people from rural areas into the cities and the invasion of the international community to occupy much of the downtown space in Priština/Prishtinë and other city centers. Rosandhaug Interview, *supra* note 31; Katz Interview, *supra* note 78.

147. The Housing and Property Directorate is working to determine title as of 1999 and had almost finished with the roughly 29,000 disputed claims on residential property as of May 2005. Rosandhaug Interview, *supra* note 31.

certificates for land sales and other contracts and have not been recording changes in land title, but this approach seems likely only to increase the potential for confusion and conflicting claims of ownership.[148] And in at least some cases, properties have been transferred within the Serbian parallel systems, causing havoc when the property is brought into the UNMIK system.[149]

The question of post-conflict disputes over title to land is one that has occurred in state after state around the world, and one that is too complex for any general civil model to resolve, or for this paper to address in detail.[150] The codes of most civil law states have some provision for resolving conflicting land claims in ordinary times, and these might serve as an effective guideline if it emerges that the number of conflicting claims are few and relatively simple. [151] If there are many claims and the legal analysis of title is complicated by lack of documentation or other problems, then these models may be inadequate to the task. The Housing and Property Directorate has almost finished determining the title to residential properties as of 1999, and this should create a baseline of legal certainty that will simplify the work on residential property disputes since that time.[152]

One solution would be to require post-1999 re-registry of all land with UNMIK offices, to employ a first-in-time default rule to incentivize participation, and to litigate any competing claims in the regular courts under standard rules of civil litigation. Irrespective of what approach it chooses, however, Kosovo would do well to exempt property cases from any overarching rule it constructs for recognition of other civil cases, and to turn to the models used by other states for addressing post-conflict land claims to construct a rule specifically for this issue.[153] Here, the balance between the problem of legal uncertainty and the risk of fundamental unfairness in any given decision tips in the other direction, requiring individual scrutiny of property transactions.

IV. CRIMINAL JUDGMENTS

Like the Serbian parallel civil cases, the Serbian parallel criminal judgments present Kosovo's courts with a politically loaded version of a commonplace legal problem: whether to treat a defendant's prior conviction or acquittal as barring additional prosecutions for the same acts. As in the civil cases, the non-recognition of the Serbian parallel criminal judgments also presents troubling legal and social consequences ripe for some form of intervention. But in the criminal context, much more so than in the civil

148. *Id.*; OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 21.

149. For example, OSCE has reported that in one case, an owner was unable to complete the sale of an apartment when an UNMIK court refused to verify the contract of sale because the previous purchase contract had been verified by a Serbian parallel court. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 23.

150. *See generally* Jon D. Unruh, *Land and Property Rights in the Peace Process* (Jan. 2004), http://www.beyondintractability.org/essay/Land_tenure/?nid=1387; Lewis, *supra* note 79.

151. *E.g.*, C. CIV. arts. 1264-65 (Fr.).

152. Rosandhaug Interview, *supra* note 31; Katz Interview, *supra* note 145.

153. *See* Unruh, *supra* note 150; Lewis, *supra* note 79, at 6.

context, the social and legal incentives for recognizing the Serbian parallel courts' judgments are parried by competing interests that weigh against recognition.

Judgments relating to criminal law touch on one of the hot-button issues of the Serbian-Albanian conflict, inter-ethnic violence, and on one of the core substantive concerns of post-conflict justice, assigning legal responsibility for past atrocities. Thus, the transitional justice concerns raised by the criminal cases are far more concrete and immediate than in the civil context, relating to the substance of the claims before the court; the fairness of the procedures used to decide them; and the satisfaction of Kosovo society with the capacity of the courts to address these controversial issues, which in the recent past were settled through force.

To the extent that Serbian parallel civil proceedings can be relied upon as essentially fair and non-discriminatory, it is the lack of certainty in the enforceability of judgments between the systems and the resulting conflicting judgments and arbitrage that have caused injustices. In civil cases, unless and until reports of systematic injustice arise, the balance between scrutinizing judgments to assure fairness and efficiently recognizing judgments to assure legal certainty clearly tips in favor of legal certainty. Recognition of the Serbian parallel civil judgments serves as an appropriate and effective mechanism for resolving these injustices.

But in the criminal setting, in addition to the problems raised by mutual non-recognition and conflicting judgments, there are reports of ethnic discrimination and sham proceedings within the Serbian parallel system. Such concerns cannot be resolved by, and would in fact be exacerbated by, recognition of the Serbian parallel criminal judgments. In such a context, the proper balance between these competing values is more difficult to ascertain.[154] The first part of this section reviews two case studies that illustrate these concerns.

In Section IV.B, I consider a further complication presented in the criminal setting: here, the balance between conflicting judgments and fairness is not entirely a matter of discretion, for it implicates international human rights norms, including double jeopardy and other defendants' rights, as well as the rights of victims and the public to see criminal justice done. Therefore, the first question that must be asked in the criminal context is not, as it is in the civil context, *may* the Serbian parallel judgments be recognized? Rather, it is *must* the Serbian parallel judgments be recognized or rejected—that is, do the human rights of the defendants or the victims compel either universal recognition or universal rejection of the Serbian parallel criminal judgments? Here, human rights norms compel the rejection of some, but not all, Serbian parallel criminal judgments.

Section IV.C considers the legal models and justifications available for recognizing those Serbian parallel criminal judgments whose fate is not determined by human rights norms. In the criminal context, the available

154. It is worth noting, of course, that if this were ultimately found not to be the case—that is, if the Serbian parallel system were demonstrated to be systematically unfair in civil cases—the balance of interests would shift for the civil cases to be closer to that in the criminal cases.

models are far more limited in number and scope than in the civil context. Here, there is not a common practice of recognizing non-state judgments like the general recognition of arbitration awards and out-of-court settlement agreements that provided both a model and a rationale (consent) for recognizing the civil Serbian parallel judgments. Indeed, such recognition is typically impermissible. Even within the limited context of criminal judgments by the courts of sovereign foreign states, there is not broad international consensus favoring recognition of such judgments, nor is there agreement on the default rules. Rather, such recognition is rare, existing primarily in the context of efforts to create a common legal system, and the default rules and exceptions for such recognition vary tremendously. The rules for recognition are also less well elaborated than in the civil context, depending instead more on exercise of discretion and comity than on codified factors.

These limited legal models will not permit Kosovo to bypass the political problem of sovereignty, nor can they adequately address the tension between resolving the problems posed by conflicting judgments and the problems posed by essential fairness concerns. Accordingly, I conclude that, in spite of the resultant loss of legal certainty and the human cost to defendants, Kosovo should address its Serbian parallel criminal judgments on a case-by-case basis, and through the exercise of prosecutorial discretion rather than formal recognition. Kosovo's provisional criminal procedure and criminal codes provide mechanisms that can facilitate such case-by-case analysis, and these are discussed in Section IV.D.

A. *Two Criminal Cases*

As in the civil context, neither the Serbian parallel courts nor the UNMIK courts recognize each other's criminal judgments. Rather, if faced with a defendant who has already been tried by the other tribunal, both courts will pursue their own prosecutions without regard to the determinations of the other system. The one concession frequently made by UNMIK courts is to give credit in sentencing a convicted defendant for time served in the Serbian parallel system, whether in pre-trial detention or after sentencing, but this is not a formal policy, merely a common practice.[155]

Two cases present paradigmatic examples of the interests at stake.[156] Judge Baruti, the President of the District Court of Mitrovicë/Mitrovica (an UNMIK court), described a case that illustrates the cost the parallel systems impose on defendants. A Serb defendant was suspected of a murder in

155. Baruti Interview, *supra* note 31.

156. As in the civil context, *see supra* note 90 and accompanying text, official reports on the parallel courts also describe criminal cases raising these issues. *E.g.*, OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 20 (describing two cases in which defendants were tried for the same acts in both UNMIK and Serbian parallel courts). The OSCE also reported that the presidents of two Serbian parallel courts informed it that they had caseloads of hundreds of criminal cases between 1999 and July 2003. *Id.* at 19-20. However, once again, due to the mutual non-recognition between the systems that has produced the problems discussed in this article, neither official judgments and other individual case records nor statistical or other general data are available for the Serbian parallel courts criminal cases, so that it is not possible to ascertain the number or nature of the overlapping and/or conflicting cases.

Mitrovicë/Mitrovica. He traveled into Serbia proper, where he was arrested by the Serbian police and brought before the Serbian parallel district court for Mitrovicë/Mitrovica, which is located in the Serbian city of Kraljevo. He was detained there, tried, and acquitted. Thinking that double jeopardy would prevent his retrial in Kosovo, the defendant returned to Mitrovicë/Mitrovica, where a warrant for his arrest was pending. He was promptly arrested, held again in custody, tried, and acquitted again, whereupon he filed a claim for compensation from UNMIK for the period of his detention.[157]

Here, what Judge Baruti described as the "human cost" of the defendant's dual detentions is obvious. But in Kosovo, these multiple prosecutions are understood to affect not only this human cost, but also the defendant's legal right to be free from double jeopardy. To American readers accustomed to the dual sovereignty exception to the double jeopardy principle and to the possibility of multiple prosecutions in state and federal courts that this exception permits, this may not seem like a legitimate concern. Here, it is important to note that some European states do not recognize the dual sovereignty principle, but rather, regard a prosecution in any recognized court as barring further prosecutions for the same acts in any other recognized court on the basis of the principle of *ne bis in idem*, a principle that is similar but not identical to the American concept of double jeopardy. Also, in the United States the otherwise stark dual sovereignty rule is substantially mitigated by the principle of comity so that repeated prosecutions are in fact rare; such an approach of course cannot be expected between the Serbian parallel and UNMIK courts.[158]

But there are other concerns as well, and these are illustrated by a second case. A Kosovo Serb was accused of shooting an unarmed, elderly Kosovo Albanian man who had been merely standing silently as the defendant passed by. The defendant's act was spurred, it was reported, by the sudden fear that the Albanian man would seize his gun. The UNMIK Prosecutor issued an indictment for murder, but the defendant fled to Serbia proper, where he was arrested, tried for murder by a Serbian parallel court, and

157. Baruti Interview, *supra* note 31. The OSCE describes what may be the same case, and is at a minimum a case with very similar facts, in a 2002 report. OSCE NINTH MINORITY ASSESSMENT, *supra* note 36, at 17. Kosovo's Criminal Procedure Code provides a cause of action for damages for unjustified convictions and deprivations of liberty. U.N. Mission in Kosovo, *Provisional Criminal Procedure Code of Kosovo*, arts. 534, 538, U.N. Doc. UNMIK/REG/2003/26 (July 6, 2003), *available at* http://www.unmikonlin.org/regulations/2003/KE2003-26.pdf [hereinafter *Provisional Criminal Procedure Code of Kosovo*). Reversals of this scenario also occur, with a Serbian parallel court trial following a prior UNMIK conviction or acquittal. OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 20.

158. *See infra* Subsection IV.C.1. Generalizing broadly, in the American view, the touchstone of double jeopardy is whether the legal grounds for prosecution are different, and multiple prosecutions for the same act are readily tolerated, so long as the charges brought do not encompass the prior charges. In the European view, the core *ne bis in idem* protection is against multiple prosecutions for the same act, regardless of how the act is charged. In addition, U.S. courts apply the dual sovereignty principle to permit second trials even on the same legal grounds so long as the trial takes place under a different sovereign. In Europe, some states apply *ne bis in idem* across international borders, whereas many, while recognizing the sweeping nature of the principle, view it as the basis for negotiating bilateral agreements not to reprosecute and do not apply it automatically in the absence of such agreements. Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent* Non Bis in Idem, 33 VAND. J. TRANSNAT'L L. 1263, 1271-73, 1282-84 (2000); *see also infra* Section IV.B.

convicted. But the sentence he received for his crime was a single year in prison, a sentence so light as to raise concern about the good faith of the proceedings. The indictment in Kosovo has never been carried out.[159]

Serbian parallel cases involving accusations of war crimes or inter-ethnic violence present a particularly acute dilemma for UNMIK, for such cases both illustrate and catalyze the continuing ethnic tensions and security problems in the province.[160] As suggested by this second example, the trial and sentencing practices of the Serbian parallel courts have raised suspicions of partiality and sham prosecutions intended to shield defendants rather than to assess their guilt or innocence. Therefore, in addition to the rights of defendants, criminal trials in Serbian parallel courts implicate the interests of both the public and victims in justice and social stability.

B. *International Human Rights Norms*

In Kosovo today, international human rights norms have been imported into the national legal structure by the Constitutional Framework for Provisional Self-Government, which provides that eight international human rights treaties are directly applicable in Kosovo, including two of relevance here: the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("European Convention") and the International Covenant on Civil and Political Rights and its Protocols ("ICCPR").[161] Kosovo's Provisional Criminal Procedure Code also directly protects certain human rights.[162]

Parallel criminal prosecutions implicate two well-established defendants' rights. On the one hand, the right to be free from double jeopardy or *ne bis in idem* (which corresponds roughly to the interest in avoiding conflicting judgments and assuring legal certainty described in the civil context)[163] might require that UNMIK refrain from trying defendants who have already faced prosecution in the parallel courts, or that it object strenuously to retrial in the parallel courts of defendants it has already prosecuted. On the other hand, the right to trial before an independent and impartial tribunal established by law (corresponding in turn to the fairness value discussed above) might require UNMIK to reject the parallel court judgments out of hand.

Of these two rights, Kosovo's international institutions have analyzed the problem of the Serbian parallel criminal judgments almost exclusively as a

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159. First Interview with Anonymous #11, *supra* note 93.

160. A number of defendants who have been indicted by UNMIK on serious charges ranging from attempted murder to genocide have reportedly fled to Serbia proper. *Id.*

161. *See* Constitutional Framework, *supra* note 41, arts. 3.2, 9; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]; International Covenant on Civil and Political Rights arts. 9, 14, *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

162. *Provisional Criminal Procedure Code of Kosovo*, *supra* note 157. Before 2003, the applicable criminal procedure code in Kosovo was that of the Former Republic of Yugoslavia.

163. "The principle of finality of criminal proceedings also underlies the principle of *ne bis in idem*." Case C-467/04, Gasparini and Others, 2006 ECJ CELEX LEXIS 295, para. 72 n.57 (June 15, 2006).

problem of double jeopardy.[164] In so doing, they seem to assume that the principle necessarily applies to duplicate prosecutions by UNMIK and Serbian parallel courts.[165] But in fact, *ne bis in idem* does not bar these prosecutions. On a theoretical level, the principle of *ne bis in idem* should ideally be applied to multiple prosecutions for the same act regardless of the courts or charges involved. But in reality, the international legal obligation is more limited. As defined by the relevant human rights treaties, *ne bis in idem* applies only to multiple prosecutions by the same sovereign. The European Convention, for example, refers to the right not to be tried again "under the jurisdiction of the same State,"[166] while the International Covenant on Civil and Political Rights forbids re-prosecution after final judgment in "each country."[167]

Within Kosovo, the language of the Provisional Criminal Procedure Code is ambiguous on the question of whether *ne bis in idem* applies only to cases tried in the recognized Kosovo courts or to cases tried in foreign courts as well.[168] However, the Provisional Criminal Code permits retrial in Kosovo after foreign prosecutions in some instances, indicating that *ne bis in idem* protection may not be considered to apply to those judgments.[169] Furthermore, even if the principle of *ne bis in idem* were applicable, this would not prevent Kosovo from trying defendants whom it believed had been subject to sham or biased prosecutions in the Serbian parallel system. There are well-established exceptions in international human rights law to permit either reopening of a case (in the traditional context of multiple prosecutions within a state) or the instigation of a new case in a different state (in the context of extension of the principle to prosecutions by multiple sovereigns) for new evidence, for lack of due process, or in the case of sham proceedings.[170]

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164. *See* OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 20; OSCE TENTH MINORITY ASSESSMENT, *supra* note 35, at 33.

165. *See* OSCE PARALLEL STRUCTURES REPORT, *supra* note 16, at 5, 20.

166. European Convention on Human Rights, *supra* note 161, Protocol No. 7, ¶ 4(1).

167. ICCPR, *supra* note 161, art. 14(7).

168. Kosovo's Criminal Procedure Code forbids re-prosecution if a defendant "has been acquitted or convicted of a criminal offense by a final decision of *a court*, if criminal proceedings against him or her were terminated by a final decision of *a court* or if the indictment against him or her was dismissed by a final decision of *a court*." *Provisional Criminal Procedure Code of Kosovo*, *supra* note 157, art. 4(1) (emphasis added). The code does not define whether the term "court" refers solely to the courts of Kosovo or also to foreign courts. It does use the terms "a court," "the courts," and "courts" throughout when plainly referring solely the enumerated courts of Kosovo and not to foreign courts or other tribunals. Adding to the ambiguity, Article 4's reference to "a court" is surrounded by variations on the phrase, seemingly without any meaningful difference: All appear to refer solely to the Kosovo courts. *See, e.g.*, *id.* art. 1 ("the regular courts"), art. 2 ("a court"), art. 3 ("the court"), art. 5 ("the court"). The criminal procedure code of the Former Republic of Yugoslavia, which was effective in Kosovo previously, is similarly non-specific, reading in relevant part: "if the defendant has already been effectively convicted of the same criminal act or acquitted of the charge . . . ." CRIM. P.C. art. 349(5) (Yugo.) (on file with author).

169. U.N. Mission in Kosovo, *Provisional Criminal Code of Kosovo*, arts. 99-104, U.N. Doc. UNMIK/REG/2003/25 (July 6, 2003), *available at* http://www.unmikonline.org/regulations/2003/RE2003-25.pdf [hereinafter *Criminal Code of Kosovo*].

170. *See* European Convention on Human Rights, *supra* note 161, Protocol No. 7, art. 4(2); Rome Statute of the International Criminal Court art. 20(3), July 17, 1998, U.N. Doc. A/CONF 183/9 (1998) [hereinafter Rome Statute]; U.N. Human Rights Comm., *General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, art. 14, ¶ 19 (1984), *reprinted in* International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 14, U.N. Doc.

From UNMIK's perspective, what ought to be of more concern is the international human rights protection of trial before a properly constituted tribunal. The European Convention requires that a person be detained only upon conviction or order of a "competent court," and that a defendant has the right to be "brought promptly before a judge or other officer authorised by law to exercise judicial power" to determine the lawfulness of his detention.[171] The defendant is then entitled to trial "by an independent and impartial tribunal established by law."[172] The requirements of the ICCPR and Kosovo's Provisional Criminal Procedure Code are essentially the same.[173]

Under these standards, there are two aspects of this right that are at issue in Serbian parallel cases like those discussed above: whether the tribunal is independent and impartial, and whether the defendant is tried before a competent court with legal authority to hear the case. As to the first question, as illustrated by the cases described above, there is some reason to doubt the independence and impartiality of the Serbian courts, at least in inter-ethnic cases. Such concerns are generally grounded in the region's history of inter-ethnic discrimination and violence—the very reason that the Security Council barred Serbia from governing the province itself.[174]

In relation to this question, it is also important to note that removing all criminal cases to the UNMIK system would not guarantee an impartial tribunal, at least not under the present operating conditions in the UNMIK courts. Indeed, several members of the legal community reported that UNMIK judges are under enormous pressure to convict Serb defendants accused of crimes against Albanians and that this pressure has taken the form not merely of social approval or disapproval but of threats of violence.[175] It has also been suggested that there is considerable pressure within the Albanian community to testify against Serbs accused of war crimes and inter-ethnic violence irrespective of the witness's actual knowledge of the matter, rendering witness testimony highly problematic as a form of evidence.[176] In counterpoint, the international judges and prosecutors are perceived by the Albanian

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HRI\GEN\1\Rev.1 (July 24, 1994); Legislative Resolution 7246/2003, Application of the "Ne Bis in Idem" Principle, amend. 13, art. 2, para. 2, 2004 O.J. (C 76) 86, 91 (Eur. Parl.), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/ce076/ce07620040325en00860094.pdf [hereinafter European Parliament Legislative Resolution]. There are also other exceptions under which the trial is not considered to have resulted in final judgment, such as retrials following successful appeals and, in the American system, mistrials or retrials on substantively different charges. *See* Albin Eser, *For Universal Jurisdiction*, 39 TULSA L. REV. 955, 967-68 (2004).

171. European Convention, *supra* note 161, art. 5.

172. *Id.* art. 6.

173. *Provisional Criminal Procedure Code of Kosovo*, *supra* note 157, arts. 2, 20; ICCPR, *supra* note 161, art. 9(3).

174. Pantovic Interview, *supra* note 31; *see also* discussion, *supra* Section I.A. Recognition of the Serbian parallel court judgments could also violate other defendants' rights—for example, the presumption of innocence. Under Kosovo's Provisional Criminal Procedure Code and the applicable human rights treaties, as in most criminal justice systems, "[a]ny person . . . charged with a criminal offense shall be deemed innocent until his or her guilt has been established by a final judgment of the court." *Provisional Criminal Code of Kosovo*, *supra* note 157, art. 3(1); ICCPR, *supra* note 161; European Convention on Human Rights, *supra* note 161. However, this concern is subject to the same limitations as the other rights discussed above.

175. Baruti Interview, *supra* note 31; Pantovic Interview, *supra* note 31.

176. Pantovic Interview, *supra* note 31.

community as bending over backwards to accommodate Serbs and other minorities in the name of ethnic harmony and minority rights.[177]

As for the second question, of course, which legal system is authorized and which law governs in Kosovo are precisely the political issues at stake. But setting aside the ultimate determination of this question, according to UNMIK's own understanding of the governing law, one must conclude that the rights of defendants under UNMIK's jurisdiction to be tried in a competent tribunal established by law are violated by trial in the unauthorized Serbian parallel court system.[178]

This conclusion foreshadows the findings in the next Section: that in the criminal context, sovereignty—or at least authority delegated by a sovereign—is the sole source of legitimacy, and it is impossible to circumvent the sovereignty question as can be done in the civil context. However, it is also important to note that while defendants' rights may have been violated by trial in the Serbian parallel court system, and while this may serve as at least formal grounds for non-recognition of such judgments, such a result could not be characterized as a remedy for the violation. After all, these standards are intended to protect defendants by limiting state power to detain and punish.[179] International human rights norms might require Kosovo to respond to a defendant's objection to Serbian parallel court jurisdiction on these grounds, to refuse to participate in a prosecution in the parallel courts, to seek compensation for a defendant wrongfully tried, and even to refuse to recognize a criminal judgment, but subsequent retrial of a defendant would have to be justified on some other grounds than protection of the defendants' rights.

C. *Frameworks for Recognition and Non-Recognition*

The relevant models for recognition and enforcement of foreign criminal judgments to bar domestic prosecution include: the Schengen acquis, which contains an agreement applicable to certain European Union member states to extend the principle of *ne bis in idem* between them;[180] a proposed E.U. Council Framework Decision to the same effect;[181] and the U.S. common law

177. Thomas & Marzatico Interview, *supra* note 35; Vokshi Interview, *supra* note 29.

178. Security Council Resolution 1244 authorizes the international community to set up temporary administration leading to self-government for Kosovo. S.C. Res. 1244, *supra* note 2, ¶¶ 10-11. The Constitutional Framework for Kosovo establishes a judiciary with sole jurisdiction over the province that does not provide any basis for Serbian parallel court jurisdiction. Constitutional Framework, *supra* note 41, art. 9.4. The Serbian parallel courts apply laws and follow procedures that are no longer the laws and procedures in force in Kosovo. *Provisional Criminal Code of Kosovo*, *supra* note 168, art. 2. Of course, one would expect Serbia to draw the same conclusion concerning the UNMIK courts.

179. This is, of course, the "main rationale" of the *ne bis in idem* principle as well. Case C-467/04, Gasparini and Others, 2006 ECJ CELEX LEXIS 295, para. 72 n.57 (June 15, 2006).

180. The Schengen acquis comprises the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985, and the Convention Implementing the Schengen Agreement. Convention Implementing the Schengen Agreement of 14 June 1985, 2000 O.J. (L 239) 19 [hereinafter Schengen Agreement Convention]. *See Gasparini*, paras. 4-5.

181. European Parliament Legislative Resolution, *supra* note 170.

rule, which represents the usual default rule to treat foreign criminal judgments as having no effect on additional domestic prosecutions on the same grounds.[182] In contrast to the civil law context, where Kosovo relies on the old Socialist Federal Republic of Yugoslavia law, Kosovo has a new Provisional Criminal Code and Provisional Criminal Procedure Code as of 2003.[183] Here, the available legal models do not provide a basis for a sweeping decision implicating all Serbian parallel court judgments, but rather leave Kosovo with no better option than a case-by-case approach.

1. *Sovereignty*

In the criminal context, the available legal models do not present a means of bypassing the issue of sovereignty, as they do in the civil context. To the contrary, recognition of criminal judgments is predicated on an exercise of state authority, and consent plays no role in most cases. The U.S. case law on point refers consistently to "sovereigns" and "sovereign governments."[184] Kosovo's Provisional Criminal Code permits recognition only of the criminal judgments of foreign states' courts, while the Schengen acquis and the proposed E.C. Framework Decision further limit recognition to contracting or member states respectively.[185] While Kosovo's Provisional Criminal Procedure Code permits private prosecutions and minor cases to be mediated, the public prosecutor, and thus ultimately the state, must acquiesce in the decision to mediate the case and approve the mediator, unlike the civil context in which the parties can take the case to mediation at will.[186]

2. *Default Rules and Grounds for Non-Recognition*

In the criminal context, as in the civil context, most states employ a default rule against recognition of other jurisdictions' criminal judgments,

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182. *See, e.g.*, United States v. Rashed, 234 F.3d 1280, 1282 (D.C. Cir. 2000) (concerning successive foreign-federal prosecutions: "The [double jeopardy] clause forecloses multiple prosecutions for the same offense by the same sovereign, but not ones by different sovereigns"); United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996) (concerning successive foreign-federal prosecutions: "The black-letter rule is that prosecutions undertaken by separate sovereign governments, no matter how similar they may be in character, do not raise the specter of double jeopardy"); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) (concerning successive foreign-federal prosecutions: "'prosecution by a foreign sovereign does not preclude the United States from bringing criminal charges'" (quoting United States v. Richardson, 580 F.2d 46 (9th Cir. 1978) (per curiam))), *cert. denied*, 439 U.S. 1068 (1979)); *see also* United States v. Lanza, 260 U.S. 377, 382-85 (1922) (applying the dual sovereignty rule to successive state-federal prosecutions).

183. *Provisional Criminal Code*, *supra* note 169, arts. 99-103; *see also Provisional Criminal Procedure Code of Kosovo*, *supra* note 157, arts. 509-11.

184. *See, e.g.*, *Rashed*, 234 F.3d at 1282 ("different sovereigns"); *Guzman*, 85 F.3d at 826 ("sovereign governments"); *Chua Han Mow*, 730 F.2d at 1313 ("a foreign sovereign"); *Lanza*, 260 U.S. at 382 ("two sovereignties").

185. The Kosovo Provisional Criminal Code refers alternately to "another jurisdiction," "a foreign jurisdiction," and "a foreign court." *Provisional Criminal Code*, *supra* note 1698, arts. 103-04; see also *Provisional Criminal Procedure Code of Kosovo*, *supra* note 6, art. 509(1); Schengen Agreement Convention, *supra* note 178, art. 54; European Parliament Legislative Resolution, *supra* note 170.

186. The prosecutor must take into account the nature of the crime, the circumstances, and the defendant's criminal record and level of culpability. *Provisional Criminal Procedure Code of Kosovo*, *supra* note 156, arts. 54(3), 228.

unless there is an agreement or law to the contrary. Specifically, without an agreement on the subject, most states do not view criminal prosecutions by one state as barring an additional prosecution on the same facts by a second state with jurisdiction over the matter. As discussed above, international human rights law does not require that they do so. Rather, without some agreement in place, states typically refrain from such prosecutions solely as a matter of comity, and most do not regard the foreign prosecution as presenting a legal barrier.[187]

But unlike the civil context, where agreements and laws to facilitate the recognition and enforcement of judgments are proliferating, there are still few agreements and laws recognizing and enforcing criminal judgments against the possibility of future prosecutions.[188] In Europe, the Schengen acquis, as integrated into the E.U. framework, provides for automatic recognition of criminal judgments of the courts of its member states and prohibits retrials on the same facts amongst thirteen of the E.U. member states.[189] The European Union is now moving toward a similar E.U.-wide model as part of its efforts to create a single regional jurisdiction in Europe, but efforts at harmonization and developing common E.U. mechanisms have been contested and controversial.[190] Moreover, there do not exist in the criminal context the widely ratified agreements that govern enforcement in the context of civil and commercial judgments and represent collective international agreement on the importance and mechanism of recognizing such judgments. In the criminal

187. Some states, such as Germany, do give credit for time served at sentencing, applying a "deduction principle." There are also a few states like the Netherlands that automatically recognize most foreign criminal judgments, applying the broadest understanding of the *ne bis in idem* principle. Eser, *supra* note 170, at 964. It is also important to note that within the United States, in the context of successive federal-state prosecutions, comity is really more the rule than the exception. The federal government has adopted internal guidelines known as the "Petite Policy" disfavoring federal prosecutions following a U.S. state prosecution "unless reasons are compelling." ADAM HARRIS CURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS 3 (2001). While policies amongst the U.S. states vary, a number of states also frequently refrain from reprosecuting following a sister state's judgment, often under the auspices of a state statute. *Id.* at 45-46.

188. Rather, most agreements and laws recognizing foreign criminal judgments are for the limited purposes of extradition, cooperation, or designation of a foreign national as having a criminal record. *E.g.*, CODE PÉNALE art. 768 (Fr.), *available at* http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm. Such provisions do not bar states from prosecuting a defendant altogether, even if he has already been charged and prosecuted for the same crime in another state, so long as the defendant enters the court's jurisdiction without the need for extradition. *E.g.*, Extradition Treaty Between the United States of America and the United Mexican States, U.S.-Mex., art. 6, May 4, 1978, 31 U.S.T. 5061 (barring extradition). Within the United States, Mississippi is unusual in having enacted a statute of general applicability barring state prosecution after a foreign "conviction or acquittal for the same offense." MISS. CODE. ANN. § 99-11-27 (1972); CURLAND, *supra* note 188, at 185.

189. European Parliament Legislative Resolution, *supra* note 170, amend. 2, recital 2a (new); Schengen Agreement Convention, *supra* note 180, art. 54. *See also* Case C-467/04, Gasparini and Others, 2006 ECJ CELEX LEXIS 295 (June 15, 2006); Joined Cases C-187/01 & C-385/01, Gözütok, Brügge, 2003 E.C.R. I-1345, 2003 ECJ CELEX LEXIS 386 (Feb. 11, 2003); Case C-469/03, Miraglia, 2005 E.C.R. I-2009, 2005 ECJ CELEX LEXIS 80 (Mar. 10, 2005); Case C-436/04, Van Esbroeck, 2006 E.C.R. I-2333, 2006 ECJ CELEX LEXIS 576 (Mar. 9, 2006); Case C-150/05, Van Straaten, 2006 ECJ CELEX LEXIS 541 (Sept. 28, 2006).

190. *See* European Parliament Legislative Resolution, *supra* note 170. Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad, 2006 WL 2612698, ¶¶ 1-8 (Sept. 12, 2006) (concerning "a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law" over the new European arrest warrant, raised in the constitutional courts in Belgium, Poland, Germany, and the Czech Republic, as well as the Supreme Court of Cyprus).

context, there is considerably less convergence than in the civil context, and the models that exist are far less robust.

Table 4: Default Recognition Rules and Grounds for Non-Enforcement

	Schengen acquis	Proposed E.C. Framework Decision	U.S. Common Law	Kosovo Provisional Criminal Code
Default Rule	Contracting Party states must refrain from prosecuting a defendant for the same acts after final disposition in another Contracting Party[191]	Member States must refrain from prosecuting a defendant for the same acts, facts or behavior after a final criminal judgment in other member states[192]	Dual sovereignty doctrine: foreign judgments do not bar prosecutions in U.S. courts[193]	Depends on the basis for Kosovo's juris. 1. If territorial: foreign judgments do not bar prosecutions in K. courts 2. If another basis: K. must refrain from prosecuting a def. following final foreign judgment & serving the foreign punishment[194]
Grounds for non-enforcement of the foreign criminal judgment	1. If convicted, failure to enforce a penalty 2. State party's prior declaration of certain exceptions concerning its: a. exclusive territorial jurisdiction b. national security/other essential interests c. official acts of state officials[195]	1. If convicted, failure to enforce a penalty 2. Post-judgment proof of new facts not reasonably discoverable by prosecutors at time of trial 3. Fundamental procedural error under original state's law 4. Violation of defendant's rights[196]	N/A	1. If territorial juris.: Public Prosecutor's discretion[197] 2. Any case can be reopened against a def. for fraudulent evidence or a judge/investigator's criminal act[198] 3. Any case can be reopened to benefit a def. on the same basis or: a. Favorable new evidence b. Def. was tried repeatedly c. Multiple people were convicted of an act only one or some could have committed[199]

Whereas in the civil context, a generous default rule is moderated by carefully crafted grounds for non-enforcement whose substance and procedure is calibrated to the level of confidence in and concern with the fairness of the alternative tribunal's process, in the criminal context, there is a sharp divergence between the Schengen and proposed European Union default rules favoring recognition and the U.S. common law rule disfavoring recognition. There is also little convergence in or certainty concerning the appropriate grounds for non-enforcement. Rather than centering the non-enforcement

191. Schengen Agreement Convention, *supra* note 178, art. 54.

192. European Parliament Legislative Resolution, *supra* note 168, amend. 12, art. 2, para. 1.

193. United States v. Rashed, 234 F.3d 1280, 1282 (D.C. Cir. 2000); United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984); *see also* United States v. Lanza, 260 U.S. 377, 382-85 (1922).

194. *Criminal Code of Kosovo*, *supra* note 169, arts. 103-04 (also listing additional minor grounds); *see also Provisional Criminal Code of Kosovo*, *supra* note 157, art. 511 (enforcing foreign criminal judgments when Kosovo lacks jurisdiction).

195. Schengen Agreement Convention, *supra* note 176, at 55.

196. European Parliament Legislative Resolution, *supra* note 166, amend. 7, recital 7(b) & amend. 12, art. 2, para. 1.

197. *Provisional Criminal Code of Kosovo*, *supra* note 169, arts. 103(1), 103(5); *Provisional Criminal Procedural Code of Kosovo*, *supra* note 157, art. 511.

198. This rule applies to reopening both domestic and foreign judgments. The fraud or crime must be proved by a final judgment or, in special circumstances, by other evidence. *Id.* art. 442.

199. This rule also applies to both domestic and foreign judgments. *Id.*

decision in a set of legal factors that can be considered after a request to enforce is presented, instead, states that do not choose to enforce foreign legal decisions tend to make that choice as a matter of discretion or comity at the outset. Furthermore, none of the grounds recognized in other states would permit Kosovo to grapple with its core concern: the risk of procedurally correct but nonetheless substantively sham proceedings. [200] Indeed, the standards established for recognition in the European examples "presuppose[] confidence in the fact that judgments recognised are always delivered in accordance with the principles of legality, subsidiarity and proportionality."[201]

Kosovo itself straddles the different models. The underlying rationale for its contrasting default rules appears to be a judgment that it is important for Kosovo to prosecute crimes committed within its own borders. This principle, of course, precludes recognition of the Serbian parallel court judgments. If Kosovo were nonetheless to adopt a default rule accepting Serbian parallel court criminal judgments, its provisions on reopening cases would provide some rationale for reopening cases involving fraud or criminal misbehavior within the proceedings. However, this provision sets a high evidentiary standard for reopening cases, requiring a final judgment of fraud or crime in most cases. As a result, this might not be sufficient to permit reopening of cases like the one described in Section IV.A above, in which an extremely light sentence gives rise to suspicions of discrimination and sham proceedings, but in which there is not necessarily evidence of such conduct available.[202]

Furthermore, while in the civil context the consent of the parties provided some rationale for tolerating differences in process and result from what might have existed if the case had been brought before the UNMIK courts, there is no principle that can do similar work here. The civil models also provided for consideration of a more generous set of concerns in at least some instances. Because they will not permit Kosovo to recognize the criminal judgments without acknowledging sovereignty, and because they do not provide factors effective for grappling with the core concern about the Serbian parallel courts' exercise of authority over criminal cases, these models do not provide a template for establishing a default rule favoring general recognition of Serbian parallel criminal judgments.

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200. The International Criminal Court rules on complementarity do permit the ICC to prosecute if a domestic proceeding was a sham, but do not provide rules or factors for determining this. *See* Rome Statute, *supra* note 166, art. 20(3).

201. European Parliament Legislative Resolution, *supra* note 166, amend. 4, recital 5 (superseded by amendment) (emphasis omitted); *see also* Joined Cases C-187/01 & C-385/01, Gözütok, Brügge, 2003 E.C.R. I-1345, ¶ 33, 2003 ECJ CELEX LEXIS 386 (Feb. 11, 2003) (when the *ne bis in idem* principle is applied, "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied").

202. *Compare Provisional Criminal Code of Kosovo*, *supra* note 168, arts. 99-104 (establishing criminal jurisdiction of Kosovo courts, conditions for prosecution where criminal proceedings have been initiated in another jurisdiction, and calculation of detention and punishment served in other jurisdictions), *with Provisional Criminal Procedure Code of Kosovo*, *supra* note 157, art. 442 (enumerating conditions under which a final criminal judgment can be reopened).

3. *A Criminal Judgment Model: Case by Case Assessments*

Finally, in the criminal context, not only are the legal models for recognition of judgments limited and linked to sovereignty, the transitional justice imperatives that push for recognition of judgments in the civil context cut in the opposite direction. Because some criminal judgments—particularly those relating to inter-ethnic violence—are so closely linked in the public view to the core of the conflict itself, the public perception that the judicial system can and will punish violence, and particularly inter-ethnic violence, is crucial to the future stability and security of Kosovo.[203] The very reason for U.N. intervention in Kosovo was the ethnic bias that pervaded the government and social institutions and that ultimately culminated in violent ethnic cleansing. Likewise, the purpose of continued U.N. involvement is the establishment of a democratic, multi-ethnic government capable of ensuring security and justice.[204] In recent months, as negotiations over Kosovo's political status have begun, bombings and other attacks, both inter-ethnic and intra-Albanian, have been frequent.[205]

Furthermore, under the law applicable in Kosovo today, prosecutors may have an obligation to bring charges in at least some of the cases already tried by the Serbian parallel courts, particularly if they have reason to believe the proceedings in the parallel case may have been discriminatory. The relevant human rights treaties guarantee rights to protection against intrusions on life, liberty, and other attack; to equality before the law; and to nondiscrimination.[206] Indeed, Kosovo's Provisional Criminal Procedure Code specifically requires the prosecutor to prosecute where there are reasonable grounds to think that a crime has been committed. Her discretion to choose not to prosecute or to divert a case to mediation is limited to minor crimes.[207] Similarly, the European Court of Human Rights has interpreted a crime victim's right of access to justice to require states to prosecute crimes that rise to the level of violating the victim's human rights, such as the right to life.[208]

Of course, not all cases tried in the Serbian parallel courts will implicate these concerns. Many crimes are minor or intra-ethnic in nature. Particularly in cases involving members of the same ethnic community and tried in the Serbian parallel courts within Kosovo, victims may well have had the

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203. *But see* Brooks, *supra* note 13.

204. UNITED NATIONS MISSION IN KOSOVO, KOSOVO STANDARDS IMPLEMENTATION PLAN 2 (2004).

205. *UNHCR Condemns Violence Targeting Kosovar Serb Returnees*, REUTERS FOUNDATION ALERTNET, Sept. 22, 2006, http://www.alertnet.org/thenews/newsdesk/UNHCR/f11107eb68de824055d1c838ce6d1833.htm; Nidhi Sharma, *Kosovo Interior Minister's Car Bombed*, ALL HEADLINE NEWS, Sept. 15, 2006, http://www.allheadlinenews.com/articles/7004870174; *Grenade Hits Serb Café in Kosovo*, BBC NEWS.COM, Aug. 26, 2006, http://news.bbc.co.uk/2/hi/europe/5290022.stm.

206. ICCPR, *supra* note 161, arts. 1, 9, 14, 17, 26; European Convention on Human Rights, *supra* note 161, arts. 2, 5, 14.

207. *Provisional Criminal Procedure Code of Kosovo*, *supra* note 157, art. 6.

208. Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1419-23 (2002). The E.U. goes further, as expressed in a 2001 Council Framework Decision guaranteeing victims' rights to participate in criminal proceedings as well as rights to compensation and protection. Council Framework Decision 2001/220/JHA, Standing of Victims in Criminal Proceedings, 2001 O.J. (L 82) 1-4.

opportunity to participate in the proceedings. As far as ethnic discrimination is concerned, not even all inter-ethnic cases will raise discrimination concerns, and it is unlikely that many of the Serbian parallel courts' criminal cases are inter-ethnic, in light of the small number of non-Albanians remaining in Kosovo and the limited interactions between the ethnic communities.

However, although at least some of the Serbian parallel criminal judgments present appealing cases for recognition, the available legal models and justifications do not provide a mechanism for general recognition of the criminal judgments as they do in the civil context. In the criminal context, there is no legal framework that permits circumvention of sovereignty. The transitional justice values of ensuring criminal justice, consolidating sovereignty, and establishing security are all so strongly implicated by control over the criminal process that they must trump the interests in efficiency and legal certainty that prevail in the civil context. To protect these rights and interests, Kosovo must either undertake a case-by-case analysis to cull those cases that raise human rights concerns from those that do not, or refuse to recognize the Serbian parallel criminal judgments altogether, thereby rejecting some judgments that do not raise human rights concerns along with those that do.

However, just as recognizing civil judgments generally does not mean ceding all discretion to deny recognition in cases where there are grounds for such a decision, so also refusing to recognize Serbian parallel criminal judgments in general does not mean that every case heard in the Serbian parallel courts must be retried. First, since the Serbian parallel courts in the enclaves have stopped hearing criminal cases and the parallel courts within Serbia hear (if any) only a few, there should be very few recent criminal cases at issue and few (if any) new cases forthcoming. For minor crimes, statutes of limitations may have run, precluding reconsideration of those cases.

Also, Kosovo's Criminal Procedure Code provides multiple mechanisms for, if not officially recognizing Serbian parallel criminal judgments, at least permitting them to stand without initiating new proceedings, on a case-by-case basis. Kosovo's provisional criminal code permits mediation of minor crimes, and so in qualifying cases, the prosecutor could treat the Serbian parallel court judgment as the equivalent of a mediation decision. The Provisional Criminal Procedure Code provides guidelines for prosecutors to consider in making such referrals and also requires the consent of both the defendant and the victim.[209] In cases meeting the guidelines, prosecutors could employ either an opt-in or opt-out approach to consent, either proactively contacting victims and defendants to request consent, or informing the public at large of the need to opt out of minor Serbian parallel criminal judgments if they wish the public prosecutor to pursue such cases and implying consent if the parties do not opt out within a certain period of time.

In more serious cases with Serbian parallel guilty verdicts, prosecutors could use the established principle of giving credit for time served for the same act to make a principled decision not to prosecute someone who has been convicted in a fair process in the Serbian parallel system and has already

209. *Provisional Criminal Procedure Code of Kosovo, supra* note 157, art. 228.

served a sentence commensurate with that available under Kosovo law.[210] After all, in such cases, even if reprosecuted, the defendant should not be subject to additional punishment under the provisions of Kosovo's provisional criminal and criminal procedure codes. Similarly, rather than directly recognizing just acquittals in the Serbian parallel system, prosecutors could determine not to bring charges on the basis of the same lack of evidence that led to the original, parallel acquittal. Any such determinations could be made by recourse to the ordinary procedures of the Kosovo legal system.

While each of these mechanisms would require review of individual cases within the prosecutors' offices, they would present a principled way of mitigating the human cost to defendants of repeated prosecutions without conceding the jurisdiction of the Serbian parallel courts or undermining the fundamental demands of justice for victims and for the state. The real risk of a case-by-case review is that this mechanism will likely not prove to be comprehensive. Reviewing all the cases tried in the Serbian parallel system would require the cooperation of the Serbian parallel courts themselves for access to case files, and this is not likely to be forthcoming, at least in the current political climate. Such review also represents a burden that the UNMIK system may not be equipped to handle. Under these circumstances, it would be wise for the prosecutor's office to begin with a review of those cases that present potential violations of the public and victims' interest in justice and other similarly serious failures of justice, using the international human rights treaties and the domestic grounds for reopening final judgments as guidelines for the circumstances that qualify as such.

V. CONCLUSION

Under ordinary principles of conflict of laws and with the aims of transitional justice in mind, the systematic recognition of most Serbian parallel civil court judgments in Kosovo is both desirable and legally feasible. In contrast, there are crucial differences between the Serbian parallel civil and criminal judgments that weigh against sweeping recognition of the decisions in criminal cases. In Kosovo's post-conflict context, the criminal judgments implicate core questions of inter-ethnic justice, and recognizing them wholesale would run the risk of legitimizing the very sort of inter-ethnic discrimination and violence that is at the heart of the conflict. In contrast, the injustices wrought by the Serbian parallel civil judgments seem to be primarily the consequences of the very existence of dual, hostile systems—conflicting judgments and legal uncertainty—and therefore can be resolved through systematic recognition of those judgments.

Furthermore, while the available legal models in the civil system enable the recognition of Serbian parallel judgments without simultaneously recognizing sovereignty or jurisdiction, those in the criminal system do not. Rather, recognition of foreign criminal judgments depends expressly on state authority for the legitimacy of the original judgment. Accordingly, any decision to recognize Serbian parallel criminal judgments through this model

210. *Id.* arts. 439, 511(6); *Provisional Criminal Code of Kosovo*, *supra* note 169, art. 104.

would have to follow a political decision concerning sovereignty and jurisdiction, rather than rendering such a decision unnecessary.

In addition, while the relevant civil judgment models have converged on determinative factors for recognition that are useful and appropriate for assessing Serbian parallel court judgments, this is not true for criminal cases. Many of the determinative factors for mutual recognition of criminal judgments are not bright-line rules that can be applied after the fact. Rather, many come in the form of unwritten prerequisites for an agreement to recognize and enforce criminal judgments, such as reciprocity, comity, and confidence in the essential justice of the other system, all qualities that are absent here.

Finally, a general international consensus has developed in favor of validating the desire of the parties to choose foreign courts, arbitration tribunals, and out-of-court settlements to resolve their civil disputes. This consensus provides some normative imperative for recognizing the civil judgments of alternative tribunals so long as the parties have participated willingly in the process. There is, however, no such consensus in the world of criminal law. Agreements to recognize foreign criminal judgments for purposes of enforcement, or to bar future prosecutions, are few and far between; momentum to create such agreements exists only between states that have established common minimum standards for procedural protections and have an interest in eventually achieving a unified legal system. Accordingly, there is no similar normative consensus concerning the value or appropriateness of recognizing foreign criminal decisions, particularly in settings where procedural or substantive protections are in doubt.

One might question whether such a divided approach is workable in practice, particularly should joint criminal-civil cases come before the courts. However, as described above, civil and criminal judgments are subject to different standards for recognition and enforcement under most legal systems. In this sense, Kosovo's dual modes of analysis would not be peculiar, but rather would be in accord with the practices of the other jurisdictions with which Kosovo interacts, in particular the European Union and the United States. Furthermore, most civil and criminal claims for recognition and enforcement of judgments will come before the courts in very different contexts: from a party seeking enforcement or non-enforcement in the civil context, and from a prosecutor filing new charges against a defendant previously tried in the criminal context. In those few instances in which the two overlap, for example if a plaintiff sought to enforce a civil judgment granted on the basis of a criminal conviction, the exceptions to the civil judgments default rule of recognition would provide a sufficient basis for examining the merits of the claim.

Looking beyond Kosovo, situations of legal pluralism with ambiguous patterns of judgment recognition and enforcement are common to other states with sharp ethnic and religious divisions, whether in post-conflict settings or in more ordinary times. What principles or determinative factors do Kosovo's situation and the legal models reviewed here suggest for other states with multiple, conflicting court systems? This is a subject that deserves exploring

in its own right, particularly when presented, as it is here, as a question of transitional justice for a post-conflict state. I can offer here some preliminary thoughts as to the issues that should be taken into account in determining whether and how to recognize the judgments of alternative systems.

(i) *Political, Economic and Social Concerns*

What are the political, economic and social incentives for recognition or non-recognition, such as implications for sovereignty, non-recognition of judgments as a barrier to efficient economic markets and social interchange, or the existence of overlapping claims to property? In the examples considered above, states have adopted models favoring broad and swift recognition of judgments when they have important economic and social ties to other states that will benefit from mutual recognition between the systems. In contrast, if there is little economic or social interaction, or if there are fundamental political issues such as sovereignty at stake, the political drawbacks to automatic recognition of judgments may outweigh any social or economic benefits.

In the same vein, can the relevant political questions be separated from the legal questions? While in Kosovo the political issue of sovereignty could be bypassed in civil cases but not in criminal cases, in other states sovereignty may be a less acute issue. This would be the case, for example, if the alternative court is part of an indigenous group with some degree of recognized sovereignty. Alternatively, in formally divided states like Cyprus or in states where the alternative institution operates only in discrete areas such as the Zapatista courts in Mexico, distinctions in recognition based on territorial jurisdiction may allow states to elide the problem of sovereignty. (This distinction is in fact suggested by Kosovo's criminal procedure code, although it is not applicable to the territorially diffuse Serbian parallel courts).[211]

Finally, is there sufficient trust between the systems to serve as a basis for reciprocity and comity? Are there ways of reliably transferring information between the systems that could facilitate such practices? No matter how appropriate the adopted rules for recognition and enforcement of judgments may be, they will be effective only if applied in good faith and with a reasonable degree of good will.

(ii) *Correspondence to Existing Legal Models*

Do the existing legal models provide determinative factors for decision-making that address the particular issues raised by the alternative system? Here, in the civil cases, there was a well elaborated set of grounds for non-recognition that is relevant to the crucial issues at stake in Kosovo. In the criminal cases, in contrast, most models relied on pre-existing protections for defendants' rights and so did not provide particular factors addressing the core concern of sham or discriminatory proceedings.

211. *See* discussion *supra* Subsection IV.C.2.

What are the principles upon which the legal legitimacy of the relevant judgments is based? In the examples considered above, judgments based on the consent of the parties are more susceptible to rules favoring recognition than judgments based on sovereignty, because states treat the parties' consent as mitigating some of the fairness concerns that might otherwise compel greater scrutiny of the relevant judgment or proceedings. If consent is relevant, is there a reliable way of systematically confirming the parties' consent to participate in the alternative system? If the parties' consent can be presumed in most cases, this may provide a basis for a default rule in favor of recognition.

(iii) *Areas of Convergence and Divergence*

To what extent do the legal systems at issue converge or diverge? In Kosovo, there is quite a bit of convergence in the procedures and rules of the two systems due to their shared history.

Also, are there identifiable subcategories of cases that raise problems that are different or more complex than other subcategories, such as the property cases in Kosovo? Can these subcategories be readily divided from the others and treated as a discrete category? In Kosovo's case, isolating the contentious category of property cases should permit other civil matters to be addressed more easily.

(iv) *Fairness v. Certainty*

What are the fundamental fairness concerns at stake in this situation? If there are systemic injustices that are internal to the alternative system and that exist independently of any interaction with other systems, this tends to militate toward non-recognition—or at least toward careful scrutiny—of an alternative system's decisions, depending on the severity of the problems, how pervasive they are, and whether they are confined to a subcategory of cases. Automatic recognition of essentially unfair decisions would only exacerbate the problem presented by the existence of the alternative system by increasing the scope of its decisions' influence. On the other hand, an alternative system could be essentially fair and internally consistent, but injustices may be created by conflicts between the systems—for example, by conflicting judgments on the same matter. If so, this tends to argue for general recognition of the alternative system's cases, or at least certain subcategories of those cases, as such recognition will itself help to prevent injustices from arising.

Finally, do the relevant fairness concerns exacerbate existing social problems, especially those that gave rise to the division in the court systems in the first place, such as inter-ethnic conflict or discrimination? If so, this tends to increase the significance of the fairness concerns vis-à-vis other values such as promoting economic efficiency. These interactions between the legal and social issues should also be taken into account in considering the mechanism used to address the decisions—for example, by identifying sub-categories of alternative cases involving inter-ethnic issues that should receive special treatment.

(v) *Designing the Framework*

The legal models discussed above also suggest mechanisms for calibrating a recognition framework to take account of particular circumstances and concerns. For example, in the civil context, where the models share a fairly uniform default rule favoring recognition, there are nonetheless substantial differences in the rule as applied. In practice, states must decide whether to have an automatic or case-by-case recognition process; the grounds for non-enforcement; whether to focus on the parties' agreement to use the alternative system or on the fairness of the proceedings themselves; and the level of judicial discretion. By making calculated choices on these crucial factors, states can subject judgments to greater or lesser scrutiny and establish corresponding levels of certainty and predictability. Kosovo's Provisional Criminal Procedure Code suggests another alternative approach, readily recognizing and enforcing judgments in which the state has a lesser interest, while subjecting those in which the state's interest is high to greater scrutiny.

These issues, of course, are not the only ones at stake, either in Kosovo or in other transitioning and divided states. Nor can legal models be expected to trump all political concerns. Ultimately, the future of Kosovo's parallel court systems will depend, like the fate of Kosovo itself, on the ongoing negotiations over Kosovo's political status. But whether and how to recognize its past judgments is a legal question that can best be resolved by recourse to the available legal models, leaving the larger political question of sovereignty to the politicians.