



REPORT OF THE OMBUDSPERSON

Following an Inquiry in the Complaint of [REDACTED] Against the Kosovo Specialist Prosecutor's Office

Ref. No. OMB-C-2021-05
Issued on 22 September 2022

The Ombudsperson of the Kosovo Specialist Chambers ('the Ombudsperson') sitting on 22 September 2022,

Having considered the aforementioned complaint, further to the authority of the Ombudsperson prescribed in Article 162(11) of the Kosovo Constitution, Article 34(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office and Rules 28 and 29 of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers ('RPE') on the establishment of the Office of the Ombudsperson and the Office of the Ombudsperson Complaints Procedure ('Complaints Procedure') adopted by the Ombudsperson on 12 September 2018,

Having deliberated, issues the following Report:

I. PROCEEDINGS BEFORE THE OMBUDSPERSON

1. The complaint was registered with the Ombudsperson on [REDACTED].
2. In support of his complaint, the complainant also submitted copies of his email correspondence, dated from [REDACTED] to [REDACTED], with the Specialist Prosecutor's Office ('SPO');
3. In support of his response, the Specialist Prosecutor also submitted copies of: (1) his email correspondence, dated from [REDACTED] to [REDACTED], with the complainant ; (2) The description of tasks and responsibilities of the

[REDACTED]; (3) his email exchange with members of the Chamber requesting the redaction of the name of the complainant; (4) the public redacted version of the post session Redaction Order of the hearing on [REDACTED]; (5) the public redacted version of the records of the hearing on [REDACTED].

4. In accordance with the provisions of Section 14.3 of the Complaints Procedure, in the handling of complaints and inquiries, the Ombudsperson's Office may, for the purpose of protecting the legitimate interests of a complainant or a third party, treat specific information contained in a complaint or others documents or material received as confidential. The complainant has confirmed that he objects to having his identity disclosed and the Ombudsperson has concluded that there are compelling reasons to treat the information received from the complainant as confidential.

II. THE FACTS

5. Having considered the correspondence from the complainant, including the documents submitted to the Ombudsperson, as well as the Specialist Prosecutor's submissions, including the documents submitted to the Ombudsperson, the facts are limited to a general summary as follows.

6. The complainant held the role of [REDACTED] within the SPO from [REDACTED] to [REDACTED].

7. Between [REDACTED] and [REDACTED], 16 documents containing the complainant's name and position were disclosed to the Defense in the [REDACTED] case, as part of the disclosure of over 1000 items to the Defence, with the names of at least 30 current and former members of the SPO.

8. On [REDACTED], Counsel for [REDACTED] ([REDACTED]), sent an email to the SPO requesting all information detailing the reasons of the departure of the complainant from the SPO. On [REDACTED], the Specialist Prosecutor informed the [REDACTED] and the Defense of its opposition to the request. On [REDACTED], the [REDACTED] issued an oral ruling denying the request of the Defence.

9. On [REDACTED], at [REDACTED]¹, Defence Counsel, [REDACTED], in the case *Prosecutor against* [REDACTED], asked Prosecuting Counsel,

¹ All mentions of time are indicated with the Central European Time.

[REDACTED], whether; “*there is an objection to [him] using the name of the former employee [REDACTED]*”. In answer to that question [REDACTED] stated: “*No objection since it’s a former employee*”, after which, the name of the complainant, having been publicly identified as [REDACTED], was mentioned during the public hearing.

10. On the same day, [REDACTED], around [REDACTED], a member of the [REDACTED] Defence team ([REDACTED]), requested the complainant’s contact details from the Prosecutor in this case ([REDACTED]). Following that request, a member of the SPO ([REDACTED]) texted the complainant and asked him if his personal contact details could be released to the Defence. This resulted in a phone call between the complainant and [REDACTED], at [REDACTED], during which the complainant expressly refused the request to have his personal contact details disclosed to Defence Counsel ([REDACTED]). Following that phone call, the complainant sent a text to the Head of Security of the SPO, [REDACTED], informing him about his refusal, and also asking him whether his name had been mentioned in court.

11. At [REDACTED], [REDACTED] contacted the complainant and told him that his name had been raised in open court by Defence Counsel in the case *Prosecutor against [REDACTED]*. Following a discussion with the complainant about the importance for him of having his identity protected, [REDACTED] assured him that an application to redact his name from the [REDACTED] records would be lodged.

12. Following that conversation, [REDACTED] spoke with [REDACTED] and an application to seek the redaction of the public transcript was sent by email to the [REDACTED] at [REDACTED].

13. On [REDACTED] at [REDACTED], the complainant was informed of the decision of the [REDACTED] to grant the redactions. The Redaction Order providing for the redaction of the all mentions of the name of the complainant from the transcripts of the public hearing of [REDACTED] was issued on [REDACTED].

14. On [REDACTED], the complainant sent an email to Deputy Specialist Prosecutor, [REDACTED], expressing his concerns about his name being put into public domain. Following a telephone conversation with [REDACTED], the complainant requested the following steps to be taken by the SPO:

- Written confirmation of his name being redacted from the [REDACTED] transcript;
- Removal of his personal details from any personal files held by SPO, KSC and EULEX (including his original SITF application form).

15. On [REDACTED], [REDACTED] confirmed the redaction of the complainant's name from the [REDACTED] transcript, but explained to him that his personal information could not be expunged from confidential personnel files held by the SPO, KSC and EULEX.

16. On [REDACTED], the complainant filed this complaint against the SPO with the Ombudsperson. The Ombudsperson, in accordance with Rule 29(2)(a) of the RPE, initiated a preliminary examination of the complaint.

17. On [REDACTED], in accordance with Section 7.1 of the Complaints Procedure, the Ombudsperson requested additional information from the complainant in relation to his complaint. On [REDACTED], the complainant submitted a response to the Ombudsperson

18. On [REDACTED], in accordance with Sections 9.3 and 9.4 of the Complaints Procedure, the Ombudsperson notified the Specialist Prosecutor of the complaint and sought his views as the body concerned. The Ombudsperson requested the views of the Specialist Prosecutor on both the admissibility and merits of the complaint and shared the complaint and attached documents. On [REDACTED], the Specialist Prosecutor submitted a response, which contained his views on the admissibility and merits of the complaint to the Ombudsperson.

19. On [REDACTED], the Specialist Prosecutor's submission was subsequently shared with the complainant, who, in accordance with Sections 9.3 and 9.4 of the Complaints Procedure, was given an opportunity to provide his views. On [REDACTED], a 30 days extension for the response was granted upon request by the Complainant. On [REDACTED], the complainant submitted a response which contained his views on the Specialist Prosecutor's submission to the Ombudsperson.

20. On [REDACTED], in accordance with Sections 9.3 and 9.4 of the Complaints Procedure, the Ombudsperson shared this response with the Specialist Prosecutor and sought his views on it. On [REDACTED], the Specialist Prosecutor submitted a response. On [REDACTED], in accordance with Section

7.1 of the Complaints Procedure, the Ombudsperson requested additional information from the Specialist Prosecutor. On [REDACTED], the Specialist Prosecutor submitted a response and provided additional information.

III. THE COMPLAINT

21. The complainant alleges that first, his name was disclosed in court, in the proceedings in the case of [REDACTED]. Second, he alleges that his name was not redacted from the documents disclosed to the Defence. He alleges that this was conducted without him being contacted in advance, and without any possibility for him to reply in the proceedings. The complainant alleges that the disclosure of his name in court and in the documents transmitted to the Defence affected his privacy, compromised his safety and those of others because of the specific sensitive role he had within the SPO. The complainant also alleges that this disclosure has adversely impacted the possibility for him to work in the same field in the future.

IV. THE LAW

22. In accordance with Rule 29(2)(a) of the RPE, the Ombudsperson may conduct inquiries into complaints received from any person asserting a violation of his or her rights by the Specialist Chambers ('SC') or the SPO. The SC and the SPO are obliged to act in compliance with the rights enshrined in the Constitution and the international human rights standards set out in that same instrument, which include both the European Convention on Human Rights ('ECHR')² and the International Covenant on Civil and Political Rights ('ICCPR')³. These instruments are binding on both the SC and the SPO.

23. Rule 28(2) of the RPE sets out the scope of the Ombudsperson's jurisdiction, which is limited to monitoring, defending and protecting the fundamental rights of persons interacting with the SC and the SPO.

² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), ('ECHR').

³ UN General Assembly International Covenant on Civil and Political Rights (16 December 1996), UN Treaty Series Vol. 999 ('ICCPR').

24. Pursuant to Article 162(2) of the Constitution of the Republic of Kosovo ('Kosovo Constitution,' or 'Constitution')⁴, the SC and the SPO are to act in accordance with Chapter II of the Constitution. Particularly, the provision notes that both "*shall uphold the protections enshrined within Chapter II of the Constitution, and in particular shall act in compliance with the international human rights standards guaranteed by Article 22 and subject to Article 55*".

25. As a matter of substantive law, the Ombudsperson is empowered to apply the human rights instruments as set out in Chapter II of the Kosovo Constitution. Therefore, the ECHR, ICCPR, and Kosovo Constitution are of particular relevance to the work of the Ombudsperson as they set out the minimum standard for the protection of human rights to be guaranteed by public authorities in a democratic society.

a. The Constitution of the Republic of Kosovo

26. Article 36 of the Kosovo Constitution sets out a general right of privacy for individuals.

27. Article 36(1) of the Constitution, which refers to the right of respect for private life, provides that "*[e]veryone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication*".

28. Article 36(4) states that "*[e]very person enjoys the right to protection of personal data. Collection, preservation, access, correction and use of personal data is regulated by law*".

29. Article 25(1) of the Kosovo Constitution provides that "*[e]very individual enjoys the right to life*".

b. Relevant International Human Rights Law

⁴ Constitution of the Republic of Kosovo, June 2008 (with 2020 amendments).

30. It is recalled that Chapter II of the Constitution emphasises the direct applicability of certain international human rights law instruments, including the ECHR and its Protocols and the ICCPR.

31. Article 8(1) of the ECHR provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence”.

32. The European Court of Human Rights (‘ECtHR’), which interprets the ECHR, has applied Article 8 in the area of employment and the exercise of professional and business activities.⁵

33. Article 17 of the ICCPR is also relevant and states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

34. Moreover, Article 2(1) of the ECHR provides that “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

35. Article 6(1) of the ICCPR is also relevant and states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

V. VIEWS SUBMITTED BY THE COMPLAINANT AND THE SPECIALIST PROSECUTOR

a. Submissions in the Complaint Form

36. In the Complaint Form received on [REDACTED], the complainant made the following submissions.

⁵ According to the ECtHR, “restrictions on an individual’s professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others”. See, e.g., ECtHR, *Martínez v. Spain*, no. 56030/07, ECHR 2012, para. 109; *Özpinar v. Turkey*, no. 20999/04, ECHR 2010, para. 46; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2015, para. 48.

37. First, the complainant alleges that his name should have been redacted from the material disclosed by the SPO to the Defence, and if for specific reasons his name was relevant to the case, he should have been contacted in advance and given the opportunity to provide his views about the disclosure. He also complains that he has no means of reply in any proceedings adversely affecting him.

38. Furthermore, the complainant alleges that the disclosure of his name damaged his reputation, compromised his safety and those of others considering his sensitive role.

b. Response of the Complainant to the Request for Additional Information

39. In his response, on [REDACTED], to a request for additional information by the Ombudsperson, the complainant made the following additional submissions.

40. The complainant alleges that the mention of his name in open court means that it could be heard by those following the feed on the day it was disclosed. As such, he notes that from his understanding of court proceedings, serving staff members of the SPO [REDACTED] are only referred to by their job title.

41. In that regard, he alleges that the disclosure of his name could have been particularly harmful, considering his former role for the SPO, [REDACTED]. Moreover, he alleges that with regard to his particular function, his identity should have been protected, otherwise there would be little point in [REDACTED].

42. In addition, the complainant alleges that the Specialist Prosecutor was unaware of the details of his current personal circumstances, such as the possibility for him to have gone back into the field of [REDACTED], and that the mention of his name in open court could have resulted in him having to step back from any such role. Moreover, the mention of his name in open court could have also damaged any prospect for a future employment in the field of [REDACTED].

43. The complainant also alleges that it is only his intervention that prevented further harm to his safety and that of his family.

c. First Response of the Specialist Prosecutor to the Submissions of the Complainant

44. In response to the submissions of the complainant, on [REDACTED], the Specialist Prosecutor made the following submissions.

45. First, the Specialist Prosecutor submits that the SPO is a public prosecution office and that no staff member can reasonably believe that his or her identity will never be disclosed, since everyone who is employed in the Office ultimately contributes to prosecutions and therefore, their identity may be disclosed to the Defence and the Court, and such a name may become public.

46. Regarding the role of the complainant as an SPO staff member, the Specialist Prosecutor submits that he served as [REDACTED]. As such, the Specialist Prosecutor submits that the complainant would have known that his reports would be disclosed to the Defence, as required by the RPE.

47. The Specialist Prosecutor submits that the steps taken by the Specialist Prosecutor regarding the disclosure of the complainant's identity was completely in compliance with the applicable rules, decisions of the [REDACTED], and Practice Directives of the Registry. As such, the Specialist Prosecutor submits that, in accordance with Rules 102 and 103 of the RPE, the SPO must disclose all relevant material to the Defence. As a result, staff members, such as the complainant, who were engaged in the collection of evidence, ought to have known that there is every prospect that they may have to testify with regard to their work in hearings or trials before the KSC. In support of this, the Specialist Prosecutor submits that the successor to the complainant [REDACTED] was required to testify in the [REDACTED]. Therefore, the Specialist Prosecutor submits that the protection sought by the complainant, a former staff member, would have exceeded those of serving staff members with similar functions to those of the complainant.

48. Regarding the documents disclosed to the Defence, the Specialist Prosecutor submits that information may only be withheld from the Defence upon justification, and is subject to the approval of the court. The Specialist Prosecutor further submits that there is, therefore, no general basis for withholding staff identities, and that this is understood by all staff members and is consistent with the Rules and practice of other International Tribunals. The Specialist Prosecutor submits that the Framework Decision on Disclosure of Evidence and Related Matters [REDACTED] ('Framework Decision') only

permits the SPO to redact the name of staff members who travel regularly to, or are based in the field, insofar as such disclosure could put them or their work at risk. The Specialist Prosecutor submits that this, by its terms, is a narrow exception and only apply to a limited category of current staff members and does not apply to former staff members. In any case, the Specialist Prosecutor also submits that the reports authored by the complainant's successor, were also disclosed without any redaction.

49. Regarding the public disclosure of staff identities in the context of ongoing proceedings, the Specialist Prosecutor refers to the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, 17 May 2019, Article 33(3) ('Registry Practice Direction'), participants in proceedings are directed to refer to staff members and their functions rather than identities, unless strictly necessary. In this regard, the Specialist Prosecutor submits that this provision is limited by its terms to serving staff members.

50. The Specialist Prosecutor points to the fact that the SPO sought protective measures, in particular, pseudonyms, for the complainant's successor and an SPO investigator, when they testified [REDACTED]. This request was denied by the [REDACTED] resulting in the identities and testimony of both staff members being heard during the public proceedings.

51. In relation to the complainant's role when he was an SPO member, the Specialist Prosecutor offered the following observations and submissions.

52. The complainant served as the [REDACTED] while he was with the SPO. [REDACTED].

53. The Specialist Prosecutor submits that the complainant would have known, therefore, even before leaving the employment of the SPO on [REDACTED], that the reports he authored would be disclosed to the Defence in the ongoing prosecution of [REDACTED], as required by the rules.

54. The Specialist Prosecutor submits that all steps taken by the SPO in respect of the complainant's identity were completely in keeping with the applicable rules, decisions of the [REDACTED] and, Practice Directions of the Registry.

55. Furthermore, the Specialist Prosecutor states that when the complainant requested, on [REDACTED], that his name be redacted from the public

transcript of the [REDACTED], the SPO acted promptly to secure such an Order [REDACTED].

56. In addressing the specific request of the complainant that the names of former employees be redacted from disclosed materials or to be put on notice if disclosure is required, the Specialist Prosecutor offers the following submissions.

57. The Specialist Prosecutor states that the demand for blanket redactions is inconsistent with the applicable rules and procedures of this court regarding disclosure and the transparency of proceedings.

58. Moreover, the Specialist Prosecutor argues that, considering the dozens of former staff members of the SPO, and its predecessor organisation, the SITF, whose names appear in the tens of thousands of documents disclosed by the SPO as part of its disclosure obligations, redacting those names and/or requiring the SPO to contact them would be unwarranted, extraordinarily onerous, would undoubtedly result in further litigation, and would add significant delay to the proceedings.

59. The Specialist Prosecutor submits that the SPO is committed to take any necessary and feasible steps to ensure the safety and security of witnesses, serving staff members, and former staff members, where there is a specific basis to do so.

d. Response of the Complainant to the Response of the Specialist Prosecutor

60. In his response to the Response of the Specialist Prosecutor, dated [REDACTED], the complainant made the following submissions.

61. First, the complainant acknowledges that he would have given evidence in the Case of [REDACTED], especially on the reports he compiled, and that such evidence may have been public. However, he argues that there are provisions allowing evidence to be heard in private session, and for witnesses to have their identity protected by various means.

62. Addressing the fact that the [REDACTED] rejected a request by the SPO for protective measures to be applied to his successor and an SPO investigator,

the complainant alleges that this demonstrates the Specialist Prosecutor's failure to grasp the points of difference in terms of [REDACTED] and an investigator.

63. The complainant alleges that if the applications for the use of pseudonyms for the [REDACTED] and the investigator were similar and the submissions were not different in substance for each, then the application for [REDACTED] was wholly inadequate.

64. In addition, the complainant alleges that the fact that attempts were made by Defence Council to contact him after the disclosure of his name demonstrates how the SPO was careless. Moreover, he also alleges that the redaction of his name from the relevant documents does not appear particularly onerous.

65. Finally, the complainant, although grateful for the actions taken by the SPO to remove his name from the record of the court proceedings, also alleges that despite the rules referred to by the Specialist Prosecutor in his response, the provisions of the KSC RPE that provide for the protection of sensitive information should have applied here and thus result in the non-disclosure of his name. The complainant alleges that this is especially the case since the SPO neither knew of cared about his current circumstances, and no prior information was given to him that his name would be mentioned.

e. Reply of the Specialist Prosecutor to the Response of the Complainant

66. In his reply to the response of the complainant, on [REDACTED] the Specialist Prosecutor submits the following.

67. Much of the complainant's response is beyond the scope of his complains. The Specialist Prosecutor highlights the complainant's assertion that the application for protective measures for his successor was, in his assessment, deficient.

68. The Specialist Prosecutor submits that, in fact, the arguments in support of protective measures for the complainant's successor were fully presented to the [REDACTED] in both written and oral submissions. After considering the arguments and applicable law, the [REDACTED] rejected the prosecution's request.

69. The Specialist Prosecutor submits that the complainant's personal views on how the prosecution conducted the litigation in this matter have no bearing on his complaint.

70. The Specialist Prosecutor submits that the remainder of the complainant's response is not responsive to the points set forth in his letter of [REDACTED]. The Specialist Prosecutor points to the request by the complainant to be provided with a copy of the application made by the SPO to redact his name from the public record. The Specialist Prosecutor submits that this request was made by an email sent on [REDACTED], which was the normal procedure for requesting redactions of public transcripts. The Specialist Prosecutor states that this email detailed the complainant's security concerns and his concerns regarding his prospects to obtain future employment as a [REDACTED]. The application was successful and the complainant's name was immediately redacted from the public record.

f. Response of the Specialist Prosecutor to the Request for Additional Information

71. In order to better understand the views of the Specialist Prosecutor, the Ombudsperson wrote to the Specialist Prosecutor on [REDACTED] seeking clarification and additional information and, in this regard, formulated precise questions for the Specialist Prosecutor to answer. On [REDACTED] the Specialist Prosecutor responded with the following observations.

72. Regarding the mention of the name of the complainant in court, the Specialist Prosecutor indicates that this matter is regulated by [REDACTED] the Registry Practice Direction, which directs participants in proceedings to refer to staff members by their function rather than identity unless strictly necessary. The Specialist Prosecutor submits that even if, on the face of it, the provision applies to serving staff members only, he acknowledges that the rationale for this rule could be extended to past staff members and that therefore, the SPO will in the future proactively undertake to have past staff members referenced in open court by position rather than name, unless strictly necessary or otherwise directed by the court. The Specialist Prosecutor argues that the name of the complainant was subsequently redacted from the transcript and does not appear in the public record.

73. Regarding the mention of the name of the complainant in the documents disclosed to the Defence, the Specialist Prosecutor submits that the SPO's disclosure obligations are set forth in Rules 102 and 103 of the RPE. The Specialist Prosecutor submits that the rules mandate the disclosure of all inculpatory, exculpatory and relevant material, permitting information to be redacted or withheld from the Defence only in narrow, and explicitly delineated, circumstances.

74. In this regard, the Specialist Prosecutor submits that there is no blanket rule permitting the SPO to redact the names of staff members or former staff members. The Framework Decision, [REDACTED], permits redaction of staff members names only when their function requires it, namely if they regularly travel to the field or are based there, or disclosure would put them or their work at risk.

75. The Specialist Prosecutor submits that there is no dispute that the complainant does not fall under this provision and did not even when he was employed by the SPO, and therefore there is simply no basis under the rules to redact his name.

76. Moreover, the Specialist Prosecutor highlights the broader principles at stake for the SPO. He states that the SPO is a public prosecution office, not an intelligence organisation and therefore must function openly and transparently, with narrow and well justified exceptions, which is essential to protect the rights of the Accused and to ensure confidence in the proceedings.

77. The Specialist Prosecutor submits that staff of the SPO understand the applicable rules and the public function of the office and that anything they do is disclosable and subject to scrutiny in court.

78. The Specialist Prosecutor points to the fact that these principles were particularly salient [REDACTED]. The Specialist Prosecutor submits that the SPO bore the burden of rebutting this defence and did so, in part, by being transparent about its functioning and its investigation.

79. In relation to the complainant's objection to the Defence [REDACTED] requesting his contact details, the Specialist Prosecutor argues that there is no genuine dispute on this matter as the SPO had always agreed that such information will not be disclosed without the agreement of the staff member.

80. The Specialist Prosecutor points to that fact that in the instant case the complainant was contacted by the SPO to see if he would consent to his contact details being shared. He did not, and therefore his details were not shared.

81. The Specialist Prosecutor draws attention to the fact the request from the Defence arose, not from the complainant's name being disclosed in court, but because the Defence had questions [REDACTED].

82. With regard to the complainant's request that all his personal information be redacted from personnel files held by the SPO, KSC and EULEX, the Specialist Prosecutor submits that the complainant's personnel file is confidential and there is no justification or mechanism to expunge information from within it.

83. Finally, with regard to the complainant's claim that the disclosure of his name in the public record and to the Defence may have compromised his security and opportunities to find future employment, the Specialist Prosecutor submits that the SPO takes very seriously any possibility of threat to the security or well-being of any current or former staff member. In this case, the Specialist Prosecutor submits that there is no basis to the belief that the complainant's security or future employment opportunities have been jeopardised by the disclosure of his name [REDACTED].

VI. THE OMBUDSPERSON'S ASSESSMENT

84. Having assessed the complaint, the Ombudsperson will deal with it in two separate strands. First, the complainant objects to his name having been disclosed in court and second, he objects to his name being included in documents disclosed to the Defence.

a. The Disclosure of the Name of the Complainant in Open Court

85. In relation to the first strand of the complaint, the Ombudsperson notes that whilst the complainant did not specifically identify the fundamental rights which he claims were violated by the SPO during the court proceedings, it is clear from the content of his application and submissions that his complaint pertains to his right to private life, his right to life, and his right to a private and

professional life, as protected by Articles 25 and 36 of the Constitution of Kosovo, Articles 2 and 8 of the ECHR and Articles 6 and 17 of the ICCPR.

86. Pursuant to Rules 29(1) and 29(3)(a) of the RPE, the Ombudsperson shall not intervene in cases or other legal proceedings before the SC, except in instances of unreasonable delays.⁶

87. The Ombudsperson is of the view that the first strand of the complaint directly relates to the conduct of the legal proceedings in the case of the Specialist Prosecutor v. [REDACTED]. The protection of the complainant during the public hearing and the conduct of those proceedings is a matter for the Court.

88. Therefore, the Ombudsperson is of the view that any potential issues arising from the complaint as a direct result of proceedings is outside his jurisdiction. Accordingly, the Ombudsperson lacks jurisdiction over this element of the complaint because he is prohibited from intervening in cases or other legal proceedings before the SC pursuant to Rule 29(1), as well as Rule 29(3)(a) of the RPE.

89. The Ombudsperson notes that a post session Redaction Order was issued by [REDACTED] providing for the redaction of the name of the complainant from the public records following an application by the SPO.

b. The Disclosure of the Name of the Complainant in Documents Transmitted to the Defence

90. Whilst the complainant did not specifically identify the fundamental rights which he claims were violated by the SPO, it is clear from the content of his application and submissions that his complaint pertains to his right to private life, his right to life, and his right to a private and professional life, as protected by Articles 25 and 36 of the Constitution of Kosovo, Articles 2 and 8 of the ECHR and Articles 6 and 17 of the ICCPR.

⁶ See also CDL-AD(2019)005 – *Principles on the Protection and Promotion of the Ombudsman Institution* ('The Venice Principles'), European Commission for Democracy Through Law (Venice Commission) (Strasbourg, 2 May 2019), para. 13 ("The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system"); *Inadmissibility Decision of the Ombudsperson following a complaint of Driton Lajçi against the Specialist Prosecutor's Office and Against the Kosovo Specialist Chambers*, issued on 2 August 2021, OMB-C-2021-02, para. 36-38

91. Rule 29(3)(a) of the RPE prohibits the Ombudsperson from intervening in judicial proceedings. However, this provision does not preclude the Ombudsperson from admitting and examining complaints formulated against legislative provisions or administrative procedures in place within an organ of the KSC-SPO if these provisions or procedures, when applied by the body concerned, engage the fundamental rights of the complainant.

92. The Ombudsperson is satisfied that the second strand of the complaint raises matters that relate to specific regulatory frameworks and how the SPO applies those frameworks.

93. Accordingly, the Ombudsperson admits the second strand of the complaint, pursuant to Rule 29(3) of the RPE.

94. Regarding the alleged violation of the right to private life of the complainant, according to Article 8(1) of the ECHR, “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. While the provision is silent with regard to its application in the area of employment law, and the exercise of professional and business activities, the ECtHR has already applied Article 8 in this area.⁷ The ECtHR has concluded that “there are a number of elements relevant to the consideration of whether a person’s private life is concerned by measures affected outside his or her home or private premises”.⁸ In particular, the ECtHR has examined on several occasions “whether individuals had a reasonable expectation that their privacy would be respected and protected”.⁹ Furthermore, the ECtHR has concluded that private life considerations would also arise where there has been a “compilation of data on a particular individual, the processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable”.¹⁰

95. The Ombudsperson recalls that, notwithstanding the possible engagement of Article 8 in the exercise of professional activities, the application of Article 8 has always been limited to those measures affecting privacy beyond what is reasonably foreseeable.

⁷ See e.g., ECtHR, *Martínez v. Spain*, no. 56030/07, ECHR 2012, para. 109; *Özpinar v. Turkey*, no. 20999/04, ECHR 2010, para. 46; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2015, para. 48

⁸ *Benedik v. Slovenia*, no. 62357/14, ECHR 2018, para. 101.

⁹ *Ibid.*

¹⁰ See *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, ECHR 2017 para. 136.

96. In this case, the Ombudsperson notes that although the complainant was primarily employed as [REDACTED], the description of his tasks and responsibilities, as set out in his job description, provides that he could be requested to undertake investigative functions which, by their very nature, would, most likely, be subject to disclosure.

97. The reality of the situation is that the complainant was performing the role of an investigator when he drafted the documents disclosed to the Defence [REDACTED]. In that regard, the Ombudsperson finds that the complainant has failed to demonstrate the extent to which, because of his particular position or privacy considerations, he could have reasonably expected that his name would be redacted from the documents disclosed to the Defence, in accordance with the provisions of Article 107 and 108 of the RPE.

98. The Ombudsperson accepts that the SPO discloses information to the Defence confidentially, meaning that it can be used for investigative or court purposes, but cannot be shared publicly, and the Ombudsperson is satisfied that this was understood by the complainant.

99. Indeed, the complainant, in his submissions to the Ombudsperson, stated that “[i]t was wholly predictable that reports I created would have been relevant. Indeed, I would have expected to give evidence, as my successor did. However, I would have made the strongest of applications for my identity **to be kept out of the public domain through protective measures...**”¹¹(Emphasis added)

100. The Ombudsperson finds that the sharing of the complainant’s name with the Defence does not amount to a disclosure of his identity in the public domain and is satisfied that the SPO did so on the basis of its statutory disclosure obligations. The Ombudsperson further concludes that the sharing of this information with the Defence was done so on the basis of confidentiality, as set out in para. 98 above.

101. Furthermore, the Ombudsperson accepts the Specialist Prosecutor’s submission that the complainant does not fall under [REDACTED] the Framework Decision, and therefore there was no basis under the rules to redact his name.

¹¹ Response of the Complainant to the Request for Additional Information, [REDACTED], p.3.

102. In relation to the complainant's objection to the Defence seeking his personal contact details, the Ombudsperson finds that there is no issue at stake here. It is, of course, the right of the Defence to request such information from the prosecution, should it see fit to do so. However, as was clear in the instant case, the SPO did not provide these details to the Defence on request and sought the views of the complainant instead. Once the complainant notified the SPO of his refusal, the SPO did not share his personal details with the Defence.

103. Therefore, the Ombudsperson finds that the right to private life, as protected by Article 36 of the Constitution, Article 8 of the ECHR, and Article 17 of the ICCPR is not applicable to the disclosure of the name of the complainant in documents transmitted to the Defence, because the complainant could not have reasonably expected his identity to be protected from the Defence. In addition, the Ombudsperson is satisfied that the disclosure was in accordance with the law.

104. In relation to the complainant's assertion that the disclosure of his name to the Defence could have compromised his security and that of his family the Ombudsperson notes the following.

105. Regarding the alleged violation of the right to life of the complainant and his family, Article 2 of the ECHR "*may come into play even though the person whose right to life was allegedly breached did not die [...] when there is a **real and immediate** risk to the life of the individual*".¹² (Emphasis added)

106. In analysing whether the disclosure to the Defence resulted in compromising the complainant's security and that of his family the Ombudsperson notes that the disclosure of the complainant's name to the Defence was done on a confidential basis. None of the complainant's personal details were disclosed by the SPO.

107. In his submissions, the complainant stated that: "*I do not make the case that Defence Council would not have done anything with malice, but the fact that my identity was not protected, could have led to disclosure to others. Again, this is not an unlikely scenario and could have simply come about by a note of my details being placed on a desk in the court room to be viewed by others*".¹³

¹² See *Selahattin Demirtaş v. Turkey*, no. 15028/09, ECHR 2015 para. 30-36.

¹³ Response of the Complainant to the Request for Additional Information, [REDACTED], p.2.

108. The Ombudsperson, respectfully rejects this assertion and must accept that material disclosed to the Defence is handled appropriately in accordance with the law and the rules. Furthermore, the Ombudsperson notes that the complainant failed to demonstrate that his identity was, in fact, compromised by the disclosure to the Defence and relies on conjecture in support of his claim.

109. The Ombudsperson finds that the complainant has failed to demonstrate that the disclosure of his name to the Defence has resulted in a violation of his right to life and that of his family, as protected by Article 25 of the Constitution, Article 2 of the ECHR and Article 6 of the ICCPR as it was done so in accordance with the law and shared on a confidential basis.

110. In relation to the complainant's assertion that the disclosure of his name to the Defence could have compromised his opportunities to find future employment, the Ombudsperson notes that the disclosure of the complainant's name to the Defence was done on a confidential basis. As a result, the Ombudsperson finds that the complainant has failed to demonstrate that the disclosure of his name to the Defence has resulted in a loss of employment opportunities for him.

111. The Ombudsperson finds that the complainant has failed to demonstrate a violation of his right to private and professional life, as protected by Article 36 of the Constitution, Article 8 of the ECHR and Article 17 of the ICCPR.

VII. CONCLUSION

112. The Ombudsperson has concluded that the first strand of the complaint that relates to the disclosure of the name of the complainant during the public hearing must be rejected pursuant to Rules 29(1), 29(3)(a) of the RPE.

113. Regarding the second strand of the complaint, the Ombudsperson is satisfied that the disclosure of the name of the complainant in the documents transmitted to the Defence has not interfered with the right to private life, and private and professional life of the complainant as protected by Article 36 of the Constitution of Kosovo, Article 8 of the ECHR and Article 17 of the ICCPR. The Ombudsperson is also satisfied that the disclosure of the name of the complainant in the documents transmitted to the Defence has not interfered with the right to life of the complainant and that of his family, as protected by Article 25 of the Constitution, Article 2 of the ECHR and Article 6 of the ICCPR.

114. For these reasons, the Ombudsperson has concluded that the SPO has not violated the fundamental rights of the complainant.

VIII. RECOMMENDATIONS

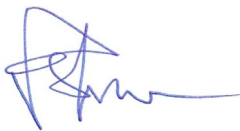
115. Notwithstanding the findings above, the Ombudsperson feels it necessary to issue the following recommendations to the SPO.

116. First, where the small cohort of staff members in sensitive positions within the SPO are called upon to perform other tasks where it is likely to result in the disclosure of their names, the Ombudsperson is of the view that the SPO should conduct an objective risk assessment of those individual staff members in advance of any disclosure to the Defence. This should also apply to former staff members. It would be useful to have a written policy available to staff members in order to provide clarity on the matter.

117. Second, the Ombudsperson notes that the complainant has requested that his personal details be deleted from any personal files held by SPO, KSC and EULEX. While acknowledging that the SPO does not control any of the complainant's personal data held by EULEX, the Ombudsperson recommends that the request should be reconsidered as a personal data request, and that the SPO should liaise with the Data Protection Officer within the Registry in order

to ensure that the request is dealt with in accordance with the applicable law, rules and procedures governing data protection.

118. Finally, the Ombudsperson welcomes the fact that the Specialist Prosecutor has acknowledged that the rationale for Article 33(3) of the Registry Practice Direction could be extended to former staff members and will, in the future, proactively undertake to have past staff members referenced in open court by position rather than name, unless strictly necessary or unless otherwise directed by the court.



Pietro Spera

Ombudsperson Kosovo Specialist Chambers

Dated this Monday, 22 September 2022
At The Hague, the Netherlands.