



REPORT OF THE OMBUDSPERSON

Following an Inquiry in the Complaint of Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi Against the Kosovo Specialist Prosecutor's Office and the Kosovo Specialist Chambers

Ref. No. OMB-C-2022-02

Date Filed: 26 April 2022

Date Adopted: 20 February 2023

PUBLIC

The Ombudsperson of the Kosovo Specialist Chambers ('the Ombudsperson') sitting on 20 February 2023,

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

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE OMBUDSPERSON

1. The complaint was registered with the Ombudsperson on 26 April 2022.
2. In accordance with the provisions of Section 14.3 of the Ombudsperson's 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 other document or material received as confidential. Despite the solicitation of the Ombudsperson, the complainants have not objected to having their identity disclosed and the Ombudsperson has concluded that there are no compelling reasons to treat any information received from the complainants as confidential.

II. THE FACTS

3. Having considered the correspondence from the complainant, the facts are limited to a general summary as follows:
4. An initial indictment was made against the four complainants on 26 October 2020. The four complainants were transferred following their arrest to the Detention Facilities of the Kosovo Specialist Chambers in The Hague on 4 and 5 November 2020.
5. On 26 April 2022, the complainants filed this complaint against the Specialist Prosecutor's Office ('SPO') and the Kosovo Specialist Chambers ('KSC') with the Ombudsperson. The Ombudsperson, in accordance with Rule 29(2) (a) of the Rules, initiated a preliminary examination of the complaint.
6. On 7 June 2022, in accordance with Section 7.1 of the Complaints Procedure, the Ombudsperson requested additional information from the complainants, in relation to their complaint. This request remained unanswered.
7. On 22 July 2022, in accordance with Section 7.1 of the Complaints Procedure, the Ombudsperson renewed his request for additional information to the complainants.
8. On 24 August 2022, the complainants responded to the Ombudsperson's request for additional information.

III. THE COMPLAINT

9. The complaint, as submitted to the Ombudsperson, including the additional information provided by the complainants is understood to revolve around eight strands which will be addressed in detail below. However, an overview of these eight strands is as follows.
10. The complainants begin by alleging that the KSC no longer respects The Constitution and the Law approved by the Assembly of Kosovo and then point to a number of specific issues. (Strand A)
11. Second, the complainants allege that the KSC operates without any oversight, especially since it is not accountable to the Judicial Council of Kosovo. (Strand B)
12. Third, they argue that the KSC is no longer attached to the court system in Kosovo, and that therefore it operates in violation of Article 3(1) of The Law. (Strand C)
13. Fourth, the complainants allege that there are excessive delays in the proceedings. (Strand D)
14. Fifth, the complainants allege that the SPO is in violation of its disclosure obligations. (Strand E)
15. Sixth, the complainants argue that their fundamental rights are being violated because of the excessive redactions of the materials submitted to them. (Strand F)
16. Seventh, they complain against the absence of decision of the Pre-Trial Judge regarding the duration of the trial. (Strand G)
17. Finally, in their Annex, the complainants point that the KSC is also in violation of Article 3(6) of the Law because of an absence of a Judicial seat of the KSC in Kosovo. (Strand H)

IV. THE LAW

18. 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')¹ and the International Covenant on Civil and Political Rights ('ICCPR').² These instruments are binding on both the SC and the SPO.
19. 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.
20. Pursuant to Article 162(2) of the Constitution of the Republic of Kosovo ('Kosovo Constitution,' or 'Constitution')³, 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*".
21. 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

¹ 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').

² UN General Assembly International Covenant on Civil and Political Rights (16 December 1996), UN Treaty Series Vol. 999 ('ICCPR').

³ Constitution of the Republic of Kosovo, June 2008 (with 2020 amendments).

22. Article 21 of the Kosovo Constitution sets out the general principles for the protection of human rights and fundamental freedoms guaranteed by the Constitution and states:

Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.

The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.

Everyone must respect the human rights and fundamental freedoms of others.

Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

23. Article 30 of the Constitution, which refers to the rights of the accused, provides that:

a. Everyone charged with a criminal offense shall enjoy the following minimum rights:

- 1. to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her;*
- 2. to be promptly informed of her/his rights according to law;*
- 3. to have adequate time, facilities and remedies for the preparation of his/her defense;*
- 4. to have free assistance of an interpreter if she/he cannot understand or speak the language used in court;*
- 5. to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel;*
- 6. to not be forced to testify against oneself or admit one's guilt*

24. Article 31 sets out the right to a fair trial as follows:

- 1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
- 2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*
- 3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order,*

national security, the interests of minors or the privacy of parties in the process in accordance with law.

4. *Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.*
5. *Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.*
6. *Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*
7. *Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.*

25. Article 32 of the Kosovo Constitution, the right to legal remedies provides that:

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

26. Article 102 of the Kosovo Constitution sets out the general principles of the Judicial system as follows:

1. *Judicial power in the Republic of Kosovo is exercised by the courts.*
2. *The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.*
3. *Courts shall adjudicate based on the Constitution and the law.*
4. *Judges shall be independent and impartial in exercising their functions.*
5. *The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.*

27. Article 162 of the Kosovo Constitution⁴ contains the provisions for the establishment of the Specialist Chambers and the Specialist prosecutor's Office as follows:

Notwithstanding any provision in this Constitution:

1. *To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist*

⁴ Added by Constitutional Amendment 24, published in the OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVA / No. 20 / 5 AUGUST 2015, PRISTINA

Prosecutor's Office within the justice system of Kosovo. The organization, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law.

2. *The Specialist Chambers and Specialist Prosecutor's Office 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.*
3. *A Specialist Chamber of the Constitutional Court, composed of three (3) international judges appointed in addition to the judges referred to in Article 114 (1), shall exclusively decide any constitutional referrals under Article 113 of the Constitution relating to the Specialist Chambers and Specialist Prosecutor's Office in accordance with a specific law.*
4. *The Specialist Chambers and the Specialist Prosecutor's Office shall have full legal and juridical personality and shall have 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, as well as in relation to the management of any residual matters after finalization of the mandate. Arrangements arising from the exercise of these powers are not subject to Article 18.*
5. *Before entering into any international treaty with a third state relating to judicial cooperation, which would otherwise require ratification under Article 18, the Specialist Chambers shall seek the agreement of the Government.*
6. *The Specialist Chambers may determine its own Rules of Procedure and Evidence, in accordance with international human rights standards as enshrined in Article 22 and be guided by the Kosovo Code of Criminal Procedure. The Specialist Chamber of the Constitutional Court shall review the Rules to ensure compliance with Chapter II of the Constitution.*
7. *The Specialist Chambers and the Specialist Prosecutor's Office may have a seat in Kosovo and a seat outside Kosovo. The Specialist Chambers and the Specialist Prosecutor's Office may perform their functions at either seat or elsewhere, as required.*
8. *Consistent with international law and pursuant to international agreements, any persons accused of crimes before the Specialist Chambers may be detained on remand and transferred to the Specialist Chambers sitting outside the territory of Kosovo. If found guilty and sentenced to imprisonment, any such persons may be transferred to serve their*

- sentence in a third country, outside the territory of Kosovo, pursuant to arrangements concluded under paragraph 4.*
9. *The official languages of the Specialist Chambers and the Specialist Prosecutor's Office shall be Albanian, Serbian and English. The Specialist Chambers and the Specialist Prosecutor may decide on the official use of language(s) for the exercise of their mandate.*
 10. *Appointment and oversight of judges and prosecutors and the oversight and administration of the Specialist Chambers and Specialist Prosecutor's Office shall be in accordance with a specific law.*
 11. *A separate Ombudsperson of the Specialist Chambers with exclusive responsibility for the Specialist Chambers and Specialist Prosecutor's Office shall be appointed and his/her function and reporting obligations determined by [a specific law]. Articles 133(2), 134, 135(1) and (2) shall not apply to the Ombudsperson for the Specialist Chambers. The Ombudsperson of Kosovo may also refer matters as provided by Article 135 (4).*
 12. *Specific administrative procedures, modalities, the organisation and functioning of the Specialist Chambers and Specialist Prosecutor's Office, the oversight, budgeting, auditing and other functions will be regulated by international agreement, by a specific law and through arrangements made under paragraph 4.*
 13. *The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.*
 14. *In the absence of notification of completion of the mandate under paragraph 12, the mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made in accordance with Law No. 04/L-274 and in consultation with the Government.*

b. Relevant International Human Rights Law

28. 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.
29. Article 6 of the ECHR, right to a fair trial, provides:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - a. *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b. *to have adequate time and facilities for the preparation of his defence;*
 - c. *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d. *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - e. *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

30. Article 13 of the ECHR, right to an effective remedy, states:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

31. Article 2.3 of the ICCPR states:

Each State Party to the present Covenant undertakes:

- a. *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- b. *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or*

legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

- c. To ensure that the competent authorities shall enforce such remedies when granted.*

32. Article 14 of the ICCPR is also relevant and states that:

- 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
 - b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
 - c. To be tried without undue delay;*
 - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
 - e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

- f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- g. Not to be compelled to testify against himself or to confess guilt.*
- 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
- 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
- 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
- 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

V. ASSESSMENT OF THE SPECIFIC ISSUES RAISED BY THE COMPLAINANTS

A - Specific issues raised by the complainants in relation to the compliance of the KSC with the Constitution and the Law

ISSUE

33. The complainants allege that the KSC is no longer respecting the provisions of The Constitution and The Law approved by the Assembly of Kosovo, and in particular Article 102(3) of the Constitution and that as a result, the KSC has fully turned into an international court, and that, as a result, anyone accused before the KSC risks being accused or punished without a legal basis and risks being discriminated against. They specifically rely on the following:

34. The Specialist Chambers refused to apply the criminal legislation in force in Kosovo between January 1998 and December 2000;
35. The fact that the Specialist Chamber of the Constitutional Court (KSC-CC) in its decision KSC-CC-2022-13 and 14, wrongly applied the Serbian version of the Constitution regarding the use of the word “accused” or “convicted” instead of applying the English and Albanian version of the text;
36. The KSC-CC, in its decision KSC-CC-2022-15, wrongly considered the investigation of illegal organ trafficking only as one of the reasons for the establishment of the tribunal;
37. Their fundamental rights have been violated in relation to the withdrawal of Judge Kai Ambos from the Appeals Court (KSC-AC) Panel appointed to adjudicate Mr. Thaçi appeal on provisional release;
38. The dismissal of the Kosovo police submissions to the monitoring of house arrest in Kosovo, and the dismissal of third-party State guarantees for the interim release of the Accused in Kosovo or on the territory of third States;
39. The alleged violation of the attorney-client privilege, by the search of the Accused’s computers and deletion of documents without prior notice and in their absence and the absence of their counsel.
40. Although the complainants acknowledge that, in accordance with the Rules, this part of the complaint could be considered as being related to litigation before the Specialist Chambers, they submit that the Ombudsperson should still have jurisdiction for two reasons:
41. The request relates to the correct implementation of the Constitution and not the basis of the accusation against them, and the KSC-CC rejected their request on the applicable law as inadmissible and did not enter into the merits of their request, and least not to the point of their claim that they are being discriminated against;
42. The case is of great importance, and there is a real danger of violation of their Constitutional rights, which imposes the intervention of the Ombudsperson, especially since there are no other protection mechanisms outside the walls of the Specialist Chambers.

ASSESSMENT

43. As has been noted in the submission of the complainants, the issues raised have already been brought before the Court during the various Status Conferences, the multiple reviews of detention, and have also been the subject of decisions of the Specialist Chamber of the Basic Court (**KSC-BC**), and the KSC-CC, in cases KSC-BC-2020-06, KSC-CC-2022-14 and KSC-CC-2022-15. As a result, these matters are part of proceedings before the Specialist Chambers, thus falling outside of the jurisdiction of the Ombudsperson, pursuant to Rule 29(1) and 29(3)(a) of the Rules.
44. Regarding the arguments of the complainants on the jurisdiction of the Ombudsperson, the Rules are very explicit about the jurisdiction of the Ombudsperson in relation to proceedings before the court and the exceptions invoked by the complainants are not provided for in the Rules.
45. In any case, remedies were and still are available to the complainants to consider the specific claim of a violation of their fundamental rights, set out above, such as the KSC-CC. In regard to a right to an effective remedy, it should be noted that the word “remedy”, in the context of Article 13 of the European Convention on Human Rights (“ECHR”) does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint⁵. Article 13 guarantees the availability of a remedy but not a successful outcome⁶. Feeble prospects of success in the light of the particular circumstances of the case do not detract from the “effectiveness” of a remedy for the purposes of Article 13⁷.
46. Moreover, the mere fact that the judgment of the highest judicial body is not subject to further judicial review does not in itself infringe Article 13 nor does it constitute an arguable complaint under the Convention⁸. Where the impugned act emanates from the highest national court or authority, the application of Article 13 is impliedly restricted since it does not require any further appellate remedy⁹. In *Wendenburg and Others v, Germany*¹⁰, the lack of a remedy in respect of a decision of the Constitutional Court did not raise any question under Article 13, the Court declaring that part of the application

⁵ C. v. the United Kingdom, Commission decision, 1983

⁶ R. v. the United Kingdom, Commission decision, 1984

⁷ Murray v. the United Kingdom, 1994, § 100

⁸ Tregubenko v. Ukraine (dec.), 2003; Sitkov v. Russia (dec.), 2004; Yuriy Romanov v. Russia, 2005, § 55

⁹ Crociani and Others v. Italy, Commission decision, 1980, pp. 150 and 183, concerning the Constitutional Court; Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland, Commission decision, 1986, concerning the Federal Council, the supreme administrative authority; Times Newspapers Ltd and Andrew Neil v. the United Kingdom, Commission’s report, 1991, § 60, concerning the House of Lords.

¹⁰ Wendenburg and Others v. Germany (dec.), 2003

inadmissible as manifestly ill-founded. Consequently, the Convention provisions cannot be interpreted as obliging States to create bodies to supervise the judiciary or national legal service¹¹.

47. The Ombudsperson cannot assume the role of appellate remedy to decisions of the court, which, in essence, is what is being requested by the complainants. The KSC operates within the specific legal framework set out by the Assembly and is bound by The Constitution, the applicable law and Rules. The Ombudsperson does not have jurisdiction to examine the application of the applicable legal framework by the courts.
48. Therefore, this element of the complaint is rejected by the Ombudsperson as he lacks jurisdiction pursuant to Rule 29(1) of the Rules.

B - Lack of democratic oversight / Absence of accountability to the Judicial Council of Kosovo

ISSUE

49. The complainants allege that there is a lack of democratic oversight over the Court. In that regard, the complainants allege that there is a total lack of accountability of the Specialist Chambers, especially in the absence of accountability to the Judicial Council of Kosovo. They allege that this lack of accountability is reinforced by the detachment of the Specialist Chambers and its complete independence from the court system in Kosovo.

ASSESSMENT

50. The Ombudsperson recalls that the independence of the KSC from the court system in Kosovo and its constitutionality has been considered by the Constitutional Court of the Republic of Kosovo and been deemed constitutional. The Constitutional Court stated that;

“...the means of functioning of the Specialist Chambers is within the framework of the justice system of the Republic of Kosovo... The structure, scope of jurisdiction

¹¹ Pizzetti v. Italy, Commission’s report, 1991, § 41

*and functioning of the Specialist Chambers will be regulated by further laws in compliance with the Constitution. Therefore, the Specialist Chambers do not diminish the constitutional rights guaranteed by Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law."*¹²

51. The KSC operates in accordance with the specific legal framework adopted by the Assembly and is bound by The Constitution¹³, the applicable law¹⁴ and Rules.¹⁵
52. It is foreseen in the Constitution and applicable law that the Judicial Council of Kosovo has no jurisdiction over the work of the KSC. In this regard, Article 162(10) of the Constitution expressly states that the appointment and oversight of judges and prosecutors and the oversight and administration of the Specialist Chambers and SPO shall be in accordance with a specific law.¹⁶
53. The Ombudsperson notes that appropriate mechanisms of accountability have been established within the Specialist Chambers.¹⁷
54. The Ombudsperson recalls that the Judges of the KSC adopted the Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers which governs the conduct of all Judges appointed to the KSC.¹⁸ The Code of Ethics provides a complaints mechanism for any person alleging that their rights or interests have been substantially affected by an alleged misconduct by a Judge of the KSC.
55. In addition, the Registrar, upon the approval of the President, adopted the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers.¹⁹ This Code of Conduct provides a complaints mechanism for any person alleging misconduct by Counsel or Prosecutors.

¹² Constitutional Court of the Republic of Kosovo, judgment of 15 April 2015, Case No. K026/15, paras. 58,59

¹³ CONSTITUTION OF THE REPUBLIC OF KOSOVO, as amended by Amendment no. 24, (Article 162- The Specialist Chambers and the Specialist Prosecutor's Office) 03 August 2015

¹⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office 2015

¹⁵ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020)

¹⁶ Specifically, Articles 27, 28, 30, 31, 35 of The Law, quoted above supra *n* 10

¹⁷ See for example, Articles 31(4), 48(1), 48(2) a, b, and 49(3) of Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office, 3 August 2015 which provide for mechanisms of oversight and accountability within the structure of the Specialist Chambers

¹⁸ Adopted on 14 March 2017, pursuant to Article 19(6) of the Law and in accordance with Article 31(4) of the Law

¹⁹ Adopted on 28 April 2021, in accordance with Article 34(3) of the Law and Rule 23(3) of the Rules

56. The Ombudsperson further recalls that the Judges of the KSC, sitting in Plenary, adopted The Rules on Assignment of Specialist Chambers Judges from the Roster of International Judges which regulate the assignment of Judges to Panels in specific proceedings. These Rules set out clearly the principles and criteria of assignment. Each assignment by the President is available to the public.
57. The Ombudsperson is of the view that the complainants have failed to demonstrate that the absence of accountability to, or oversight by, the Kosovo Judicial Council has, in any way, resulted in a violation of their fundamental right to a fair trial and rejects this element of the complaint pursuant to Rule 29(3)(b) of the Rules.

C - Non-compliance with Article 3(1) of the Law No.05/L-053

ISSUE

58. The complainants allege that the KSC is no longer respecting the provisions of The Constitution and the law approved by the Assembly of Kosovo, and in particular Article 3(1) of the Law which states that:

“Specialist Chambers shall be attached to each level of the court system in Kosovo: the Basic Court of Pristina, the Court of Appeals, the Supreme Court and the Constitutional Court. The Specialist Chamber of the Constitutional Court shall deal exclusively with any constitutional referrals relating to the Specialist Chambers and Specialist Prosecutor’s Office. The Specialist Chambers shall be independent in the exercise of their functions”.

59. In particular they allege that the Chambers are now an international court, and not a local court and as a result, anyone accused before the Specialist Chambers risks being accused or punished without a legal basis and risks being discriminated against.

ASSESSMENT

60. While the English version of the Law states that the *“Specialist Chambers shall be attached to each level of the court system in Kosovo”*, the Albanian version of the Law states that the Specialist Chambers **shall be a constituent part** of every level of the judicial system in

Kosovo²⁰, and the Serbian version of the text states that the Specialist Chambers **shall be founded** at every level of the judicial system in Kosovo.²¹

61. As such, the requirements of Article 3(1) of the Law in the three languages may seem slightly at odds. Thus, it is necessary to interpret this requirement in accordance with the internal and external context of this provision and its aim and purpose.
62. First, Article 1(2) of the Law, states that the Law aims at fulfilling “*the international obligations undertaken in Law No. 04/L-274*”, which provides for the ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Rule of Law Mission in Kosovo [‘**Exchange of Letters**’]. It is clear from the Exchange of Letters that the KSC would operate as a **separate** judicial chamber²², a procedural aspect of the work of the KSC that was approved by the Constitutional Court of the Republic of Kosovo.²³
63. Indeed, it is clear from the wording of the Exchange of Letters that while the Specialist Court would be created **within** the Kosovo court system, in order to allow such proceedings to operate, Kosovo would set up dedicated **separate** judicial chamber which would **include** all levels of the court system, including the Constitutional Court.
64. Therefore, since the Law must give effect to the Exchange of Letters, it is clear that the KSC is not required to be physically “*attached to each level of the court system in Kosovo*”. While the KSC must **include** all levels of the Kosovo court system, the KSC must remain separated from them.
65. The Ombudsperson is of the view that no evidence has been provided by the complainants that the KSC is no longer respecting the provisions of The Constitution and the law approved by the Assembly of Kosovo, and in particular Article 3(1) of the Law and can see no merit in the argument put forward by the complainants.
66. Furthermore, the Ombudsperson is of the view that the complainants have failed to demonstrate that the operation of Article 3(1) of the Law has, in any way, resulted in a

²⁰ The Albanian version of the text indicate: “*Dhomat e specializuara janë pjesë përbërëse e çdo niveli të sistemit të gjykatave në Kosovë: Gjykatës Themelore të Prishtinës, Gjykatës së Apelit*”.

²¹ The Serbian version of the text indicates: “*Specijalizovana veća se osnivaju pri svakom nivou sudskog sistema na Kosovu*”.

²² Law No. 04/L-274 on Ratification of International Agreement between the Republic of Kosovo and the European Union on the European Rule of Law Mission in Kosovo (‘Exchange of Letters’), 14 April 2014, p.3, “*To allow such proceedings to operate, Kosovo will set up a dedicated separate judicial chambers, which would be relocated to a third State pursuant to an Agreement with that State and which would include all levels of the court system, including the Constitutional Court, for any criminal proceedings that arise out of the SITF’s work.*”.

²³ Constitutional Court of the Republic of Kosovo, judgment of 15 April 2015, Case No. K026/15.

violation of their fundamental right to a fair trial. Therefore, the Ombudsperson rejects this element of the complaint pursuant to Rule 29(3)(b) of the Rules.

D - Excessive Prolongation of Proceedings

ISSUE

67. The complainants allege that they are submitted to excessive prolongation of the proceedings especially since it was first announced that the SPO would be ready to start the trial in the summer of 2021, but also due to the delayed disclosure of exculpatory evidence and the multiple extensions of time awarded to the SPO;

ASSESSMENT

68. The Ombudsperson notes that the issues raised by the complainants in this element of the complaint have already been the subject of discussions and deliberations before the KSC-BC, and the KSC-CC, for instance the decision KSC-BC-2020-06 and KSC-CC-2022-14 and KSC-CC-2022-15. However, the specific complaint being made to the Ombudsperson here is that there is undue delay in their proceedings.
69. Rule 29(1) of the Rules provides that *“The Ombudsperson shall not intervene in cases or other legal proceedings before the Specialist Chambers, except in instances of unreasonable delays. [...]”*.
70. Therefore, it is necessary for the Ombudsperson to address this element of the complaint in the context of the power of the Ombudsperson as provided by Rule 29(1) of the Rules.
71. While the ordinary meaning of the word “intervene” implies that the Ombudsperson may directly contribute to the proceedings and cases before the Specialist Chambers, the Ombudsperson, in analysing this provision, is mindful of the doctrine of the separation of powers, the independence of the judiciary and the role of the Ombudsperson.
72. As a matter of course, the Ombudsperson, as an independent human rights protector, should not interfere with other independent institutions. In particular, the Ombudsperson should not compete with legal protection by courts. The two concepts have a common goal – human rights protection, but they are based on completely

different organizational and functional concepts. The Ombudsperson has soft powers to prevent human rights violations and to promote human rights protection, whereas courts have to decide individual cases and can enforce human rights protection.

73. Thus, the independence of both institutions and the principle of separation of powers demand a strict segregation of the two institutions and exclude a mutual control.
74. The Ombudsperson recalls the view of the Venice Commission regarding any provision bestowing a power on an Ombudsperson to intervene in legal proceedings. In its Opinion on the Draft Law on the People's Advocate of Kosovo, the Venice Commission has stated;

*"In general, it would seem preferable to give the People's Advocate the power to make general recommendations about the functioning of the courts system, and exclude the power to intervene in individual cases (not even as regards their length); this should be left to the judiciary itself. Article 30 of the Draft Law provides in paragraph 1 under e) that the People's Advocate has also competence to investigate complaints about the judiciary, but with the proviso that this may not lead to interference with the procedure conducted by the court. However, it is difficult to imagine how a complaint about violation of a human rights provision by a court (including as regards the length of the proceedings) would not be part of the judiciary procedure."*²⁴

75. With this in mind, the Ombudsperson is of the view that the provisions of Rule 29(1) must be interpreted narrowly and must be confined to examining and making general recommendations (when appropriate) on the functioning of the court system and not to investigating complaints about the judiciary where such a complaint alleges a violation of a human rights provision by a court (including as regards the length of the proceedings), something which would be part of the judicial procedure.
76. The Ombudsperson recalls that the European Court of Human Rights ('ECtHR') has repeatedly held that Article 6(1) imposes on contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.²⁵

²⁴ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) OPINION ON THE DRAFT LAW ON THE PEOPLE'S ADVOCATE OF KOSOVO Adopted by the Venice Commission at its 71st Plenary Meeting, (Venice, 1-2 June 2007) Opinion no. 434 / 2007

²⁵ Gast and Popp v. Germany (*Application no. 29357/95*) Judgment 25 February 2000, para.75

77. In this regard, the Ombudsperson notes that The Law establishes and regulates the organisation, functions and jurisdiction of the KSC and the SPO and that the KSC and SPO have full legal and juridical personality.
78. The KSC, in the organisation of the procedural efficiency and administrative aspects of its judicial system, has been tasked with ensuring that relevant processes and procedures are in place in order to be able conduct proceedings in three official languages, conduct proceedings in a Host State and put in place a multitude of other measures and procedures which are not, normally, required or necessitated by corresponding courts in Kosovo.
79. In analysing whether the KSC has met its Article 6(1) requirements as set out in *Gast and Popp v. Germany*²⁶, the Ombudsperson notes that, since its inception, the Court has consistently carried out its work in an expeditious manner notwithstanding being faced with many challenges including the COVID 19 pandemic. In this regard, the Ombudsperson is mindful of the fact that the court continued to function fully throughout the pandemic and continued with its proceedings.
80. In the instant case, Case Number KSC-BC-2020-06, following their arrest, the accused were transferred to the Detention Facilities of the KSC in The Hague on 4 and 5 November 2020. The four accused made their initial appearance before the Pre-Trial Judge on dates between 9 and 11 November 2020. On 15 December 2022, the Pre-Trial Judge transferred the case to the Trial Panel. The Trial Panel held their first Status Conference the following day, 16 December 2022. The trial preparation conference took place on 18 January 2023. The commencement of the trial is scheduled for 3 April 2023.
81. In addition, in its submission dated 14 February 2023, the prosecution indicated that it intends to seek the admission of 312 witnesses and projected an estimated 545.5 hours to present its case. This, it submitted, constitutes a 24% reduction in hours from the estimate filed on 2 November 2022. The SPO estimated that, based on current information and bearing in mind the preliminary nature of such an estimate. Its case may conclude at the end of 2024, though it may continue into 2025, depending on numerous factors.²⁷
82. The Ombudsperson is of the view that there is no evidence to lead to the conclusion that the procedural and administrative aspects of the KSC are deficient in supporting the proceedings being conducted against the complainants.

²⁶ *ibid*

²⁷ *KSC-BC-2020-06/F01291 Prosecution Submission in advance of Specialist Prosecutor's preparation conference with Confidential Annexes 1-3 and Strictly Confidential and Ex Parte Annexes 4-6 para's 6-11*

83. In support of the view, the Ombudsperson recalls that all of the other proceedings before the KSC are, and have been conducted efficiently and are moving apace.²⁸
84. The Ombudsperson recognises that each of the proceedings attach different levels of complexity and the proceedings being conducted against the complainants must be acknowledged as being complex in nature²⁹.
85. Therefore, the Ombudsperson can find no evidence of undue delay on the part of the KSC in the organisation of the procedural and administrative aspects of its judicial system in support of the proceedings against the complainants and rejects this element of the complaint pursuant to Rule 29(3)(b) of the Rules.

E - The non-compliance of the SPO with its disclosure obligations

ISSUE

86. The complainants allege that the SPO is not complying with its disclosure obligations, and that it is still withholding Rule 102(3) and 103 materials.

²⁸ In Case Number KSC-BC-2020-05, the accused was arrested on 24 September 2020. He made his initial appearance before the Pre-Trial Judge on 28 September 2020. The Pre-Trial Judge transmitted the case file to Trial Panel I on 7 May 2021. His trial commenced on 15 September 2021 and closing statements took place from 13 to 15 September 2022. The Trial judgment was pronounced on 16 December 2022.

In Case Number KSC-BC-2020-07/KSC-CA-2022-01, the accused were arrested on 25 September 2020. They made their initial appearance on 18 December 2020 before the Pre-Trial Judge. On 16 July 2021, the Pre-Trial Judge transmitted the case file to Trial Panel II. Their trial commenced on 7 October 2021 and closing statements took place from 14 to 17 March 2022. The Trial judgment was pronounced on 18 May 2022. A notice of appeal was filed by the defence on 17 June 2022 and the appeal hearing took place on 1 and 2 December 2020.

In Case Number KSC-BC-2020-04, the accused was arrested on 16 March 2021 and transferred to the Detention Unit of the KSC on 15 April 2021. He made his initial appearance before the Pre-Trial Judge on 19 April 2021. The Pre-Trial Judge transmitted the case file to Trial Panel I on 21 September 2022. The trial preparation conference was held between 18 and 20 October 2022.

²⁹As of January 20th 2023, there have been 26 hearings in the case, 16 of which occurred whilst the Court was operating under COVID-19 related restrictions. Despite the difficulties presented by these restrictions, the Court set up a dedicated videolink to ensure that the accused were able to actively participate in proceedings at all times. The Court has also accommodated the participation of Defence counsel via videolink.

The Ombudsperson notes that thus far no scheduled hearing in the case has been cancelled by the Court. Throughout the course of proceedings, the Court has processed 10,109 pages in 1,215 filings, consisting of petitions, submissions and orders, as well as 25 interlocutory appeals and 1 constitutional court appeal regarding the protection of legality.

ASSESSMENT

87. The issues surrounding allegations of non-compliance with disclosure obligations have already been brought before the Court during the various Status Conference, and they have also been the subject of decisions of the KSC-BC. As a result, these matters are part of proceedings before the Specialist Chambers.
88. Therefore, the Ombudsperson must reject this element of the complaint as falling outside of the jurisdiction of the Ombudsperson, pursuant to rule 29(1) and 29(3)(a) of the Rules.

F - Excessive redactions of the materials submitted to them

ISSUE

89. The complainants allege that there is too much redaction in the documentation they receive from the SPO.

ASSESSMENT

90. The issue of excessive redactions by the prosecution has already been brought before the Court during the various Status Conferences, and has also been the subject of decisions of the KSC-BC. As a result, these matters are part of proceedings before the Specialist Chambers and must be rejected by the Ombudsperson as falling outside of the jurisdiction of the Ombudsperson, pursuant to rule 29(1) and 29(3)(a) of the Rules.

G - Absence of decision regarding the length of the Trial

ISSUE

91. The complainants allege that the current proposal of the prosecution regarding the amount of witnesses and hours of court would end up in a decade-long trial, and in any case, they complain about the absence of clear indication on whether a decision will be taken by the Pre-Trial Judge regarding this proposal.

ASSESSMENT

92. This issue has been subject of debates and deliberation before the Pre-Trial Judge. Furthermore, the Ombudsperson notes again that the Pre-Trial Judge, on Wednesday, 30 November 2022, notified the KSC President that the case file in the case against Hashim Thaci, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi would be ready for transmission to the Trial Panel on 15 December that year.
93. Accordingly, the KSC President assigned Trial Panel II to this case, the trial preparation conference took place on 18 January 2023 and the commencement of the trial is scheduled for 3 April 2023.
94. As such, this matter is part of proceedings before the Specialist Chambers, and must be rejected as falling outside of the jurisdiction of the Ombudsperson, pursuant to Rule 29(1) and 29(3)(a) of the Rules.

H - Absence of a judicial seat in Kosovo

ISSUE

95. The complainants allege in their annex that the KSC operates in violation of Article 3(6) of the Law, which states that

“The Specialist Chambers shall have a seat in Kosovo. As provided for through an international agreement with the Host State, the Specialist Chambers shall also have a seat in the Host State outside Kosovo, but may sit elsewhere on an exceptional basis, if necessary, in the interests of proper administration of justice. [...]”

ASSESSMENT

96. The Ombudsperson recalls that in addition to the provision of Article 3(6) of the Law, Article 3(8)(a) provides that;

“the President of the Specialist Chambers, the Specialist Prosecutor, Specialist Counsel or Victims’ Counsel may at their discretion invoke a change of venue to the Host State

of a trial, any part of a trial or any particular stage or stages of the criminal process under this Law;”.

97. Regarding the proceedings conducted against the four complainants, the President invoked a change of venue to the Host State which led to the decision KSC-BC-2020-06/F00017 on 21 September 2020. This invocation of a change a venue to the Host State necessarily demonstrated a relocation from the seat of the KSC in Kosovo, and further demonstrated that in the absence of such a decision, the KSC had the possibility to conduct proceedings in its seat Kosovo.
98. The Ombudsperson is of the view that the complainants have failed to demonstrate that the operation of Article 3(6) of the Law has, in any way, resulted in a violation of their fundamental right to a fair trial as protected by Chapter II of the Kosovo Constitution. Any submission arguing that Article 3(6) of the Law requires the KSC to have a permanent physical seat in Kosovo is rejected as being ill-founded. Therefore, the Ombudsperson rejects this element of the complaint pursuant to Rule 29(3)(b) of the Rules.

VI. CONCLUSION

99. The Ombudsperson has concluded that strands A, E, F and G of the complaint which relate to alleged non-compliance with The Constitution and The Law, non-compliance with disclosure obligations, excessive redactions of exculpatory material and the absence of a decision regarding the length of the trial respectively, are the subject of proceedings before the Court and must therefore be rejected pursuant to Rules 29(1), 29(3)(a) of the Rules.
100. The remaining strands of the complaint, B, C, D and H allege a lack of democratic oversight, non-compliance with Art 3(1) of The Law, an excessive prolongation of proceedings before the Court and non-compliance with Art 3(6) of The Law respectively. The Ombudsperson has concluded that the complainants have failed to demonstrate that any of the above issues have violated their right to a fair trial as guaranteed by Article 31 of the Kosovo Constitution, Art 6 ECHR and Art 14 ICCPR and therefore rejects these elements of the complaint pursuant to Rule 29(3)(b) of the Rules.

101. For these reasons, the Ombudsperson has concluded that neither the KSC or the SPO have violated the fundamental rights of the complainants.



Pietro Spera

Ombudsperson Kosovo Specialist Chambers

**Dated this 20 February 2023
At the Hague, The Netherlands.**