

Assessing the potential impact of the Kosovo Specialist Court

Gëzim Visoka - September 2017

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Colophon

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Cover photo: Man standing in front of a wall depicting the names of missing people, Pristina

Photo credit: Armend Nimani

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About PAX

PAX is a Dutch civil society organisation that brings together people who have the courage to stand up for peace, working to build dignified, democratic and peaceful societies around the globe. In Kosovo, PAX's programme includes transitional justice and dealing with the past, as well as a long-standing commitment to promoting good relations between communities in the north.

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About Impunity Watch

Impunity Watch (IW) is a Netherlands-based international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts research into the root causes of impunity and obstacles to its reduction that includes the voices of affected communities to produce research-based policy advice on processes intended to encourage truth, justice, reparations and an end to violence.

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Abbreviations

CTR	Commission on Truth and Reconciliation
EEAS	European External Action Service
EU	European Union
EULEX	EU Rule of Law Mission in Kosovo
IcSP	Instrument contributing to Stability and Peace
ICTY	International Criminal Tribunal for the former Yugoslavia
IMWG	Inter-Ministerial Working Group on Dealing With the Past and Reconciliation
IPA	Instrument for Pre-Accession Assistance
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LDK	Democratic League of Kosovo
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
SPRK	Special Prosecution Office of Kosovo
PACE	Parliamentary Assembly of the Council of Europe
RECOM	Regional commission for the establishment of facts about war crimes and other serious violations of human rights
RYCO	Regional Youth Cooperation Office
SAA	Stabilisation and Association Agreement
SITF	Special Investigative Task Force
UNMIK	UN Mission in Kosovo

Key findings

- ◆ The Kosovo Specialist Chambers and Specialist Prosecutor's Office (the Kosovo Specialist Court) were established in 2015, after persistent international pressure, to try war crimes and crimes against humanity allegedly committed by members of the Kosovo Liberation Army (KLA) between 1998 and 2000.
- ◆ Beyond providing a measure of justice to the victims and ending impunity, Kosovo Specialist Court could have a positive societal impact by encouraging other initiatives dealing with the ignored causes, drivers and legacies of the conflict in Kosovo.
- ◆ However, the inhospitable social and political context in Kosovo means that the Specialist Court risks producing adverse effects as well, such as further polarising intra-ethnic and inter-ethnic relations, undermining political stability and institutional reforms, delaying the normalisation of relations between Kosovo and Serbia, and harming Kosovo's international credibility and standing.
- ◆ These potential risks can be mitigated if the Specialist Court, the Government of Kosovo and the international community cooperate in delivering a comprehensive and inclusive programme of outreach and public dialogue that tackles misinformation and nationalist counter-narratives; and undertake a whole-of-society approach to transitional justice that entails strengthening the efforts of local institutions to prosecute war crimes through domestic courts, supporting civil society initiatives that advance dealing with the wartime past, and integrating transitional justice themes in the EU enlargement process and the EU-facilitated dialogue between Kosovo and Serbia. ◆

Executive summary

Since the end of the 1998-99 Kosovo conflict, international and domestic hybrid courts have been the main fora for investigating the most serious war crimes and crimes against humanity in Kosovo.¹ The establishment in 2015 of the Kosovo Specialist Chambers and Specialist Prosecutor's Office (hereafter 'the Specialist Court') represents the most recent effort to adjudicate a specific set of alleged crimes committed by members of the Kosovo Liberation Army (KLA) during and immediately after the violent conflict. While formally part of the Kosovo legal system, the Specialist Court enjoys complete autonomy from all Kosovo institutions, it is located outside Kosovo in The Hague, and it is financed by the European Union (EU). The jurisdiction of the Specialist Court encompasses the investigation of grave cross-border and international crimes committed during and immediately after the conflict in Kosovo. The alleged crimes that the Specialist Court will try were cited in a Council of Europe report (widely known as the Marty Report), and were initially investigated by a Special Investigative Task Force (SITF). The SITF recommended establishing a special judicial arrangement located outside Kosovo to properly adjudicate the alleged crimes.

While the Specialist Court may provide a measure of justice for victims and a direct form of accountability for the alleged perpetrators, its work could be severely undermined by limited public understanding and significant political contestation in Kosovo. While the international community and ethnic Serb political actors perceive the Specialist Court as a positive step towards the administration of justice for unpunished crimes against minorities in Kosovo, the entire process leading to the establishment and operationalisation of the Specialist Court raised fierce and polarising debates among ethnic Albanian politicians and the public. Many ethnic Albanian political actors in Kosovo do not support the Specialist Court due to strong resentment about the fact that the institutions are focusing only on alleged KLA-related crimes, while ignoring other crimes that were not tried by preceding mechanisms for adjudicating war crimes. This is reinforced by ongoing ethnic divisions, a lack of enthusiasm for reconciliation and the prevalence of social denial regarding certain past abuses. Kosovo's authorities half-heartedly supported the establishment of the Specialist Court. However, it remains to be seen whether they will continue to cooperate and comply after the first indictments are formally issued. This also depends on the composition of Kosovo's new government following the snap elections in June 2017. Therefore there is a need to assess the potential impacts of the Specialist Court on political stability and on ethnic reconciliation in Kosovo and to explore ways of mitigating any negative effects that may arise from local contentions.

This study finds that the current political and social context in Kosovo will significantly complicate the work of the Specialist Court and could produce both positive and negative effects. First and foremost, the Specialist Court is expected to promote accountability for alleged

crimes committed by non-state actors in Kosovo and provide the victims and their families with a long-awaited measure of justice. However, this depends on the satisfactory performance of the Specialist Court and the broader supportive measures undertaken by political and civil society in Kosovo. Beyond providing a measure of justice to the victims, ending impunity and bringing legal clarity regarding the alleged crimes, the Specialist Court could create new momentum for enhancing local, national and wider regional efforts aimed at addressing the legacies of the conflict more comprehensively, promoting intra-ethnic and inter-ethnic reconciliation, and removing extremist elements from political processes.

The political contestation generated by the work of the Specialist Court could trigger potential risks in Kosovo, which could in turn undermine political stability, lead to a deterioration in ethnic relations, halt political reforms and deepen local hostility towards the international community. The Specialist Court has already become a catalyst that could further polarise intra-ethnic relations (among ethnic Albanians) and undermine the normalisation of inter-ethnic relations (between the ethnic Albanian and Serb communities) in Kosovo. The prevalence of misconceptions and misinformation regarding the mandate of the Specialist Court, coupled with the dominance of counter-narratives opposing its work, risks undermining the expected positive societal effects of the Court. For most Albanians in Kosovo, the Specialist Court is viewed as a politicised body lacking impartiality and intended to emphasise wrongdoings committed by former members of the KLA, thereby attempting to shift responsibility for war crimes in Kosovo away from Serbia. For ethnic Serbs, on the other hand, the Specialist Court represents an opportunity to undermine the political power of the KLA-affiliated leadership and subsequently alter the agenda of statebuilding and nation-building in Kosovo. Some also fear that the Specialist Court will negatively affect Kosovo's domestic reforms and harm its international reputation. Neighbouring Serbia has already started using the Specialist Court to downplay Serbia's responsibility for war crimes in Kosovo and the wider region in order to undermine Kosovo's international standing.

Caught between these divergent ethnic agendas, the Specialist Court risks further antagonising the Kosovo Albanian families of victims and missing persons, and undermining the already fragile local trust in international criminal justice. Moreover, the politicisation of the work of the Specialist Court could negatively impact the normalisation of relations between Kosovo and Serbia and undermine the EU's facilitation of this sensitive yet highly important process.

While the Specialist Court aims to hold perpetrators of alleged crimes to account, the potential risks of this process can be mitigated only if Kosovan and international stakeholders undertake a whole-of-society approach to transitional justice and dealing with the past. A comprehensive approach to dealing with the past in Kosovo entails strengthening the efforts of local institutions to prosecute war crimes through domestic courts, redoubling efforts to promote inclusive truth-telling, civic commemoration and non-discriminatory reparations for all social categories, and supporting local reconciliation initiatives. Kosovo's institutions should demonstrate political maturity by cooperating and complying with the requirements of the Specialist Court and discouraging obstructionist responses. For the process of dealing with the past to succeed in Kosovo, Serbia must take steps to support local, national and wider regional transitional justice initiatives. Notwithstanding the role of local ownership, the EU and wider international community have an indispensable role.

In addition, civil society groups, opinion-makers and the media can play an important role by taking a constructive, rational and empathetic stance on the importance of speaking

the truth, bringing justice and pursuing reconciliation for Kosovo society. It is only through a comprehensive and renewed commitment by all local, wider regional and international stakeholders that the unwanted impacts of the Specialist Court can be mitigated and the institution's potential to promote positive societal change maximised. ♦

Methodology

This study seeks to assess the potential impact of the Specialist Chambers and Specialist Prosecutor's Office (hereafter termed 'the Specialist Court'²) in Kosovo. In general, assessment of the impact of special war crime courts and other criminal justice mechanisms takes place after the trials have been completed.

This study utilises a framework developed by Impunity Watch for assessing international criminal tribunals, which assesses the extent to which their mechanisms and processes contribute to truth, justice and reconciliation, as defined as follows.³ *Truth* is measured by the extent to which the allegations, testimonies and court verdicts are considered to be truthful and the extent to which alleged crimes are acknowledged or denied by the wider public. *Justice* is measured by the public perception of the trials, knowledge of the work of the war crime courts, and the broader understanding of justice. *Reconciliation* is measured by human security, inter-ethnic contact, trust and mutual acceptance. Across the board, impact assessment studies have found that criminal justice measures usually produce "multiple, conflicting and often unexpected consequences".⁴ These effects could play a positive societal role, for example by contributing to ethnic reconciliation, easing psychological healing, fostering human rights and the rule of law, deterring adverse incidents and preventing future conflict. Yet this does exclude the possibility of such criminal justice measures exacerbating ethnic divisions, undermining political stability, and undermining local efforts for peace, justice and reconciliation.⁵ Since the Specialist Court has not yet started judicial proceedings, its performance and efficiency remain unknown. Yet a comprehensive analysis of the social and political context and the positions of key stakeholders can provide a useful basis for exploring the Specialist Court's potential societal impact and for devising mitigation strategies. At this early stage, observations about the impact of the Specialist Court are empirically grounded predictions and educated conjectures.

In assessing the potential positive and negative impacts of the Specialist Court, this study first provides an overview of the social and political context within which the institutions will operate; the overview includes an outline of the legacies of previous transitional justice processes in Kosovo.⁶ A documentary analysis is provided of the achievements and shortcomings of war crime trials and other transitional justice initiatives in Kosovo. The study then offers a comprehensive overview of key stages and political and legal obstacles before the Specialist Court was established to illustrate the challenging background conditions and possible difficulties that might be experienced in the future.

The assessment provides a comprehensive outlook on the Specialist Court's potential positive societal impacts. It also explores the potential risks and possible risk mitigation strategies. This central segment of the study is based on information drawn from desk research and field research in Kosovo, Brussels and The Hague during April and May 2017. Over 40 interviews and conversations were held with interlocutors from the Government of Kosovo, the Specialist Court, the European Commission and the European External Action Service, civil society actors

from all ethnic backgrounds, and other relevant interest groups and political commentators. The interviews and conversations aimed to understand participants' views on the Specialist Court's origin, establishment and likely impact.

Due to the sensitive nature of the Specialist Court, several difficulties were encountered in collecting data for this study. They included hesitation among local and international stakeholders about sharing their views, a dominant securitisation of knowledge about the Specialist Court prosecutorial and outreach strategy, and the notable prevalence of anecdotal information, repetition of points, and little substantive knowledge among the interviewees. An unnecessary and counterproductive level of suspicion seems to exist within the Specialist Court. This was articulated in a lack of transparency and the refusal to disclose information for public benefit, accompanied by extreme caution and a distrust of researchers and civil society. As this study is the first comprehensive independent assessment of the potential impact of the Specialist Court, such a lack of engagement represents a missed opportunity to reach out to a wider audience, to manage expectations and to rectify misconceptions. Similarly, core international stakeholders who have pushed for the establishment of the Specialist Court expressed an unwillingness to discuss the Specialist Court in an attempt to distance themselves from responsibility for the potential outcomes of this sensitive criminal justice process. Despite these unexpected constraints, this study has managed to assemble a solid body of evidence that can benefit relevant stakeholders and the general public. ♦

1. A brief overview of transitional justice initiatives in Kosovo

The Kosovo conflict was the last chapter in the violent dissolution of former Yugoslavia, which was characterised by a large number of casualties, devastating war crimes, ethnic cleansing and international military intervention. The number of casualties in the Kosovo conflict is estimated at 13,535, of whom 10,812 (80 per cent) were members of the ethnic Albanian majority, 2,197 (16 per cent) were members of the ethnic Serb minority, and 526 (4 per cent) were Roma, Bosniaks and members of other minority communities in Kosovo.⁷

The overwhelming majority of casualties were killed by Serbian army, police and paramilitary forces in a state-orchestrated ethnic cleansing campaign, which also aimed to crush the peaceful and armed resistance groups seeking self-determination and independent statehood.⁸ Moreover, 1,600 persons from all ethnic groups in Kosovo disappeared or were kidnapped and are still missing. Most of these criminal acts amount to war crimes and crimes against humanity, which are prohibited in international criminal law, international humanitarian law and the law of armed conflict. While most ethnic Albanian casualties were civilians, around 45 per cent of ethnic Serb casualties were military and police personnel. In the immediate aftermath of the armed conflict, most casualties were civilians from ethnic minority communities who were victims of situational acts of ethnic revenge and organised acts of property looting.

These legacies of the conflict continue to play a significant role in shaping peace in Kosovo and they negatively affect the prospects for reconciliation.⁹ The absence of a peace settlement between Kosovo and Serbia at the end of conflict resulted in the application of ad hoc transitional justice mechanisms, which were imposed from outside and were widely unpopular.¹⁰ Decades-long hostilities between Albanians and Serbs in Kosovo left a deep distrust of mono-ethnic domestic courts based in either Serbia or Kosovo.¹¹ The approach of the international community

to transitional justice in the former Yugoslavia has focused on criminal justice implemented through the UN's International Criminal Tribunal for the former Yugoslavia (ICTY) and hybrid domestic courts. Internationalised and hybrid courts pursue criminal punishment as a necessary retributive process to sanction individual perpetrators for grave breaches of international humanitarian law, to serve the needs of victims, to reinforce democratic norms, and to reduce political threats and deter immediate and future potential abusers.¹² Yet the focus of the international community in Kosovo on criminal justice was at the cost of other transitional justice approaches that could help the country deal comprehensively with the legacies of past violence.¹³

During its 24 years of operation, the ICTY's jurisdiction covered the entire territory of the former Yugoslavia during the periods of armed conflict. The ICTY managed to indict only 161 individuals for war crimes and serious violations of international humanitarian law in the entire former Yugoslav space.¹⁴ With regard to the Kosovo conflict, it mainly focused on "high level civilian, police, and military leaders, of whichever party to the conflict, who may be held responsible for crimes committed during the armed conflict in Kosovo".¹⁵ Between 1999 and 2017, the ICTY indicted and tried a small number of high-ranking Serb military and political officials for war crimes in Kosovo, including a former president, prime minister and ministers, as well as the key military, security and intelligence leadership. Concerning ethnic Albanians, the ICTY examined two high-profile cases against two Kosovo Liberation Army (KLA) regional commanders, Ramush Haradinaj and Fatmir Limaj (and their associates), both of whom were acquitted.¹⁶ The ICTY concluded that the scale and frequency of the alleged crimes committed by the KLA did not amount to crimes against humanity, and no grounds were found for joint coordination and cooperation in committing mass war crimes.¹⁷ The effectiveness of the ICTY was undermined by prolonged trials, appeals and retrials, limited cooperation from state authorities, problems with witness protection and difficulties retaining the accused in custody.¹⁸ While the ICTY is ending its mandate enjoying strong global recognition for having advanced international criminal justice, its legacy in the Western Balkans remains contested because ethnic communities remain polarised, victims are dissatisfied and many perpetrators remain free.¹⁹ While Albanians in Kosovo consider that the ICTY has not indicted enough Serbs for war crimes, the ICTY is perceived by Serbs in general as an anti-Serb mechanism.

Parallel to the ICTY, the UN Interim Administration Mission in Kosovo (UNMIK) administered domestic hybrid courts in Kosovo, which dealt with low-profile war crime investigations and provided in-country assistance to the ICTY.²⁰ In 2000, UNMIK took over the administration of war crime investigations, fearing that the biased investigations of local judicial institutions would have repercussions on the fragile stability during the post-conflict transition. Focusing on peacebuilding and statebuilding efforts, UNMIK's transitional justice track record is considered poor, and it managed to complete only around 40 war crime cases.²¹ Monitoring reports by the Organisation for Security and Cooperation in Europe (OSCE) found that UNMIK demonstrated systematic failures in adjudicating war crime cases, as was evident in delays in handling cases, a lack of continuity in judicial personnel, a lack of training and capacity to deal with war crime cases, and insufficient protection of witnesses and judges.²² UNMIK has also been criticised for poor management and archiving of war crime evidence. To a large extent, UNMIK's shortcomings were the result of uncondusive domestic conditions, such as political interference in war crime cases, weak local cooperation in handling cases, inadequate witness protection programmes and constant changes to witness testimonies.²³

Following Kosovo's declaration of independence in 2008, UNMIK significantly reduced its presence and ceased investigating war crimes as part of a deal to hand over relevant competences to the European Union (EU).²⁴ As a result, UNMIK handed the EU Rule of Law Mission in Kosovo (EULEX) information regarding a total number of 1,187 acts of suspected war crimes, plus an additional 50 cases that were ready for indictment.²⁵ Established within the framework of the EU's Common Security and Defence Policy (CSDP), EULEX was mandated first and foremost to strengthen the rule of law in Kosovo by monitoring, mentoring and advising Kosovo judicial institutions, police and customs authorities on a wide range of institutional and operational matters. This extensive mandate tended to overshadow war crime investigations; EULEX gave priority to corruption and organised crime cases, as they were thought easier to investigate and resolve.²⁶

EULEX's War Crimes Investigation Unit has assisted in the adjudication of 38 war crime cases²⁷, but each case took five years to complete on average.²⁸ In most cases, domestic hybrid court panels consisted of local and EU judges, and were supported by international prosecutors and police and the Special Prosecution Office of Kosovo (SPRK). Despite many challenges, EULEX has helped in identifying the bodies of victims and sites where missing persons are buried, and when circumstances permitted, it mediated mutual legal assistance between Kosovan and Serbian authorities.²⁹ However, EULEX's war crime investigations were significantly hindered by limited territorial and legal jurisdiction and Serbia's lack of cooperation in war crime cases regarding alleged perpetrators resident within Serbia.³⁰

In 2014, EULEX further downsized its presence in Kosovo, which resulted in a reduction in the number of war crime investigations. It is expected that all war crime cases will be transferred to Kosovo's judiciary by 2018. However, in the past ten years, there was a tendency among local judicial institutions to avoid handling war crime cases and to pass them on to EULEX whenever possible. The reluctance of local judicial institutions to prosecute war crime cases is partly due to the lack of appropriate protection for prosecutors and judges, and fears of political retaliation by criminalised power structures entrenched in Kosovo.³¹ This suggests that Kosovan institutions are unwilling to handle war crime cases involving politically powerful ex-KLA members, and significantly undermines the credibility of calls by Kosovan officials for more local ownership of transitional justice.³² In support of local ownership, EULEX helped Kosovo authorities set up a war crime department within the SPRK, which remains under EULEX's umbrella. Serbia's lack of willingness to cooperate with Kosovan bodies on cases implicating ethnic Serbs remains an additional complicating factor.

Kosovo institutions and civil society groups have undertaken a wide range of reparative and restorative justice initiatives to establish an institutional and social infrastructure for dealing with the past.³³ The Government of Kosovo established a Government Commission on Missing Persons in 2008, along with supporting forensic mechanisms, for the purpose of truth-seeking regarding missing persons. A Working Group involving Kosovo and Serbia on missing persons has existed since UNMIK's active governance of Kosovo. The Government of Kosovo provides reparations in the form of pensions and other privileges to KLA war veterans, invalids and families of 'martyrs' (KLA war dead), civilian victims and the survivors and victims of sexual violence during the conflict, as well as political prisoners and civilians who sustained physical injuries. Assistance for these categories is regulated by specific laws and is implemented by specific institutional structures. Despite these costly reparations schemes, civilian victims and those belonging to minority communities are dissatisfied because of what they see as the limited access to reparations.³⁴

An Inter-Ministerial Working Group on Dealing with the Past and Reconciliation (IMWG) was established in 2012 and mandated to devise a national strategy on transitional justice in Kosovo.³⁵ However, the IMWG fell short of promoting truth-telling and ethnic reconciliation within Kosovo, largely due to a lack of political commitment by the Government of Kosovo, internal disagreement among the representatives, and the lack of capacities and inadequate donor support.³⁶ Civil society organisations in Kosovo and the wider region have undertaken a wide range of initiatives for dealing with the past and for transitional justice. They have included the attempt to establish a regional truth commission (RECOM), and national efforts to document the conflict's casualties, monitor war crime trials, support the victims' communities and identify missing and disappeared persons.

So far, these transitional justice initiatives in Kosovo have produced mixed results. International and hybrid war crime courts are seen by both Albanian and Serb communities in Kosovo as mechanisms to hold the other side to account for wrongdoings, to cultivate a culture of victimhood, and to expand the political power of nationalist hardliners. The international and hybrid courts in Kosovo focused mainly on criminal justice and ignored other aspects of transitional justice, such as truth-seeking, victim support, apologies, reparations and community reconciliation.³⁷

Oriented toward retributive justice, hybrid judicial institutions in Kosovo have been the subject of contention and resistance, and they have been a significant factor in the emergence of ethno-nationalist dynamics of commemoration and mono-ethnic documentation of war crimes attuned mainly towards in-group power consolidation and the de-legitimation of others.³⁸ While there is extensive support across all ethnic groups in Kosovo for the idea of dealing with war crimes, there is a huge difference between Albanians and Serbs when it comes to the prosecution of individuals belonging to their respective ethnic groups. Hence, the unintended consequence of international criminal justice in Kosovo and Serbia has been the glorification of the respective perpetrators and marginalisation of the respective victims.

At the same time, the current process of dialogue between Kosovo and Serbia is being obstructed by the failure to address the past and resolve the issue of missing persons, to apologise for war crimes and to acknowledge past violence committed in Kosovo. This is evident in the most affected regions of Kosovo, where the local communities constantly reject attempts at reconciliation and multi-ethnicity imposed by the EU and national actors.³⁹ While these embedded dynamics are attributable to the lack of local commitment to properly resolving outstanding legacies of the past, the EU-facilitated dialogue for the normalisation of relations between Kosovo and Serbia has thus far failed to tackle questions regarding missing persons, war crimes and justice for the victims of past crimes, and reparations for human and economic losses in Kosovo.

Many of the challenges that the Specialist Court is likely to face are by-products of previous failures to deliver the expected justice to all victims and to invest seriously in resolving outstanding inter-ethnic and inter-state issues that inhibit peace, reconciliation and development in Kosovo and the wider region. Both international and national stakeholders share the responsibility for mismanaging transitional justice processes in Kosovo. ♦

2. Contextualising the establishment of the Kosovo Specialist Court

The Specialist Court represents the latest attempt of the international community to address a strand of alleged war crimes that remains problematic in Kosovo. It is as important to understand the Specialist Court's contested origins, externally-imposed character and mono-ethnic features as to analyse its eventual potential impact.

The Specialist Court has been established under Kosovo law to investigate and try crimes against humanity, war crimes and other crimes that were alleged in a report issued by the Council of Europe's Parliamentary Assembly (PACE) and released on 7 January 2011 (known as the Marty Report). This report was based on the work of the Council of Europe's Parliamentary Committee on Legal Affairs and Human Rights, which in 2008 appointed the Swiss senator Dick Marty as a rapporteur to investigate certain allegations and to propose further steps.⁴⁰ The PACE investigation was influenced by the memoirs of former ICTY prosecutor Carla Del Ponte, who raised allegations that crimes committed by certain members of the KLA remained unpunished as the ICTY and UNMIK were unable to gather sufficient evidence.⁴¹

The Marty Report outlined two broad allegations of criminal wrongdoings that had not been addressed.⁴² The first set of allegations concerned disappearances, detentions and killings of ethnic minorities and ethnic Albanian political opponents and those affiliated with the Serbian regime of Slobodan Milošević. The Marty Report suggested certain KLA factions could have committed crimes against wartime detainees (before June 1999) and post-war detainees (after June 1999) for various motives, such as revenge, punishment and profit. The second set of allegations concerned murders committed to facilitate the harvesting and trafficking of human organs. The Marty Report accused certain factions within the KLA (mainly from the Drenica region) of running a network of detention facilities in northern Albania for unlawful activities. The publication of the Marty Report in 2011 met with a strong negative reception among ethnic Albanians in Kosovo as it coincided with the victory of KLA-affiliated parties in national and local elections. The Government of Kosovo and the wider Albanian public dismissed the allegations as Serbian- and Russian-backed attempts to implicate the KLA in crimes against humanity

and war crimes, in an effort to counterbalance historical and legal Serbian responsibility for past conflicts, to undermine the recognition of Kosovo's independence, and to harm efforts to achieve ethnic reconciliation under international supervision.⁴³

While the international community endorsed the findings, they approached the Marty Report with caution as many of the allegations implicated the UN and the North Atlantic Treaty Organisation (NATO) for failing to properly investigate the alleged crimes in the first place. The Marty Report and related PACE resolution did not initially envisage the establishment of a special judicial arrangement such as the Specialist Chambers and Specialist Prosecutor's Office. Instead, they called on EU Member States and EULEX to allocate resources and confirm political support for investigating the alleged war crimes while offering protection to the witnesses in Kosovo. The EU feared that inaction would undermine its international credibility and its foreign policy strategy of promoting conflict prevention and international justice.⁴⁴ The option of investigating the alleged crimes in the Marty Report via the ICTY or EULEX's existing structure was deemed inappropriate for political and legal reasons. Aside from issues relating to jurisdiction and territoriality (the ICTY's mandate was to try crimes in the territory of the former Yugoslavia during the period of armed conflict, whereas the allegations in the Marty Report relate to the post-war period and include crimes allegedly committed in northern Albania), the ICTY was near the end of its mandate and no further extension by the UN Security Council was envisaged. EULEX lacked the resources and mandate to carry out such a complex criminal justice process.

In 2011 the EU established a Special Investigative Task Force (SITF) as the best possible solution to conduct an independent investigation into the allegations of war crimes and organised crime made in the Marty Report.⁴⁵ The EU's Political and Security Committee, which supervises common security and defence policy missions such as EULEX, authorised the SITF "to investigate and, if warranted, prosecute individuals for crimes alleged" in the Marty Report, and specifically to "examine unlawful detention, deportation, inhumane acts, torture and killings, as well as any other crimes, related to the allegations contained in the report".⁴⁶ The SITF's investigation extended into the territory of neighbouring Albania since the Marty Report alleged that sites within northern Albania were used for organ harvesting and trafficking. To facilitate these investigations, Albania was obliged to adopt a special law.⁴⁷ EU officials in Brussels acknowledge that the SITF's investigations were carried out while the EU was concluding the first agreement for the normalisation of relations between Kosovo and Serbia, raising questions regarding the role of the investigations in relation to these sensitive talks.⁴⁸ So far, the first agreement of principles governing the normalisation of relations between Kosovo and Serbia, which was signed in April 2013, has only been partially implemented due to a lack of domestic political support and disagreements on the implementation modalities.⁴⁹ Although the normalisation of relations between Kosovo and Serbia and the Specialist Court's operations are separate processes, they are likely to affect one another in the coming years.

After two and a half years of investigation, SITF lead prosecutor Clint Williamson issued a lengthy statement with the preliminary findings from what he called "the most comprehensive investigation ever done of crimes perpetrated in the period after the war ended in Kosovo in June 1999".⁵⁰ The SITF's preliminary findings were in line with most of the allegations made in the Marty Report. Without giving much detail, the SITF claimed to have found evidence to "file an indictment against certain senior officials of the former Kosovo Liberation Army", who "bear responsibility for a campaign of persecution that was directed at the ethnic Serb, Roma,

and other minority populations of Kosovo, and toward fellow Kosovo Albanians whom they labeled either to be collaborators with the Serbs or, more commonly, to have simply been political opponents of the KLA leadership”.⁵¹ The SITF statement cited evidence that these crimes “were conducted in an organized fashion and were sanctioned by certain individuals in the top levels of the KLA leadership”.⁵² Therefore, indictments of several senior officials of the former KLA were “likely to include charges for war crimes, and certain violations of the domestic Kosovo law, including murder”.⁵³ Regarding the controversial organ harvesting and trafficking allegations, the SITF concluded that “this practice did occur on a very limited scale” but there was “no indication that a significant portion of the ethnic minorities who went missing or were killed were victims of this practice”.⁵⁴ Last but not least, the SITF concluded that the environment was not conducive for undertaking an investigation of the Marty Report allegations in Kosovo itself. It appears that one of the main reasons for the EU’s decision to choose a location outside Kosovo for the mechanism for investigating and trying the alleged crimes was the negative reaction to the Marty Report in Kosovo, alongside weak judicial capacity for investigating war crimes and insufficient witness protection measures.⁵⁵

Following the SITF’s recommendations, the EU had little choice but to provide political and financial support for the establishment of the Specialist Court.⁵⁶ Although the EU considers the Specialist Court to be an inevitable measure in enhancing the rule of law in Kosovo, seen from the transitional justice perspective, the EU itself sees criminal justice as “a key priority for the EU when engaging in situations of gross violations of human rights and serious violations of international humanitarian law and international criminal law”.⁵⁷ From the outset, it was known that establishment of a special judicial mechanism to deal with the Marty Report allegations and the SITF’s preliminary findings would require extensive diplomatic and political pressure on Kosovo’s institutions. The United States and most of the EU Member States openly warned Kosovo’s institutions that if they failed to establish a special arrangement integrated within Kosovo’s legal system, the chances were high that the UN Security Council would authorise the formation of a UN special tribunal outside Kosovo’s jurisdiction.⁵⁸ To avoid the creation of such a UN special tribunal, the EU and Kosovo’s institutions had to go through a complex legal and institutional process to develop an arrangement for internationalised chambers and a prosecutor’s office that would be formally part of Kosovo’s legal system, but with supreme judicial autonomy and located outside the country. After strong political pressure from the EU, it was agreed that along with the extension of EULEX’s reconfigured mandate, the President of Kosovo would welcome the establishment of a specialist court.⁵⁹ In an Exchange of Letters with the EU’s High Representative for Foreign Policy, Catherine Ashton, Kosovo’s President Atifete Jahjaga agreed on 14 April 2014 that “a specialist court within the Kosovo court system and a specialist prosecutor’s office would be used for any trial and appellate proceedings arising from the SITF investigation”.⁶⁰ The Exchange of Letters was subsequently adopted as a law by the Assembly of Kosovo on 23 April 2014, which marked the first institutional commitment taken by Kosovo authorities to support the establishment of the Specialist Chambers and Specialist Prosecutor’s Office.⁶¹

The establishment of the Specialist Court took place around the same time that an EULEX-led panel issued the verdict for the high-profile trial of 15 former KLA members (known as the Drenica Group).⁶² The Drenica Group trial became highly politicised, triggering angry protests and, allegedly, witness intimidation. Under these volatile political conditions, the draft law on the Specialist Court, written entirely by the European Commission, was put to the vote in an extraordinary session of the Assembly.⁶³ After a lengthy political battle between the EU and the

Government of Kosovo, it was agreed that the Specialist Court would be embedded in Kosovo's legal system, an arrangement which inevitably required amending the constitution. The required constitutional changes were finally adopted on 7 March 2015 after intense political debate in the Assembly of Kosovo.⁶⁴ In an unprecedented situation, the Assembly of Kosovo's reluctance to pass the required constitutional changes almost caused a breach in Kosovo's relationship with the United States.⁶⁵

The new amendment to the constitution (Article 162) stipulates that the organisation, functioning and jurisdiction of the Specialist Court would be clarified by a specific law. This constitutional change states that the Specialist Chambers and the Specialist Prosecutor's Office shall "have full legal and juridical personality" and "all the necessary powers and mandate for their operation, judicial co-operation, assistance, witness protection, security, detention and the service of sentence outside the territory of Kosovo for anyone convicted".⁶⁶ To avoid any legal or political uncertainty, the President of Kosovo sent the constitutional amendments to the Constitutional Court of Kosovo for a review, which ultimately cleared the way for the amendment of the necessary legislation enabling the formal establishment of the Specialist Court of Kosovo.⁶⁷ On 3 August 2015, the Assembly of Kosovo adopted Law No. 05/L-053 'On the Specialist Chambers and Specialist Prosecutor's Office', which stipulated that, as an international obligation, these judicial institutions located outside the country will "secure independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-border and international crimes committed during and in the aftermath of the conflict in Kosovo" made in the Marty Report and by the SITF.⁶⁸ Members of the Assembly of Kosovo were widely criticised for their lack of political independence, voting based on their parties' instructions and the pressure of the international community.⁶⁹

On 15 February 2016, the Government of Kosovo and the Kingdom of the Netherlands signed an agreement to host the Specialist Court in The Hague with the sole purpose of ensuring its smooth and efficient functioning in the Netherlands.⁷⁰ The agreement not only allows the Netherlands to host the Specialist Chambers and Specialist Prosecutor's Office but also grants the right to detain suspects as part of the criminal proceedings. To ensure its effective operation, the Specialist Court has been granted full diplomatic privileges, immunities and facilities in the Netherlands such as are necessary for the fulfilment of its purpose. It will operate under the laws and regulations of the host state. The Specialist Court is located outside Kosovo primarily because of the international community's fears that criminal proceedings in Kosovo would not produce meaningful results as the alleged perpetrators are deeply entrenched within Kosovo's institutions and society.⁷¹ While the location of the Specialist Court outside Kosovo angered the Kosovo Government and certain civil society groups, it has also relieved local political and judicial institutions of the burden of trying former KLA members for the alleged crimes mentioned in the Marty Report.⁷² Although its formal judicial structures are embedded in Kosovo's constitutional and legal system, the special features of the Specialist Court makes it an internationalised court that is separate from Kosovo in all respects except for its name and formal legal affiliation.⁷³ The institutional setting of the Specialist Court has borrowed elements from the ICTY's rules of procedures and evidence, and from various hybrid war crime courts, including the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

The Specialist Chambers comprise two main organs: the Chambers and the Registry. The Chambers consist of the President of the Chambers and individual judges attached to each level of the court system in Kosovo, namely the Basic Court, the Court of Appeals, the Supreme

Court and the Constitutional Court. The Registry consists of a Defence Office, a Victims Participation Office, a Witness Protection and Support Office, a Detention Management Unit and an Ombudsperson's Office.⁷⁴ The Public Information and Communication Unit is also part of this structure.

The Specialist Prosecutor's Office is an independent body that has the "authority to conduct criminal investigations and to take responsibility for new or pending criminal investigations or proceedings within the subject matter jurisdiction of the Specialist Chambers..."⁷⁵ It will be supported by a separate police structure, which will exercise powers normally given to the Kosovo police under Kosovo law⁷⁶. While all authorities in Kosovo are required to assist the Specialist Prosecutor's Office in its investigations, it will not receive instructions from the Government of Kosovo or share any information with Kosovo authorities.

Seated in The Hague, the Specialist Court is staffed entirely by non-Kosovan, mostly European judges, prosecutors and administrative officers. This is due to the sensitive nature of the process, concerns about impartiality and fears that the inclusion of local staff would harm the investigative process. The exclusion of Kosovan nationals provoked furious reactions in Kosovo and contributed to a more hostile attitude towards the Specialist Court.⁷⁷ Judges are appointed by the Head of the EULEX upon recommendation by an independent selection panel consisting of experienced international judges and appointees. So far, 19 judges have been appointed and they will be assigned by the President of the Chambers. While the Specialist Court is an integral part of the Kosovo court system, its jurisdiction includes full legal personality and primacy over all other courts in Kosovo.

It is worth noting that the Specialist Court has established a rigorous and highly securitized witness protection arrangement to overcome the challenges encountered by the ICTY regarding witness intimidation and deaths. The Specialist Court has taken advanced measures to ensure the safety, physical and psychological well-being, dignity and privacy of all victims and witnesses. Victims and witnesses are also granted full privileges and immunities from legal processes regarding their spoken or written testimonies and are not subjected to immigration restrictions when they travel to provide testimony or appear before the courts.

The Law on the Specialist Court stipulates that it will adjudicate in accordance with Kosovo law as well as customary international law on war crimes and international human rights law. The Specialist Court will have temporal jurisdiction regarding crimes that occurred between 1 January 1998 and 31 December 2000, and territorially bounded jurisdiction regarding crimes that were either commissioned or committed in Kosovo.⁷⁸ The jurisdiction of the Specialist Court encompasses the investigation of grave trans-border and international crimes committed during and after the conflict in Kosovo, which are punishable by national and international law. While international law covers war crimes and crimes against humanity, Kosovo's domestic law covers ordinary crimes and criminal conduct. The type of war crimes that the Specialist Prosecutor's Office will investigate include: "murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds; enforced disappearance of persons; and other inhumane acts."⁷⁹ While the Specialist Court will seek individual criminal responsibility, no person will be tried before this body for acts that have already been tried by the ICTY or a court of Kosovo.⁸⁰ The Law on the Specialist Court stipulates that the "Rules of Procedure and Evidence shall include provisions relating to the reasonable

reparation to Victims from an accused who has pled or been adjudged guilty of a crime(s) which has directly resulted in harm to the Victims.”⁸¹

The Specialist Court is financed by the EU within the framework CSDP, granted through a special agreement with the Registrar. Financial contributions are also provided by third countries. As stipulated in the Law on the Specialist Court, they “shall have a budget, which shall not come from the budget of Kosovo” and “shall be not be subject to audit by the Auditor of Kosovo”.⁸² This ensures the Specialist Court has complete financial autonomy from the Government of Kosovo. The Specialist Court became operational in June 2017, almost two years after the Assembly of Kosovo voted in favour of its establishment. EU sources confirm that the Specialist Court has undertaken preparatory work for a smooth and effective filing of charges. Yet they have not provided any information on the prosecutorial strategy.⁸³ In light of the difficult birth of the Specialist Court and the failure of previous transitional justice processes in Kosovo, it is crucial to assess the likelihood of the Specialist Court successfully achieving its intended goals, and its possible impact on peace, stability and reconciliation in Kosovo and the wider region. ♦

3. Assessing the potential impact of the Kosovo Specialist Court

At this early stage, it can be noted that the Specialist Court has the potential to make a positive societal impact in Kosovo while also triggering certain risks. The remainder of this study explores the potential positive impact and looks at possible mitigation strategies for risks resulting from the Court's work.

3.1 Identifying potential positive impacts

Undoubtedly, the primary desired impact of the Special Court is to bring justice to the victims and to hold accused persons to account for their crimes. A recent public opinion poll shows that 47 per cent of Albanians and 64 per cent of Serbs in Kosovo believe that a legitimate outcome of the work of the Specialist Court would be to sentence all indictees proven guilty in accordance with the crimes they committed.⁸⁴ Even greater support was found among both ethnic groups when it comes to serving justice for victims and their families. Exempting alleged perpetrators from punishment risks reinforcing social perceptions that those individuals are invulnerable. Beyond convicting persons adjudged guilty of crimes, the Law on the Specialist Court allows for the possibility of ordering convicted persons to make reparations and restitution to the victims. This includes powers to have convicted individuals forfeit property and assets used for, or deriving from, the commission of the crime.⁸⁵

Potential positive impacts

1. Bringing justice to the victims, holding accused persons to account for their crimes and ending the cycle of impunity;
2. Providing legal clarity and liberating Kosovo's institutions and society from the burden of allegations;
3. Promoting accountability and the rule of law in Kosovo;
4. Opening the political and societal space for local actors to discuss the causes, drivers and legacies of the conflict in Kosovo;

Currently, there is a predominance in Kosovo of exclusive narratives of ethnic victimisation. Some of the interviewees believe that by acknowledging the suffering and harm caused to the victims, the Specialist Court could help generate sympathy for the suffering of other ethnic groups during and in the aftermath of the conflict and create space for more pluralistic narratives about victimhood in Kosovo.⁸⁶ Bringing justice to the victims and the families of those affected by ethnic or political murders, forced disappearance, sexual violence, mass deportation and inhumane treatment could potentially contribute to ethnic reconciliation and the resolution of outstanding inter-communal, societal and inter-state issues, such as property restitution, sustainable return and reintegration, and peaceful coexistence in public spaces and institutions. A public opinion poll conducted during 2015 found that “[t]he majority of Kosovans (59%) also think that the Special Court is likely to bring justice for the serious crimes committed in the 1990s”.⁸⁷ A more recent public opinion poll conducted in 2017 shows that 64.8 per cent of ethnic Albanians and 53.2 per cent of ethnic Serbs say it is important to deal with all crimes committed, or crimes suffered by all civilians, during and in the aftermath of the 1998-99 war.⁸⁸ Yet legal experts, political commentators and civil society activists in Kosovo, aware of the protracted and complex nature of war crime trials, are not optimistic that the Specialist Court will bring significant justice to the victims and their families in Kosovo.⁸⁹ In particular, members of the Serb community in Kosovo express mixed feelings about the effectiveness of the Specialist Court, while remaining optimistic that it may contribute to ethnic reconciliation by sending a message that nobody is above the law in Kosovo and that there is no place for impunity.⁹⁰

As an internationalised mechanism, the Specialist Court is likely to provide legal clarity, thereby removing a ‘cloud’ of uncertainty that has been cast over Kosovo by the allegations. The official discourse of the Government of Kosovo frames the establishment of the Specialist Court as an inevitable international obligation, which provides the country with an opportunity to clarify the allegations regarding war crimes that were made in the Marty Report, and to help the country move forward in achieving full membership in the Euro-Atlantic structures. A recent public opinion poll shows that 78 per cent of Albanians in Kosovo consider pressure from Kosovo’s international allies as the main reason why the Assembly of Kosovo agreed to establish the Specialist Court.⁹¹ Kosovo’s pragmatic politicians feared that opposing the Specialist Court would risk exposing the country to international isolation and impede efforts to extend recognition of Kosovo’s sovereignty. They claimed that the Specialist Court was created at the request of Kosovo’s international allies and that it therefore represents Kosovo’s commitment towards its international allies, who supported Kosovo’s liberation, its transition to independent statehood and the ongoing consolidation of international recognition.⁹² Despite dissatisfaction and disagreements, it is expected that, in the end, Kosovo’s cooperation with international justice will restore the confidence of international partners and is likely to boost support for completing diplomatic recognition and securing membership of key international and regional organisations.

The possibility that the Specialist Court could have a positive effect in promoting accountability and the rule of law in Kosovo cannot be ruled out. The Specialist Court represents one of the most challenging tests that Kosovo society must pass to demonstrate that it is an open, democratic society that respects truth, justice and the rule of law. This will be an essential indicator of the Europeanisation of Kosovo society and a collective statement on what direction Kosovo wants to take as a society. For some, the Specialist Court represents one final effort by the EU and the United States to address the previous failures of the ICTY, UNMIK, EULEX and Kosovo’s own judicial authorities to properly investigate a particular strand of alleged war crimes relating to the Kosovo conflict.⁹³

There is international consensus that national authorities should take the lead in war crime investigations and address them through domestic judicial mechanisms.⁹⁴ In Brussels, there is a general perception that it is now time for Kosovo's authorities to take responsibility for such war crime investigations.⁹⁵ Kosovo's authorities have openly discussed the possibility of finding new legal avenues for filing local, regional and international lawsuits for unpunished war crimes and material damage caused during the Kosovo conflict.⁹⁶ Therefore, the Specialist Court gives Kosovo the moral and political basis to open a route for judicial institutions to assume responsibility for the investigation of crimes relating to the conflict, to address all unpunished crimes in Kosovo affecting all ethnic groups, to be more assertive in raising the issues of missing persons and war reparations, and to seek EU assistance in obliging Serbia to cooperate more proactively with Kosovan authorities in bringing justice for past wrongdoings and serious crimes in Kosovo.

Another possible positive legacy of the Specialist Court could be to open the political and societal space for local actors to discuss the causes, drivers and legacies of the conflict in Kosovo. Sooner or later, both Albanian and Serb communities must have a frank discussion about the legacies of the conflict, set the record straight about casualties and the responsibility for wrongdoings, negotiate terms of moral recognition and material reparation, and undertake constructive confidence-building and conciliatory measures. In this context, the Specialist Court has the potential to contribute to a broader awareness of the importance of combining retributive and reparative transitional justice processes to deal comprehensively with the bitter legacies of the past. Although not directly related to the establishment of the Specialist Court, a more conducive environment is emerging in Kosovo for discussing a wide range of taboo issues that were ignored for many years, such as recognition of the victims of wartime sexual violence and a readiness to engage with and accept multiple narratives of the past.⁹⁷

Furthermore, the Specialist Court has the potential to gradually transform ethnic relations in Kosovo by breaking the collective impasses, such as binary views of the perpetrators and victims of the conflict, and the collective allocation of blame for past wrongdoings. Since the end of the conflict, Kosovo's Serb community has been placed under immense pressure by nationalist forces in Serbia to deny crimes committed by the Milošević regime and the association of local Serbs with those wrongdoings.⁹⁸ At the same time, the Serb community has also come under pressure from Kosovo's Albanian community to accept collective guilt, apologise for war crimes and integrate more into Kosovo society. In this context, the Specialist Court may provide symbolic redress for the Serb community in Kosovo, enabling them to overcome these binary dilemmas through a more granular shared understanding of the suffering on both sides, which could encourage the Serb community to engage more positively with Kosovo's institutions. So far, a narrative of collective victimhood has dominated among Kosovo Albanians. Consequently, the possibility of war crimes having been committed by the in-group armed insurgency remains a public taboo. The Specialist Court may encourage Kosovo's Albanian community to acknowledge that some members of their ethnic group also committed war crimes.⁹⁹

The Specialist Court could potentially help address outstanding inter-Albanian political issues. Kosovo's independence was sought both by Albanians who favoured a peaceful and non-violent resistance and those who favoured an armed resistance. This resulted in intra-ethnic polarisation and political conflict, which continue to affect political and social dynamics in Kosovo.¹⁰⁰ These two wings of Albanian resistance in Kosovo have accused one another on multiple occasions of committing political killings during and immediately after the conflict.¹⁰¹ To date, there are dozens of unresolved cases of politically-motivated killings of senior members

and associated journalists of the Democratic League of Kosovo (LDK). A senior official from the LDK recently argued that “political killings should not remain unpunished, especially those that are committed under important and sensitive circumstances for the fate of a country, as was the case with Kosovo when the LDK activists were murdered—the patriots that gave everything from themselves to achieve what we have now”.¹⁰² While the temporal jurisdiction of the Specialist Court might not cover all political killings, at least the Court may shed light on some of these allegations and bring justice to the families of the victims, as well as contributing to intra-ethnic political reconciliation.

Many in Kosovo seem to believe that the Specialist Court provides an opportunity to change the current political establishment in Kosovo, thereby demonstrating the interrelationship between transitional justice processes and regime change. It is no secret that one of the main roles of criminal prosecutions in the transitional justice context is “to remove some of the worst offenders from public life and send a strong signal to those who may contemplate committing such acts in the future”.¹⁰³ Several political commentators in Kosovo argue that, while the Specialist Court was created to punish alleged crimes, it may also help dislodge the current political stranglehold in Kosovo.¹⁰⁴ Unofficially, foreign diplomats do not deny that this sensitive process may offer more moderate and progressive voices a new impetus to push for reforms and bring an end to the country’s political and economic stagnation.¹⁰⁵

Many in the current political elite in Kosovo emerged from the KLA’s political and military structures. They have achieved political power and popular legitimacy largely based on their self-proclaimed entitlement derived from armed resistance during the conflict. Their former role in the armed struggle not only secured them electoral support but also gave them the possibility of occupying and exploiting newly established state institutions as a shield protecting them from accountability for past war crimes and for current corruption and misuse of power. In this regard, although the post-war criminalised power structures are not a target of the Specialist Court’s prosecutorial strategy, this is an opportunity to unmask the contested pathways to political power in Kosovo. Yet despite these expectations, political change through external transitional justice processes is considered counter-productive and could result in further political polarisation in Kosovo.¹⁰⁶ Contrary to what is often expected, transitional justice processes have unified the KLA-affiliated political parties and increased their popularity and political legitimacy, thereby counteracting the political consequences of accusations raised regarding criminal conduct after the war.

3.2 Understanding the potential risks

While the Specialist Court might be effective in addressing unpunished crimes documented in the Marty Report, many are sceptical about the ultimate impact of this body in Kosovo. The Specialist Court was established at a time when attempts to operationalise international criminal justice in Kosovo and the Western Balkans had not been wholly successful in bringing justice to the victims and fostering reconciliation. The attitude of the general public in Kosovo to the Specialist Court is mainly negative due to its controversial and sensitive mandate, the lack of local ownership and transparency about the process, and the lack of trust in transitional justice in general.¹⁰⁷

Potential risks

1. Polarising intra-ethnic relations and undermining the normalisation of inter-ethnic relations in Kosovo;
2. Destabilising the political and security environment and sidelining institutional reforms;
3. Tarnishing Kosovo's international reputation and standing;
4. Deepening local distrust of international criminal justice.

Within the ethnic Albanian community, the narrow focus of the Specialist Court's jurisdiction, which is based on examining the allegations of the Marty Report, has weakened the institution's social and political legitimacy.¹⁰⁸ An April 2017 poll shows that 76.4 per cent of ethnic Albanians believe it is unfair that the Specialist Court will mainly prosecute war crimes and crimes against humanity associated with the KLA.¹⁰⁹ Kosovo Albanian sceptics perceive the Specialist Court as unjustly imposed on the country and harmful to Kosovo's national interest and sovereignty. The narrow mandate of trying only alleged KLA crimes is seen as selective justice that does not contribute to the normalisation of ethnic relations in Kosovo. For many, the fact that the court will not tackle all the war crimes in Kosovo and will focus only on the alleged crimes of Albanians represents a deep politicisation of international criminal justice. In the existing social and political context of Kosovo, there is strong resentment among ethnic Albanians regarding the ICTY's perceived failure to punish many war crimes and crimes against humanity committed by the Serbian regime, as well as the failure of the international community to challenge the culture of impunity and denial in Serbia. Moreover, the unprecedented international pressure placed on Kosovo's institutions to establish the Specialist Court is considered undemocratic and illegitimate.¹¹⁰ The political opposition argues that the Specialist Court represents another effort by the international community to remove the responsibility from local institutions in Kosovo following their own failure to administer transitional justice.¹¹¹

As an externally-imposed mechanism, the Specialist Court already faces strong political and social rejection in Kosovo, which is accompanied by robust counter-narratives and media campaigns criticising the investigations, proceedings and eventual verdicts. The aforementioned poll shows that around 50 per cent of ethnic Albanians and Serbs believe that the Specialist Court will not deliver fair trials because it operates outside of Kosovo and has international judges and prosecutors.¹¹² This sense of injustice could further deepen local distrust of international justice, limit the possibilities for inter-ethnic coexistence, and ultimately damage the prospects for reconciliation in Kosovo and the wider region. In particular, there is a risk that the Specialist Court could further antagonise Kosovo Albanian victims, polarise ethnic relations and, in a worst-case scenario, boost local and national peace-breaking dynamics. Some family members of Kosovo Albanian victims and survivors have already spoken out against

the Specialist Court and they may well lose faith in international and domestic courts and their ability to bring justice for their past suffering.¹¹³ The families of missing persons and of the civilian victims and groups affiliated with the KLA feel that this process will not provide balanced justice or deal with their concerns.¹¹⁴

The Serb community in Kosovo is divided concerning the likely impact of the Specialist Court. Heavily influenced by Belgrade, the Serb community in Kosovo is not satisfied with the transitional justice mechanisms that have been set up to date, especially the war crime trials, initiatives concerning reparations, and recognition for the victims and the survivors.¹¹⁵ A recent poll shows that 69 per cent of Kosovo Serbs believe it is unlikely or very unlikely that the Specialist Court can bring justice to those who committed serious war crimes.¹¹⁶ They fear that the Specialist Court will prosecute only a handful of former KLA members, thereby omitting other unpunished crimes, with the sole purpose of justifying the international humanitarian intervention in Kosovo during 1999.¹¹⁷ Beyond this scepticism, the Serbian community living in the southern areas of Kosovo fear that the Specialist Court could trigger ethnic tensions, thereby undermining security in Serbian-populated areas and religious sites in southern Kosovo.¹¹⁸

A common view among local Serb civil society groups is that the Specialist Court could well puncture the dominant narrative that only the Serb regime has committed war crimes. They see this as an essential precondition for initiating a gradual process of reconciliation. While Serbia refuses to issue an official apology to the victims for the state-sponsored war crimes in Kosovo, some local Serb civil society groups in Kosovo acknowledge that war crimes have happened. Public opinion polls from five years ago reveal that 40 per cent of Kosovo Serbs claimed that Serbs had not committed crimes in Kosovo, compared with 80 per cent of Kosovo Albanians who believed that Albanians had not committed war crimes.¹¹⁹ Despite this, civil society is entrapped by mono-ethnic narratives regarding the past and the meaning of justice and reconciliation. Regardless of the due legal process and the cost, it appears as if Serbs in Kosovo will only be satisfied if top figures in the KLA political establishment are held responsible for war crimes in Kosovo. As stated by a Serb civil society activist: "This is the last chance to attempt to balance things out".¹²⁰ Therefore, the Specialist Court risks amplifying a revisionist tendency in Serbia and among the Serb community in Kosovo that downplays Serbia's ethnic cleansing campaign and the large-scale human rights abuses in Kosovo by focusing only on the post-war consequences of the conflicts, such as ethnic revenge, the displacement of people and the looting of property.

The United States and the EU Member States speak with a unified voice on the importance of serving justice by addressing the Marty Report allegations.¹²¹ However, there is a widely held perception among local stakeholders that transitional processes in Kosovo are being utilised by the international community to sabotage local actors and coerce them to endorse externally imposed policies and institutions, and pass controversial laws.¹²² In particular, the Specialist Court is seen as a new instrument of sabotage that will steer painful political reforms in Kosovo, including the normalisation of relations with Serbia and cooperation with international missions aimed at preserving domestic and regional stability.¹²³ In this context, the Specialist Court's work can easily be misrepresented as trading justice for political stability and unfavourable compromises. Furthermore, critical civil society groups fear that the Specialist Court is being welcomed in Kosovo not to serve justice for war crimes but rather to vindicate a faction of Kosovo's political elite that is implicated in corruption and organized crime.¹²⁴ This is seen as a process that deepens Kosovo's dependency on international actors for instigating societal

change, which ultimately disempowers citizens and depoliticises democracy in the country.

The politicisation of the work of the Specialist Court is likely to have a negative impact on the Kosovo-Serbia dialogue, which has currently stalled due to the failure on both sides to implement existing agreements. Since the start, opposition parties in Kosovo have opposed an unstructured and unconditional dialogue for the normalisation of relations without Serbia recognising Kosovo's independence, apologising for war crimes, returning the bodies of missing persons, providing reparation for war damage or bringing justice for unpunished crimes. The Specialist Court risks further contributing to the unpopularity of the dialogue with Serbia unless it is restructured in such a manner as to address Kosovo's recognition and to incorporate transitional justice into the dialogue. For the majority of Albanian citizens of Kosovo, this is key for the normalisation of relations between the two states and societies.

As the Specialist Court has been set up to investigate and try the alleged crimes outlined in the Marty Report, the main objections are likely to be raised by the KLA-affiliated political parties, veterans' associations and other affected individuals. Foreign diplomats unofficially admit that the consequences of the Specialist Court's work will depend largely on which individuals are indicted within the former KLA structures and how these individuals react once they are indicted.¹²⁵ Most of the former KLA structures continue to enjoy wide popular support in Kosovo. Indictments of key KLA leaders would disrupt Kosovo's political scene, which could destabilise the country. If the next government is led by KLA-affiliated parties, it could be severely affected by the indictments, setting off an unpredictable series of intra-Albanian political disagreements. On the other hand, if the next government consists of the non-KLA parties, the KLA-affiliated parties will have a strong incentive to resist indictments of their members. A recent poll indicated that 51 per cent of ethnic Albanians would be prepared to protest if KLA fighters are indicted by the Specialist Court, while 36 per cent would be prepared to act to prevent prosecution of members of the KLA.¹²⁶

So far, KLA veterans have openly threatened to cause trouble if indictments are issued for the political and military leadership of the KLA. While these threats are not new, they should not be underestimated. In the past, KLA veterans have actively protested against the investigation and prosecution of former KLA combatants undertaken by the ICTY, UNMIK and EULEX. The situation was generally contained by the KLA successor parties, who made a strategic choice to control veterans through political and financial incentives, thereby 'buying peace' from the most sensitive interest group in the country.¹²⁷ These risks notwithstanding, some of the interviewees in Kosovo have repeatedly stated that support for the KLA-affiliated structures has dropped over the years because the demographics of activism and social and ethnic cleavages have changed in favour of other, more pertinent socio-economic and governance issues.¹²⁸ Many contend that despite fears of troubles flaring up again, Kosovo is well prepared to deal with the arrest and indictment of key KLA political and military leaders. Kosovo has experience of handling such processes from the decade-long protracted ICTY and EULEX investigations of war crimes in Kosovo.¹²⁹

Yet the wider societal impact of the Specialist Court will largely depend on the narratives that the political elite and media use in the immediate future. A recent public opinion poll shows that 38 per cent of Kosovo Albanians think that they might not take part in protests if former senior KLA commanders and leaders of the international community speak out in favour of the Specialist Court and declare that no one is above the law.¹³⁰ Notably, Kosovo has a good media infrastructure for monitoring and reporting on justice, rule of law and war crimes, which can be

mobilised to mitigate the biased campaigns of political actors.¹³¹ New investigative journalism outlets have proven to be effective mechanisms in communicating the proceedings of war crime trials to the wider public in Kosovo. Kosovo's society has matured and become more tolerant and empathetic to the victims of war crimes, sexual violence and stories of suffering regardless of ethnic background.¹³² However, most of the media outlets in Kosovo are largely mono-ethnic, politically polarised and sometimes prone to misrepresent facts, events and personalities, incite hatred and use denigrating and discriminating language (although this is against the press code of Kosovo and the ethics of journalism).¹³³ In the past, the media in Kosovo have been subjective and biased in favour of the KLA members who were indicted by the ICTY, UNMIK or EULEX. Similarly, media reporting in Serbia regarding political developments in Kosovo is infused with hate speech, misinformation and the incitement of ethnic division.¹³⁴ Therefore, many preconditions are in place for this transitional justice process to be manipulated by external and domestic media for different political agendas. The challenge now is to mitigate these negative impacts.

Finally, on the international stage, there are fears that the Specialist Court is likely to tarnish Kosovo's reputation and provide its opponents with the opportunity to undermine the process of securing diplomatic recognition and obtaining membership of international organisations.¹³⁵ There is a risk that Serbia will attempt to collectivise the criminal responsibility explored by the Specialist Court, thereby offsetting its own guilt for past criminal abuses in Kosovo and the region. Although Serbia would have preferred a UN-administered special court, officials in Belgrade openly claimed that "we will seize any opportunity to punish the criminals, as that is in our interest".¹³⁶ The chances are high that the Specialist Court will be used by Serbia to delay the recognition of Kosovo and to incriminate the political and ethnic foundations of Kosovo's struggle for independence and statehood. ♦

4. Strengthening prospects for positive impact, mitigating risks

The prospects for the Specialist Court having a positive impact in Kosovo depend largely on improving local prosecutions, leveraging the cooperation of government stakeholders, and complementing transitional justice initiatives, especially those that integrate truth-finding, justice, reparation and reconciliation.

4.1 The need for a whole-of-society approach to transitional justice

While transitional justice is an integral part of post-conflict peacebuilding efforts, in Kosovo the international donor and diplomatic communities, governmental bodies, political parties and—to a certain extent—civil society groups have not made comprehensive efforts to deal with the past, build peace and bring about reconciliation.¹³⁷ At this early stage, neither Kosovan nor international actors, including the Specialist Court, appear to have a clear strategy on how to mitigate the potential negative consequences of the institution's work. The EU, the Specialist Court and the foreign diplomats in Kosovo are more concerned with the procedural aspects and often seem to be avoiding responsibility for the consequences of their actions.¹³⁸ Unless public expectations are managed properly, the Specialist Court will most likely further polarise ethnic communities in Kosovo, which in a worst-case scenario could end the normalisation of relations, increase insecurity and lead to violent inter-ethnic incidents.¹³⁹ Tailored, comprehensive and proactive mitigation measures are required to deal with the wide range of potential negative effects that the Specialist Court could produce in Kosovo and the wider region. These measures are the responsibility not just of the Specialist Court but of all the relevant Kosovan and international actors. To mitigate the potential unwanted side effects of the Specialist Court, the Government of Kosovo and the key international actors should develop an all-inclusive strategy for transitional justice and reconciliation in Kosovo.¹⁴⁰ A whole-of-society approach to transitional justice in Kosovo would require mobilising all sectors, including government, international missions and civil society groups, to strengthen the prospects for a

positive impact and to mitigate the risks associated with the Specialist Court.¹⁴¹

Such a comprehensive approach requires the Specialist Court to design and implement a comprehensive and inclusive outreach programme and work closely with Kosovo's institutions and civil society groups. Kosovo's institutions need to redouble their efforts to make transitional justice a national government policy, which will require not only cooperating with international justice mechanisms but also developing a more effective institutional and policy infrastructure that can support truth-telling initiatives, enhancing inter-ethnic dialogue and advocating the complementarity of local, national and wider regional initiatives for dealing with the past. The EU and its Member States must make space for transitional justice in the dialogue for the normalisation of relations between Kosovo and Serbia. They should also make further progress in EU accession processes conditional for both Kosovo and Serbia on satisfactory efforts to deal with the past and cooperate with international justice. The wider international community in Kosovo should redouble efforts to ensure that mutual legal assistance works between Kosovo and Serbia on war crime investigations, missing persons, reparations and property restitution.

The question of missing persons remains unresolved 18 years after the conflict: determining the fate and identifying the remains of persons who disappeared during the conflict and its immediate aftermath is central to reconciliation in Kosovo. As of 2017, there are still over 1,600 missing persons, while some 3,400 bodies have been identified. The question of the fate of missing persons has been used by nationalists in Kosovo to justify their unwillingness to restore relations with Serbs in Kosovo. One of the main obstacles to the identification of bodies and disappeared persons is Serbia's lack of political will to cooperate with the international community and Kosovan authorities in excavating suspected mass grave sites in Serbia. As regards the identification of Serbian missing persons in Kosovo, efforts undertaken by the Government of Kosovo are also insufficient. The international community and its missions in Kosovo have failed to prioritise the issue of missing persons. Identifying the bodies of missing persons and resolving the fate of the disappeared from all ethnic groups should be de-politicised and made a priority for all parties.

The first step towards reconciliation is accepting the truth. There is strong disagreement between Albanians and Serbs in Kosovo on when "the conflict" began and ended, and the period that should be the focus of the investigation into crimes.¹⁴² Most of the Serbian state-sponsored violence against Albanians occurred during the period of armed conflict (1998-99), whereas the smaller-scale instances of Albanian violence were more sporadic and continued into the post-conflict period (up to 2004). If there are two contradictory narratives about the past, then the prospect of a recurrence of the conflict remains. Accordingly, if Albanians and Serbs in Kosovo could agree on what happened in the past, this would be a major step towards a better future. The recent initiative by Kosovo's president to establish a Commission for Truth and Reconciliation (CTR) to "promote truth and reconciliation and the protection of human rights" deserves critical engagement by local and international actors, especially from victim communities and civil society.¹⁴³ While there was broad participation among the victim communities, civil society and international organisations in the four consultative meetings prior to the establishment of the CTR, it remains to be seen if this initiative can become an effective truth-seeking mechanism and avoid the shortcomings of the largely defunct IMWG.¹⁴⁴ The Government of Kosovo and civil society should decide whether to pursue the belated development of the National Strategy on Transitional Justice in Kosovo. In particular, the relationship between the CTR and the IMWG needs to be further clarified and modalities need

to be found to ensure that the CTR complements and contributes to regional initiatives such as the RECOM.

Nationalist discourses in Kosovo and Serbia have significantly undermined the legitimacy of transitional justice processes in the region. A change to the inflammatory and populist discourses of the political elite in Kosovo and Serbia is long overdue; they should assume a more constructive and positive stance on peace, development and reconciliation. The Serb community in Kosovo, especially local politicians and civil society activists, should avoid using the Specialist Court to try to create false equivalence between the crimes of the KLA and the crimes committed by Serbia in Kosovo. Both communities need to develop the maturity to acknowledge that crimes of differing scales were committed by all ethnicities at different times and for different reasons. Transitional justice needs to bring as many perpetrators as possible to account without skewing the process by attempting to reallocate the blame between ethnicities or draw equivalences. For this to happen, a broad inter-ethnic dialogue is needed to agree on an inclusive understanding of the period of the conflict and its aftermath and to distinguish between wartime and peacetime criminal conduct, namely between crimes committed during the conflict and everyday routine or organised ethnic violence. Moreover, some of the Specialist Court's negative impacts could be mitigated if Serbia changed its tone and attitude towards this sensitive process and assisted in resolving the fate of missing persons, cooperated with European and Kosovan authorities on war crime investigations, and supported local reconciliation processes between ethnic groups within Kosovo.¹⁴⁵

4.2 Closing the (mis)perception gap

International criminal justice mechanisms are often undermined by misconceptions relating to the political context of their establishment.¹⁴⁶ Public misinformation and lack of knowledge about the Specialist Court remain widespread in Kosovo. A recent poll shows that 60.4 per cent of ethnic Albanians and 59.2 per cent of ethnic Serbs do not believe they received enough information about the establishment and role of the Specialist Court.¹⁴⁷ In the absence of a proactive public information campaign in Kosovo, many myths and negative narratives have spread and have come to influence public perceptions and attitudes regarding the Specialist Court.¹⁴⁸

A well-prepared public communication and outreach strategy is essential to mitigate negative perceptions and widespread public misinformation. So far, the Public Information and Communication Unit within the Registry has held closed meetings with international missions and organisations in Kosovo, and has undertaken consultative meetings with selected civil society groups and the media. As such, the Registry seems to be following the same outreach model as the ICTY, which was widely criticised.¹⁴⁹ The Specialist Court has missed the opportunity to learn from the mistakes of other international criminal justice tribunals, especially on the importance of early outreach to counter misinformation and negative perceptions. A website, broadcasting trials on TV and holding closed meetings with selected stakeholders are not sufficient for effective outreach. The Registry's Public Information and Communication Unit should have more of a presence in Kosovo and reach out to broader interest groups. The current viewpoint that Kosovo's institutions are responsible for managing expectations seems misguided and needs to change.

As a matter of urgent priority, the Specialist Court should design a more effective outreach programme that involves both Kosovan and international actors to ensure that its work and

legacy will be properly understood and explained in Kosovo. It is important for the Specialist Court to dispel myths, rumours and counter-narratives about its mandate and its proceedings by reaching out to as many organisations and individuals in Kosovo as possible. If it does not do this, it risks reinvigorating ethnic tensions in Kosovo without having to face the political and physical consequences of such a negative impact. Current and former heads of international and bilateral diplomatic missions should take a more proactive stance in supporting and communicating the work of the Specialist Court. Stronger ties with civil society organisations are crucial. The Court should also provide sufficient access for monitoring and reporting on the trials as this can increase transparency and the availability of accurate public information.¹⁵⁰ While the judges and prosecutors working within the Specialist Court are not accountable to Kosovo's institutions, it is crucial that they seek societal accountability through public outreach activities and other dialogical engagements that ensure the entire process enjoys not only procedural legitimacy but also social legitimacy in Kosovo.

4.3 Leveraging the cooperation of national stakeholders

So far, Kosovo's institutions have cooperated smoothly with the EU and other international stakeholders in the establishment and operationalisation of the Specialist Court. Yet there is a risk that local institutions may resist cooperating appropriately with the organs of the Specialist Court. This could take the form of indirect actions such as delaying the formation of a new government after the June election, instigating other more urgent crises, or undertaking actions to revise the legal basis of the Specialist Court. Currently, most of the legal mechanisms to enforce the cooperation and compliance of Kosovo's institutions are regulated by the Law on the Specialist Court, which is integral to Kosovo's domestic law. Insofar as a solid legal framework is not a guarantee of successful enforcement in practice in circumstances where the cooperation of Kosovo's political, judicial and law enforcement institutions is essential, the Specialist Court is likely to experience practical and legal challenges that might complicate and delay trials. UNMIK, ICTY and EULEX all faced significant institutional resistance from Kosovo's authorities.

At present, the cooperation of Kosovo's institutions depends to a large extent on who comes to power after the recent elections. The KLA successor parties formed a pre-election coalition, which for many is symptomatic of their desire to unify in face of the uncertainties that the Specialist Court could bring for their political power, structures, and popular and international legitimacy.¹⁵¹ It is too early to judge what level of cooperation with the Specialist Court can be expected from a new government.

In any case, pressure on Kosovo's institutions to cooperate with the Specialist Court will most likely come from outside.¹⁵² The EU is, first and foremost, concerned with how to preserve the Kosovo-Serbia dialogue and maintain regional stability. It seems that the EU's main consideration when establishing the Specialist Court was not so much transitional justice as how to preserve the EU's investment in the Kosovo and Serbia dialogue.¹⁵³ While EULEX is implicated in the Specialist Court mandate, it does not appear willing to engage in the mitigation of negative consequences from the Court's work, and it does not have a clear strategy in place for doing so. As a binding framework, the EU Stabilisation and Association Agreement (SAA) obliges Kosovo "to fully cooperate with the ICTY and its residual mechanism, and all other investigations and prosecutions conducted under international auspices".¹⁵⁴ This obliges Kosovo to cooperate not only with EULEX but also implicitly with the Specialist Court in handing over

indicted individuals and providing the required political and institutional assistance. However, the EU and the US are likely to try and ensure Kosovo's compliance through political and financial incentives related to Kosovo's European integration, assistance with domestic reforms, and support for international recognition and memberships.¹⁵⁵ Some interviewees suggest that as a last resort and a deterrent measure, the presence of EULEX and NATO peacekeepers could be used to enforce the orders of the Specialist Prosecutor and mitigate possible violent incidents.¹⁵⁶

One of the most effective mitigation strategies would be to include themes related to missing persons, reparations for war damage, and mutual legal cooperation in investigating war crimes in future rounds of the EU-facilitated dialogue between Kosovo and Serbia. Civil society actors in Kosovo overwhelmingly favour the inclusion of transitional justice in the EU-facilitated dialogue to enhance confidence-building measures and regulate mutual legal assistance in handling war crime cases.¹⁵⁷ As the existing dialogue format only permits discussion and deals on themes that are mutually agreeable, the topics of missing persons and cross-border judicial cooperation on war crime investigations remain sensitive and encounter opposition from both sides.¹⁵⁸ Serbia is keen to retain the Specialist Court focus on alleged crimes committed by KLA members and is unwilling to engage with other transitional justice aspects that would reintroduce a focus on Serbian wrongdoing. Despite these challenges, the Specialist Court provides an opportunity to include transitional justice as a new theme in the dialogue, and in the whole framework for EU accession, especially the annual country reports.

Although transitional justice remains on the European Commission's enlargement agenda for the Western Balkans, the EU has reduced pressure on national governments to progress further on war crime investigations, the identification of missing persons and societal reconciliation. This is related to the EU's growing concern about the rise of Euroscepticism and anti-EU sentiment among the potential and candidate countries in the Western Balkans.¹⁵⁹ Nevertheless, the EU has a unique opportunity to apply its new policy framework on transitional justice in relation to Kosovo and Serbia, which would contribute significantly to the societal impact of the EU-facilitated dialogue, and also prepare these countries for joining the EU.¹⁶⁰

The EU as a regional actor has a political and moral responsibility to ensure that the Specialist Court—a body supported politically and financially by the EU—does not produce negative consequences that undermine political stability and undo improvements in inter-ethnic relations. For these reasons, the EU should not only see the Specialist Court from the perspective of the rule of law, but also complement it with broader efforts to promote reconciliation and normalise relations between Kosovo, Serbia and other states in the wider Western Balkan region.

4.4 Reinvigorating the role of civil society

Civil society groups are often relatively progressive forces in the context of transitional justice, able to promote truth-telling and facilitate social dialogue. The existing civil society infrastructure in Kosovo represents the best hope to mitigate some of the unwanted societal impacts of the Specialist Court. Civil society actors in Kosovo representing both ethnic communities recognise the need for a societal dialogue for reconciliation which goes beyond institutional and formal peace talks. They also recognise the importance of introducing transitional justice in the formal school curricula, as there is a real lack of knowledge about Kosovo's complex past, with poisonous misconceptions generated by mono-ethnic narratives

and nationalist school history textbooks. Civil society organisations could be a reliable partner in implementing a whole-of-society approach to transitional justice in Kosovo, thereby boosting bottom-up efforts for restorative justice and conciliatory dialogue in Kosovo.

However, the work of civil society groups in dealing with the past remains sensitive. Activists face constant criticism by nationalist forces and are often subjected to public smear campaigns. In particular, victims' associations remain vulnerable and exposed to nationalist discourses and hate speech in the public sphere in Kosovo. The civil society community in Kosovo working on transitional justice matters continues to rely heavily on external donations, and network-building and collaboration have been hindered by competition for funding and the lack of sufficient donor support. The civil society representatives in the Inter-Ministerial Working Group have been unable to contribute effectively to the completion of a much-needed National Strategy on Transitional Justice in Kosovo.¹⁶¹ A stronger civil society movement in Kosovo is needed, one that projects a vision for strategic transitional justice with clear priorities and possesses the capability to mobilise society and influence policy agendas in Kosovo and abroad.

There is also a need to look into the question of whether and how to create space for existing national and wider regional transitional justice initiatives such as RECOM, joint commemoration and documentation projects, and emplaced and virtual forms of commemoration in Kosovo that could contribute to promoting truth, change ethnic misperceptions, and gradually restore ethnic relations and trust.¹⁶² The EU and other donors should increase their support for civil society organisations' work on transitional justice to let them undertake outreach activities with youth and victims' communities.¹⁶³ For instance, the recently established Regional Youth Cooperation Office could lead regional efforts for societal dialogue and reconciliation.¹⁶⁴ The potential of civil society could also be bolstered by dedicated EU funding to support national and cross-border transitional justice projects, for example through the Instrument contributing to Stability and Peace (IcSP) or the Instrument for Pre-Accession Assistance (IPA). ♦

Conclusion and recommendations

The Kosovo Specialist Court represents the latest attempt by the international community to address the allegations of the Marty Report. Although the Specialist Court has become operational and is expected to proceed with formal indictments in the course of 2017, the lack of political support and widespread misinformation in Kosovo could affect its broader societal impact.

As a result, the Specialist Court is likely to produce mixed effects, some of which may enhance truth, justice and reconciliation, and others of which may undermine political and social stability in Kosovo. To improve the potential positive impact and mitigate risks, key Kosovan and international stakeholders need to demonstrate clear political commitment and take responsible, coordinated actions in support of truth, justice and reconciliation in Kosovo. By way of conclusion, this study offers specific policy recommendations to a wide range of actors aimed at increasing the likelihood of the Specialist Court making a positive impact in Kosovo.

KOSOVO SPECIALIST COURT SHOULD:

- ◆ Design and implement a comprehensive and inclusive programme of outreach and public dialogue in Kosovo that is tailored to explain clearly the work and mandate of the Specialist Court, thereby tackling misinformation and nationalist counter-narratives, while working to generate broad social acceptance of the process and its outcomes;
- ◆ Establish effective working relationships with Kosovo institutions, and conduct open consultative meetings and events with local stakeholders to demonstrate Kosovan ownership and ensure accountability;
- ◆ Work closely with civil society groups in Kosovo and create a role for them in promoting outreach and public dialogue, ensuring meaningful victim participation, and monitoring and reporting on the trial proceedings;
- ◆ Ensure timely and effective indictments, trials and judgments in full compliance with Kosovo's laws.

KOSOVO'S INSTITUTIONS AND POLITICAL ACTORS SHOULD:

- ◆ Offer full political, legal and technical support to the Specialist Court by ensuring that the Ministry of Justice, the Assembly, and the judicial and law enforcement institutions fully implement all the provisions of the Law on the Specialist Court and provide the necessary assistance on the ground;
- ◆ Ensure that all entrenched interests and barriers within institutions that might impede the work of the Specialist Court are dealt with;
- ◆ Redouble efforts to strengthen justice and the rule of law, and especially to enhance the capacities of the SPRK to investigate war crime cases, and the judiciary to conduct war crime trials, and develop new institutional mechanisms in pursuit of those goals;
- ◆ Renew political commitment and support at the highest level to prioritise the development of a National Strategy on Transitional Justice for Kosovo that takes a holistic approach to dealing with the past, either through the work of a revived IMWG or another body;
- ◆ Design an institutional infrastructure for coordinating local and national transitional justice initiatives, including the effective implementation of a future National Strategy on Transitional Justice;
- ◆ Ensure broad inclusion and ownership of all the relevant communities and of civil society in the current process of establishing a CTR, provide genuine political and financial support for this process, and ensure complementarity with other transitional justice processes;
- ◆ Ensure that the Media Commission and Press Council of Kosovo monitor media reporting on the work of the Specialist Court for accuracy and objectivity;
- ◆ Ensure that law enforcement agencies in Kosovo develop plans, in close collaboration with EULEX and the NATO-led Kosovo Force (KFOR), to mitigate public security risks deriving from the Specialist Court's judicial proceedings;
- ◆ Strengthen the role of the Assembly of Kosovo to promote transitional justice processes by engaging with victims' communities, tackling entrenched political interests that block reconciliation, and demanding government accountability on dealing with the past;
- ◆ Support the complementarity of local, national and wider regional initiatives for dealing with the past and transitional justice, and play a more active role in support of regional reconciliation efforts (RECOM).

THE EU AND KEY INTERNATIONAL STAKEHOLDERS IN KOSOVO SHOULD:

- ◆ Include outstanding issues related to transitional justice in the EU-facilitated dialogue for the normalisation of relations between Kosovo and Serbia;
- ◆ Make Kosovo's and Serbia's accession to the EU more explicitly and affirmatively conditional on satisfactory progress in dealing with the past and supporting transitional justice, including through inclusion of transitional justice in annual country reports;
- ◆ Provide more financial support to foster local and cross-border transitional justice projects through the IcSP and/or the IPA, as well as prioritise transitional justice in other EU-funded civil society projects;
- ◆ Redouble efforts to ensure that mutual legal assistance between Kosovo and Serbia on war crime investigation works;
- ◆ Recognise and reward the work of Kosovo institutions that supports the Specialist Court, for example by facilitating visa-free access to the Schengen zone, advancing Kosovo's European integration process, and supporting Kosovo's diplomatic efforts to secure new recognitions and obtain membership of international and regional organisations;
- ◆ Improve coordination amongst donors and other international actors and prioritise support for initiatives dealing with the past and transitional justice in Kosovo.

CIVIL SOCIETY SHOULD:

- ◆ Develop a strategic vision for transitional justice in Kosovo, which entails strengthening organisational capacities, and developing tangible strategic communication campaigns and long-term projects;
- ◆ Establish a new civil society coalition or network on transitional justice in Kosovo that tailors proactive advocacy on behalf of victims directed at the Kosovo government and international stakeholders, with serious investment in capacity building and effective and sustainable outreach campaigns that combat nationalist and exclusionary narratives;
- ◆ Work closely with the Public Information and Communication Unit (within the Registry) to develop a proactive, multi-stranded and transparent communication and dissemination strategy that mitigates potential undesired effects;
- ◆ Take a proactive role in leading and complementing national and wider regional initiatives for dealing with the past, including in the process of establishing a CTR and the RECOM. ◆

Endnotes

- 1 'Hybrid courts' are special domestic criminal justice mechanisms that consist of a mixture of international and local judges, prosecutors and enforcement staff, and that try war crimes, crimes against humanity and other serious crimes based on international and domestic law.
- 2 While the Kosovo Specialist Chambers and Specialist Prosecutor's Office are discrete institutions, this report applies the terminology in common use in Kosovo, referring to "the Specialist Court" as a single entity.
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- 15 ICTY, Statement by Carla Del Ponte, 'Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo', The Hague, 29 September 1999.
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- 17 For further details, see the ICTY track record for the Haradinaj et al. case: <http://www.icty.org/case/haradinaj/4>.
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