**REPORT**

**OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO**

***Ex-officio***

**Case no. 621/2018**

**In relation to**

***Preventive operational measures to protect victims of domestic violence pursuant to the Law no. 05/l -003 on the Electronic Supervision of Persons whose Movement is Limited by the Decision of the Court***

Addressed to:

* Mr. Avdullah Hoti, Acting Prime Minister of the Republic of Kosovo
* Mr. Selim Selimi, Acting Minister of Justice
* Mr. Agim Veliu , Acting Minister of Internal Affairs
* Mr. Skender Çoçaj, President of the Kosovo Judicial Council
* Mr. Jetish Maloku , President of the Kosovo Prosecutorial Council
* Mr. Samedin Mehmeti, Director General of Kosovo Police

Prishtina, on ...March 2021

**I. PURPOSE OF THE REPORT**

1. The Ombudsperson, through this report, would like to draw the attention of state institutions in charge of positive obligations deriving under Article 25, paragraph 1 of the Constitution of the Republic of Kosovo: “Right to Life”: whereby “*Every individual enjoys the right to life”;* and the failure of respective institutions to implement the Law No. 05/L-003 on the electronic supervision of persons whose movement is limited by the decision of the court, determined under Article 2, paragraph 1.2
2. **COMPETENCES OF THE OMBUDSPERSON**
3. Article 135, paragraph 3 of the Constitution determines *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
4. Law no. 05/L-019 on Ombudsperson, under Article 16, paragraph 4 determines *“The Ombudsperson has the power to investigate, [...]on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”.*
5. Also, Law no. 05/L-019 on Ombudsperson, Article 18, paragraph 1 provides that the Ombudsperson, inter alia, has the following responsibilities:

* *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases”* (point 2);
* *“to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination”* (point 5);
* *“to publish notifications, opinions, recommendations, proposals and his/her own reports”* (point 6).

1. By submitting this report to the respective institutions, the Ombudsperson intends to fulfil its constitutional and legal responsibilities mentioned above.

**III. CIRCUMSTANCES OF THE CASE**

1. Based on information published in printed and electronic media regarding victims of domestic violence, among which there are cases of fatalities, the Ombudsperson has ex officio opened investigations regarding domestic violence with case number OIK 621/2018.
2. The Ombudsperson has monitored implementation of the *Law 05/2-003 on the electronic supervision of persons whose movement is limited by the decision of the court*, by gathering information from the Kosovo Police, basic prosecution offices and Basic Courts in all of Kosovo municipalities.
3. The Kosovo police informed that Kosovo does not have an operational room for *electronic supervision,* as is required under Article 10 of the *Law No. 05/2-003 on the electronic supervision of persons whose movement is limited by the decision of the court.*
4. The Basic Courts informed that there no court decisions against perpetrators of domestic violence, which provided for electronic surveillance without the consent of the person, perpetrator of domestic violence, as defined under Article 8 paragraph 1 of *Law 05/2-003 on the electronic supervision of persons whose movement is limited by the decision of the court.*

**IV. CONSTITUTIONAL AND LEGAL GROUNDS**

1. The Constitution of the Republic of Kosovo (hereinafter the Constitution) in Article 25.1 stipulates: “*Every individual enjoys the right to life*”.
2. Also, Article 22 of the Constitution foresees rights and freedoms set forth, inter alia, in the European Convention on Human Rights (hereinafter ECHR) and its Protocols: “*guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions*”.
3. Article 53 of the Constitution stipulates that “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*”.
4. Article 2 of the *Law No. 05/2-003 on the electronic supervision of persons whose movement is limited by the decision of the court,* subparagraph 1.2 stipulates that the scope of this law includes “*protection or emergency protection orders foreseen by Article 5 of the Law for Protection from Domestic Violence*”.
5. Furthermore, Article 3 of the *Law No. 05/L -003 on the electronic supervision of persons whose movement is limited by the decision of the court*, in paragraph 1.1 stipulates: “*Electronic supervision - mechanism which guarantees effective implementation of the decisions of the court, by determining in real-time the location of a person through the utilization of electronic devices placed on his body”*; whereas paragraph 1.2 determines: “*Device - the electronic equipment placed on the body of the person and which enables to determine his location in real-time”*.
6. Also, Article 5 defines the initiative for utilization of electronic supervision, whereby it is stated as follows: *The court decides on the utilization of electronic supervision upon request of the prosecutor, of the person, of his defense counsel, parents or the juvenile’s custodian”*.
7. Whereas Article 6 (*Consent of the person*), paragraph 5 stipulates: “*Exceptionally from paragraph 2. of this Article, the court may decide to utilize Electronic supervision even without the consent of the person in the case foreseen by Article 2, paragraph 1, sub-paragraph 1.2 of this Law, if it deems as mandatory in guaranteeing constitutional rights of third parties and when there is reasonable suspicion, that the subject poses danger to the impingement of these rights”*
8. Also, Article 8 determines the decision for the utilization of Electronic supervision under paragraph 1: “*Utilization of Electronic supervision is ordered by the court through a court decision issued to person in cases foreseen in Article 2 of this law”.* Paragraph 2 stipulates: “*During the judgment prior to issuing the decision, the court may require from the Probation Service a pre-punitive report for the defendant and the need to use Electronic supervision”*;, while paragraph 3 provides: “*The deadline of the timeframe of the Electronic supervision is determined by a court decision. The deadline of the electronic supervision timeframe shall not be longer than one (1) year.”*
9. The *implementation of supervision*, under Article 10 of the Law stipulates: “*The Electronic supervision implementing body 1. Kosovo Police implements the Electronic supervision and is responsible for the placement, removal and proper functioning of the device. 2. The location, time and rules for the placement and removal of the device are determined in the order for the execution of the court decision who immediately notify the person and the body implementing the Electronic supervision. 3. The Electronic supervision implementing body, through the operation room, shall collect, process and report the data transmitted by the device. 4. The criteria which the Electronic supervision implementing body should meet, its rights and obligation are determined by sublegal act issued from the Minister of Justice”*; while Article 11 stipulates: *1.* *Kosovo Police is the responsible body to control the Electronic supervision implementing manner; 2. Kosovo Police shall make available before the court updated data for the Electronic supervision implementation under the request of the Court and Probation Service; 3. The Electronic supervision implementation and the reporting manner of the Kosovo Police shall be determined with a sub-legal act issued by the Ministry of Internal Affairs*; and Article 12, paragraph: *1.* *The Electronic supervision is implemented through the placement of a special device on the person’s body, which should: 1.1* *be of small dimensions in order to be easily covered by clothing and not be seen by others; […] 2.1. be capable of transmitting the signal from any part of the territory of the Republic of Kosovo; […] 2.3. be difficult to remove; 2.4. transmit a special signal if damaged or removed”.* Article 13 stipulates: *1. The operation room shall have the technical capability to obtain real-time information on the location of persons within the territory where the Electronic supervision implementing body has competence; 2. The information obtained by the device shall be transmitted directly to the operation room which operates around the clock; 3. The Electronic supervision implementing body ensures an uninterrupted functioning of the operation room and its real-time connection with the device which determines the location of the person”*. Article 14 stipulates: *1. The information obtained by the device appears on maps which enable the ongoing identification of the person`s location in compliance with the road and administrative system of the Republic of Kosovo; 2. The information displayed on maps and its visualization is prohibited if the person remains within the permitted zone or outside of the prohibited zone of movement; 3. The information about the person’s location is displayed on map only if: 3.1. the person trespasses the permitted zone boundary or enters into the prohibited zone of movement as determined by the court decision ordering the utilization of Electronic supervision; 3.2. the person is suspected to have violated the terms established in the court decision; 3.3. a possible danger towards the person or other persons must be evaded;[…].* Article 17 determines actions in cases of violation of the decision of the court: *1. When the information on the map records the exit from the permitted zone or entry into the prohibited movement zone, as well as the damaging or removal of the device, the operation room shall immediately contact the person. If the latter cannot be contacted, the operation room shall contact the close person assigned on the decision of the court; 2. If, within fifteen (15) minutes from the moment when contacted by the operation room, the person returns into the permitted zone or moves away from the prohibited zone, then no further action shall be taken”*; […] *3. In the event when the person or the close person cannot be reached, the operation room shall immediately notify the state police to whom it conveys the information on the location of the person. Within twenty four (24) hours the operation room notifies the court and prosecution office on the violation and actions committed.* […] Article 18 foresees the violation of electronic supervision conditions: *1. The Kosovo Police notify the respective court as soon as they receive notification of the violation of Electronic supervision conditions.*
10. Administrative Instruction no. 11/2016 for implementation of electronic surveillance and reporting from Kosovo Police, of the persons who’s movement is restricted, whereby according to Article 1: “*The purpose is to determine the rules for implementation of electronic surveillance and reporting manner, in function of controlling the implementation of orders that a judicial decision contains, setting out one of the measures for ensuring the defendant presence and of the protection order or order for emergency protection*”
11. **LEGAL ANALYSIS**
12. The Ombudsperson considers that, in order to determine the scope of the state's obligations to guarantee the right to life, we must refer to the case law of the European Court of Human Rights (hereinafter *ECtHR*).
13. In addition to the negative obligations of states regarding the right to life (the state refraining not to endanger the lives of persons), which arise from Article 2 of the ECHR, the ECtHR has, with its decisions, defined the positive obligations of the state regarding the right to life, which oblige the state to take certain measures, in order to prevent the endangerment of the right to life of persons under its jurisdiction.
14. The Ombudsperson points out that, according to the ECtHR, Article 2 of the ECHR stipulates that states must not only refrain from the intentional and unlawful taking of life, but are also obliged to take appropriate measures to safeguard the lives of persons under their jurisdiction (see case: *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*).
15. In broad terms, this positive obligation has two aspects: a) the duty to adopt the legal framework; b) the obligation to take preventive operational measures.
16. According to the ECtHR, the positive obligation arising from Article 2 (*to take appropriate measures to safeguard the lives of persons under the jurisdiction of the State*) applies in the context of any activity, whether public or not, in which the right to life may be at stake (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*).
17. According to the ECtHR, Article 2 of the Convention sets out positive obligations of the State even in circumstances where the authorities must take preventive operational measures to protect individuals whose lives are at risk from the criminal acts of another person (*Osman v. The United Kingdom; Branko Tomašić and Others v. Croatia*).
18. The positive obligations of the State regarding the right to life, through the jurisprudence of the ECtHR, are defined in different contexts, while in the context of the protection of victims of domestic violence they are defined in the cases of *Branko Tomašić and Others v. Croatia; Opuz v. Turkey*, where the ECtHR has considered the State to have an obligation to take preventive operational measures to protect one or more individuals identifiable in advance as the possible target of violent acts even in the context of domestic violence. This includes the obligation of the State to ensure that the legal framework protects people who are potential victims of domestic violence. In summary of these cases, it is concluded that states are obliged, in addition to the adoption of relevant legislation, to take preventive operational measures to protect one or more individuals identifiable in advance as the possible target of violent acts within the family.
19. The Ombudsperson recalls that the Republic of Kosovo has so far protected victims of violence in general through the provisions of the Criminal Code of Kosovo, while it has protected victims of domestic violence through the provisions of the *Law on Protection against Domestic Violence* but failed to *implement the provisions of Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court*. In January 2019, the Assembly of the Republic of Kosovo adopted the Criminal Code of the Republic of Kosovo, which contains a special provision for sanctioning domestic violence as a criminal offense.
20. Furthermore, the Ombudsperson considers that the possibility of protection of life and the issue of violation of the protection order are guaranteed by legislation, however, the Ombudsperson raises the concern in the implementation of the relevant law. *Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court*, which aims to regulate the use of electronic surveillance in the criminal justice process to increase public safety and to guarantee the effective execution of decisions of court, while fully respecting the rights of the persons involved.
21. The Ombudsperson considers that the implementation of this law, which is in force, would be a guarantee that the state will provide effective protection to victims of domestic violence. Concrete actions that would be taken by the responsible institutions in the protection of victims of domestic violence, in accordance with this law, would directly affect the observance of the protection order issued by the court against perpetrators of domestic violence, in preventing further actions of violence, as well as in preventing the fatal outcome of cases of domestic violence.

**VII. CONCLUSIONS OF THE OMBUDSPERSON**

1. The Ombudsperson finds that, as a result of the failure in the implementation of *Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court*, the Republic of Kosovo has not fully fulfilled its positive obligation to protect victims as well as victims of domestic violence.
2. The Ombudsperson finds that domestic violence must be combated in such a way that the state uses all measures, including those deriving from *Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court*, to enable the prevention of domestic violence as much as possible.
3. Based on these findings and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 16, paragraph 4 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson:

**RECOMMENDS:**

1. ***The Prosecution and the Courts to implement the provisions of Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court****.*
2. ***The Ministry of Internal Affairs and the Kosovo Police to implement the provisions of Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court.***
3. ***The Ministry of Internal Affairs and the Kosovo Police, in accordance with Article 10 of Law No. 05/L-003 on the Electronic Surveillance of Persons whose Movement is Limited by the Decision of the Court, to carry out electronic surveillance, collect, process and report data coming from the device.***
4. ***The Ministry of Internal Affairs and the Kosovo Police to implement the provisions of Administrative Instruction No. 11/2016 for implementation of electronic surveillance and reporting from the Kosovo Police, of the persons whose movement is restricted.***

Best regards,

Naim Qelaj

Ombudsperson