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Prishtinë, 3 September 2020

Mr. Bahri Hyseni, Presider  
Kosovo Prosecutorial Council  
Str. "Luan Haradinaj", No.16/1  
Zone II, category II

## RECOMMENDATION LETTER

### Complaint No. 280/2020 Versus Kosovo Prosecutorial Council

The Ombudsman, pursuant to Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsman and according to Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 20 April 2020, received a complaint of Mrs. Serbeze Haxhijaj, a journalist of the Balkan Investigative Reporting Network (BIRN), filed against the Kosovo Prosecutorial Council (KPC), due to rejection of her request for access to information by the Special Prosecution of the Republic of Kosovo (SPRK).

The complainant, on 25 March and 9 April 2020, addressed the Chief Prosecutor of the SPRK with a request for access to information. In the request of 25 March 2020, the complainant required response on the following questions:

- 1. Do actually authorities in Kosovo have systemized archives of documents and other war crimes case materials that have been or may be still used in court proceedings. If so, how these materials from local war crimes prosecutors are being currently used?*
- 2. What are the biggest challenges for Kosovo Prosecution authorities in terms of access to war crimes archives, especially those that have initially been under the management of UN mission and later of the EU?*
- 3. Does Kosovo legal system have a specific policy on what to do with these materials?*
- 4. Has there been any co-operation so far with The Hague Tribunal with regard to the use of Tribunal's archives for war crimes cases in Kosovo, especially the issue of the missing persons ?<sup>1</sup>*

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<sup>1</sup> Complainant's request of 25 March 2020, addressed through email to SPRK

While in the Request of 9 April 2020, the complainant requested response in the following questions:

- 1. Last year, Kosovo Prosecutorial Council adopted a War Crimes Strategy, in efforts to increase the progress in prosecuting war crimes committed by Serbia in Kosovo. For almost a year, which were the main issues in this strategy on which have been worked on?*
- 2. It has been stated that this strategy will give priority to investigation of some of the biggest massacres committed during the war in Kosovo. In how many cases investigations of massacres have been initiated and is Meja massacre one of them?*
- 3. Family members of Meja massacre's victims point out that part of materials and evidence has been recently handed over to investigators in Kosovo. Is this a step that signalizes that the investigative mechanism can be set in motion for the cases where international missions did not succeed?*
- 4. Meja massacre is one of the cases for which The Hague Tribunal has condemned three persons in Serbia's top chain of command. Does this fact facilitate further investigations by the Kosovo justice authorities?*
- 5. The core of the war crimes investigation strategy is focusing on the chain of command responsibility. How is this actually possible for the prosecution, having in regard almost zero level of Kosovo-Serbia legal cooperation?<sup>2</sup>*

In the first request, the complainant, through e-mail, received a response from the Chief Prosecutor of the SPRK, informing her that she would be served with the response after the pandemic, while she did not receive any response at her second request. Furthermore, the complainant claimed that she was faced with rejection and ignorance of her requests for access to information from the Prosecution's Office of Public Relations, except in cases where prosecutors themselves responded in person.

On 4 May 2020, the Ombudsperson addressed a letter to the Presider of the KPC and SPRK regarding the given complaint. On 14 May 2020, the Ombudsperson admitted a response from the KPC Presider, informing him of the actions taken by the KPC regarding the complainant's request for information and that they could not provide information on some of the questions as they are related to the investigation process, while for some of the questions answer will be provided in the shortest possible time. Further, on 19 May 2020, the Ombudsperson received a response from the Chief Prosecutor of the Special Prosecution, through which he informed that due to the pandemic situation with Covid-19, they have carried out solely activities of an urgent nature and that, as soon as they start to work normally, the complainant will be served with the response. Since, no response to her request for information has been served to the complainant even after a month, the Ombudsperson on 16 June 2020, again addressed a letter to the Presider of the KPC and the Chief Prosecutor of the SPRK. However, neither the Ombudsperson nor the complainant were provided with the response.

On this occasion, the Ombudsperson emphasizes that the requests for access to public

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<sup>2</sup> Complainant's request of 9 April 2020, addressed through email to KPK.

documents addressed to public institutions by citizens, civil society, the media, etc., are requests which are based on constitutional and legal guarantees. Constitution, in Article 41, paragraph 1, determines: *“Every person enjoys the right of access to public documents.”*; and paragraph 2 stipulates that: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification..”*

Further, the Ombudsperson draws attention on the Law No. 06/L-81 on Access to Public Documents (LAPD), which is applied for all public documents which are produced, received, maintained or controlled by public institutions, except in cases when otherwise restricted by legislation at effect.

Whereas, refusals related to the right of access to public documents are defined in Article 17 of the LAPD, according to which a public institution may not refuse to inform on whether it has a document in its possession or refuse access to a public document, unless it performs a damage and public interest test to determine whether the damage caused to the protected interest overrides the public interest in accessing that public document

Furthermore, it should be taken in consideration that the case law of the European Court of Human Rights (ECtHR), according to Article 53 of the Constitution, is the basis for interpretation of human rights. While the ECtHR in its practice has consistently estimated: *“Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10 of the ECHR and is applicable not only to 'information' or 'ideas' that are favourably received or regarded. [...] Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog.’”*<sup>3</sup> In case *Lingens v. Austria*, ECtHR reiterates: *“[...] such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". These principles are of particular importance as far as the press is concerned.”* [...].<sup>4</sup>

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*

Handling of requests for access to public documents is a legal liability for all entities exercising public authority. Consequently, requests for access to public documents, submitted to institutions exercising public authority, cannot be treated otherwise than according to the legal provisions in force. *Therefore, to deny the public information on the functioning of state*

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<sup>3</sup> Case of *Observer and Guardian V. The United Kingdom* (Application No.13585/88, 26 November 1991, paragraph 59 (a) (b)).

<sup>4</sup> Case of *Lingens V. Austria* (App. no\_9815/82), 8 July 1986, paragraph 41.)

*bodies is to violate the fundamental right to democracy.”<sup>5</sup>*

The state of emergency declared by the Government of the Republic of Kosovo should not be an obstacle in terms of providing information to the press and the public.

The right of access to public documents of every person, as well as the guarantee and fulfillment of this right by public institutions is one of the foundations of democratic and transparent institutions. Data access and transparency in the public sector serves for accountability to the public, for social, economic and democratic development and advancement.

The Ombudsperson ascertains that, in the given case, the KPC has failed in fulfilling its obligations regarding provision, in fact imparting information in a timely manner in accordance with applicable legal provisions. Given that the document / data requester is a journalist and this data is required in relation to the activity she carries out in informing the public and is considered as an essential element to hold a debate in the public interest, while the contribution of the media and civil society is important in discussing issues of public interest.

In order to improve the respect for the right for access to public documents, as a constitutional and legal right, so that citizens can use this right as a powerful tool to control the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

### **RECOMMENDS**

#### **Kosovo Prosecutorial Council and Special Prosecution:**

- *To handle complainant's request and provide her with the information requested, in accordance with Law no. 06 / L-081 on Access to Public Documents and in accordance with relevant legislation at force.*

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo (“*Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.*”) and Article 28 of the Law No. 05/L-019 on Ombudsperson (“*Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question*”), you are kindly asked to inform us on the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari  
Ombudsperson

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<sup>5</sup> Case Of *Observer And Guardian V. The United Kingdom*, (Application no. [13585/88](#), 26 November 1991)