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Ex officio

Case No.707/2017

REPORT OF OMBUDSPERSON OF THE REPUBLIC OF KOSOVO

in relation to the

Freedom of expression (media) and safety of journalists

Addressed to:

Mr. Ramush Haradinaj, Prime Minister of the Republic of Kosovo

Mr. Nehat Idrizi, Chairperson of the Kosovo Judicial Council

Mr. Blerim Isufaj, Chairperson of the Kosovo Prosecutorial Council

Mr. Aleksandër Lumezi, Chief State Prosecutor

Mr. Shpend Maxhuni, General Director of Police

Prishtina, 2 November 2017

Purpose of the report

1. The purpose of this report is to address the freedom of expression as a fundamental right in the Republic of Kosovo, with the emphases on the safety of journalists in accomplishment of the mission entrusted to them.
2. This report is initiated as a response to concerns about violation of freedom of expression, with an emphasis to media and safety of journalists in Kosovo. In this report, the freedom of expression as a fundamental right will be mainly identified with the concept of freedom of the media.
3. Moreover, the Ombudsperson declares the high level of sensitivity and complexity to establish equilibrium between freedom of expression as a fundamental right in every democratic society and determining its limitations toward other rights. It should be stated that this topic represents an ongoing challenge in all countries and the interpretation of such limitation is difficult even in the highest international institutions, such as the European Court for Human Rights (ECHR). However, conclusions in main international documents, notably the ECHR jurisprudence, have established a standard on guaranteeing the freedom of expression and determining necessary limitations.
4. The complexity of this topic represents the challenge for careful as well as balanced handling in order to prevent the hate speech and guaranteeing human rights.
5. On the other hand, guaranteeing the safety of journalists and efficiency of justice bodies in fighting and preventing attacks and violence against journalists is a precondition for building a democratic society.
6. through this report the Ombudsperson aims to:
 - Draw attention on the necessity of guaranteeing the freedom of expression, namely the freedom of media as a fundamental right and as an indicator of the level of democracy, and the observance of international standards on human rights in general.
 - Draw attention on the necessity of journalists' effective protection from any form of violation against their safety and ensuring the free discharge of their profession. In particular, pointing out the obligations of Kosovo institutions to efficiently investigate and adjudicate perpetrators of official offences against journalists.
 - Draw attention on the limitations to the freedom of expression in relation to other rights and the risk of violating privacy, dignity, incitement of violence, hatred, intolerance or disruption of public order.
 - By analysing the legal grounds and international standards in this field, to provide concrete recommendations on guaranteeing the freedom of expression in relation to other fundamental rights.
 - Emphasize the necessity of having the institutions of the Republic of Kosovo, particularly courts, always refer to ECHR's decisions in all cases when rendering a decision regarding freedom of expression and its limitations.

Legal ground

7. Report is based on the Article 135, *parag.3* of the Constitution of the Republic of Kosovo and Article No. 05/L-019 on Ombudsperson, namely Article 16 (*parag.4, 8 and 15*) and Article 18, *parag.1 (sub-paragraph 1.4-1.6)* and its *parag.3*. On this ground, the Ombudsperson, with this report, decided to review the international and local legal ground for the freedom of expression and determining its restrictions. Also, attention should be drawn to standards established by ECHR, whose decisions are the main source even for public authorities in the Republic of Kosovo, in particular courts.

Summary of facts and reasons for initiating the report from the Ombudsperson

8. The tendency to limit the freedom of expression, the challenges of journalists in exercising their profession and threats against them in one hand, and the risk of privacy violation, incitement of hate and other problems related to the freedom of expression and media on the other hand, have been continuously discussed in Kosovo.
9. This report has been initiated due to the on-going concerns in this regard, and information of the Ombudsperson, in various forms, about the challenges and problems in this field, especially on the lack of judiciary efficiency for addressing such cases.
10. A specific reason for drafting this report by Ombudsperson is the attack against the journalist and Director of “Insajderi” Newspaper, Mr. Parim Olluri. The attack against the journalist Parim Olluri is one of the most serious cases of threatening the physical integrity and life of a journalist in Kosovo. As such, is one of the most serious forms of violation against the freedom of expression and threats toward journalists in Kosovo.
11. The attack against the journalist Olluri happened in the evening of August 16, 2017, by unidentified persons (not identified even during the drafting of this report), while Mr. Olluri was accompanied by his family. On this occasion, due to the physical attack against him, Mr. Olluri suffered body injuries and needed medical attention. This fact illustrates the seriousness of this attack against a journalist, as a tendency to arbitrarily and violently restrict the freedom of expression and media in Kosovo.
12. Another very serious case against journalists, which occurred during the drafting of this report, is the physical attack against the other journalist of “Insajderi” newspaper, Mr. Vehbi Kajtazi, Editor in Chief of this Newspaper, who also suffered body injuries. The attack against the journalist happened on 13 October 2017, in a coffee shop at the centre of Prishtina, in broad daylight, and in the presence of many citizens. Unlike the previous case, the assailant of Mr. Kajtazi was easily identified (with initials F.TH) due to the fact that the attack happened in a public place. This case is under investigations and the assailant has the measure of detention for 30 days has been imposed against the perpetrator.
13. On this case, the Ombudsperson expresses its special concern, emphasizing that such consequences (physical attack against the journalist Mr. Kajtazi) result due to the numerous threats and blackmails (which have been published) against the concerned

journalist and failure to discover and adjudicate perpetrators of attacks and threats against journalists. On this ground, the Ombudsperson considers that the repetition of attacks and threats against journalists in Kosovo indicates the inefficiency of the justice system to address such cases and displays the lack of a comprehensive support by the state to journalists.

14. Regarding the case at hand, the Ombudsperson draws attention to the necessity for an efficient and complete investigation and adjudication of criminal case, by meritoriously treating all circumstances of the case. To this end, the prosecution office should investigate any allegation related to this case (especially those concerning the incitement of the offence by third persons, as was publicly reported in media), and undertaking actions in compliance with the applicable laws. The court should also treat this case with priority and render a meritorious decision on the case, in order to render the justice for this specific case, and to provide a reasonable ground for prevention in the future.
15. In addition to other cases, the Ombudsperson, on 24 October 2016, was informed through media with regard to threats against the journalist Leonard Kerquki, who in the TV show “Zona Express”, production of “Express” Newspaper for RTV Dukagjini, broadcasted two documentaries about the establishment of the Special Court, listing cases that may be included therein. In relation to this case, Ombudsperson refers to the Press Release of the Association of Journalists of Kosovo (AJK) condemning this case of threaten and attack against the concerned journalist, where the AJK response reads: *“Association of Journalists of Kosovo is concerned with the life threats against our colleague Leonard Kerquki. We are concerned about the announcement that our colleague Kerquki has received hundreds of life threats following the broadcast of the show authored by him”*.
16. Referring to the case of the attack against the journalists, Olluri, Kerquki and several other cases of physical attacks (not necessarily only against journalists), the Ombudsperson expresses the concern that none of the recent cases has been solved and no person has been arrested, until the time of drafting this report. Moreover, this lack of efficiency by law enforcement and justice bodies is even a greater problem with regard to the safety journalists and freedom of media in Kosovo in general.
17. Furthermore, a serious case of physical assault occurred on 13 May 2017 towards the former editor-in-chief of the daily newspaper "Zëri", Mrs. Arbana Xharra, who joined political party prior to endure a physical violence. The attack towards Mrs. Xharra has occurred after midnight, where she was assaulted with hard objects in the parking plot of her residence and was admitted and cured in Prishtina hospital for the injuries suffered. In addition, the Ombudsperson points out the concern that there is no any person arrested related to this case, although more than 5 months have passed since the physical assault towards Mrs. Xharra occurred.
18. Moreover, within its work and competencies, the Ombudsperson has paid special attention to human rights related to the freedom of expression and media reports that may infringe freedoms and other rights. In the light of activities in this regard, the

Ombudsperson, on 28.10.2016, organized a roundtable titled “*HUMAN RIGHTS AND MEDIA REPORTS*”.

19. The purpose of the roundtable was to ensure a joint discussion regarding media reports in Kosovo and issues regarding the freedom of expression and freedom of media against the right to privacy, incitement of violation/hatred, or disrupting public order. The main purpose of the roundtable, in addition to advancing the mutual cooperation between Ombudsperson and media, was to ensure some conclusions and recommendations in view of maintaining a necessary balance between freedom of expression and other rights and freedoms, thereby guaranteeing values based on social diversity.
20. In addition to roundtables of such nature and on-going monitoring of freedoms and rights in relation to freedom of expression (media), the Ombudsperson has, while exercising its constitutional and legal competencies, decided *ex officio* to prepare this report.

I. Freedom of expression (media) and security of journalists as a standard of democratic countries

21. Find below the analysis of international and local legal grounds for guaranteeing the freedom of expression as a fundamental right and the reasons for its limitations. Also, a special aspect of the report is pointing out the standard established by the ECHR jurisprudence.

A) *Guaranteeing the freedom of expression – international and local legal grounds*

22. Freedom of expression is rightfully considered as the main concern of human rights in the society, and has been recognized ever since the ancient Greece (Greek poleis) and ancient Roma, where citizens were provided with form of expressing their opinions in debates. However, from the historic aspect of human society development, the freedom of expression has been objected and restricted for a long time, until the first real institutions and democracies were established.¹ The true history of this freedom corresponds to that of democracy in Europe and North America and the fight for freedom of the journalists, i.e. freedom of the media.²
23. Freedom of expression, as a fundamental right, coincides with the concept of democracy and equality of all people. Naturally, the freedom of expression is mainly exercised by the media and as such is seen as the grounds, or a way of realizing other human rights. As such, the freedom of expression in a contemporary society is significantly identified with the freedom of media, as implied by this report.
24. In fact, the freedom of expression as a concept means a broader framework of rights, including: freedom to hold an opinion without any interference (freedom of opinion), freedom to seek, receive and impart information and idea (orally, in writing, in the form of art, through media, etc.). Such a definition is also provided at global or European level. Thus, Article 19 of Universal Declaration of Human Rights (UDHR) sets forth

¹ See <http://www.proversi.it/>.

² Mihajlova, E., Bačovska, J., Shekerxhiev, T.: “*Freedom of Expression and Hate Speech*”, Brochure, OSCE (Skopje), 2013 (hereinafter Brochure), p.6.

that: *“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.”*

25. According to the International Covenant on Civil and Political Rights (PNDPCP): *“Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*(Article 19, parag.1 and 2).
26. ECHR (Article 10 *parag.1*) provides for that: *“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...”*.
27. Also, Charter of Fundamental Rights of the European Union, in the Article 11 titled *“Freedom of expression and information”* determines the freedom of expression as a fundamental right where: *“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”*. Also, the same value in relation to the freedom of expression and media is promoted in the Treaty of Lisbon, where Article 11 determines that: *“1. 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. 2. The freedom and pluralism of the media shall be respected.”*³
28. A such standard of broad character guaranteeing the freedom of expression in harmony with the main international documents is also contained in the legislation of democratic countries, which defines the freedom of expression as a constitutional category, giving particular importance to and guaranteeing a wide use protected from state interference without a justifiable cause which must be determined in advance by law. Thus, the First Amendment of the US Constitution states, inter alia, that: *“Congress shall make no law ... abridging the freedom of speech, or of the press ...”*. In addition, Article 21 of the Italian Constitution states, inter alia, that: *“Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorisation or censorship ...”*. This model of guaranteeing freedom of expression exists without exception in the constitutions of other democratic countries.
29. The Constitution of the Republic of Kosovo (hereinafter: “Constitution”) is in the same spirit, stipulating in Article 40, *paragraph 1*, that: *“Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.”* Meanwhile, the freedom of media is regulated with a special provision, namely Article

³ Basis of freedom of expression is set forth even in many other international documents on human freedoms and rights.

42 of the Constitution, as follows: “1. *Freedom and pluralism of media is guaranteed. 2. Censorship is forbidden. No one shall prevent the dissemination of information or ideas through media, except if it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion. 3. Everyone has the right to correct untrue, incomplete and inaccurate published information, if it violates her/his rights and interests in accordance with the law.*”

30. It is seen from these constitutional provisions that the broadest model of guaranteeing freedom of expression as a fundamental right is recognized in Kosovo as well, clearly giving priority to its free use, and its restriction can only be justified under certain circumstances (*to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion*).
31. To ensure effective implementation of this right, the Ombudsperson warns that an essential component of the implementation of freedom of expression, i.e., freedom of media, is the right of access to public documents as one of the criteria for access to information and transparency of public institutions. For the media, access to public documents is one of the prerequisites for informing citizens about issues of public interest. Therefore, it is essential that this right be implemented in Kosovo in accordance with applicable laws.
32. In the formal view, the legislative of Kosovo has defined this right as one of the fundamental rights of citizens. To this end, Article 41 of the Constitution [**Right of Access to Public Documents**] foresees that: “1. *Every person enjoys the right of access to public documents. 2. 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*”. This right is regulated in more detail by special law.⁴ However, it remains a challenge for public institutions in Kosovo to enable the effective implementation of this right. The Ombudsperson, based on his legal authority, receives complaints on refusal or non-response to requests for access to public documents by any public institution and also takes care to promote and advocate for this right.⁵

B) Safety of journalists, an obligation of the Republic of Kosovo institutions

33. Additionally, one of the specific preconditions for freedom of expression is guaranteeing the safety of journalists from threats and attacks against them. The Ombudsperson, based on continuous concerns about the safety of journalist, in particular recent reports on threatening of journalists (Case of journalist Kajtazi, Olluri, Kerquki, etc.), considers that this constitutes one of the main problems of the violation of freedom of media, namely freedom of expression, in Kosovo. These problems have been widely reported in the media and presented in various local and international reports (reports by OSCE Mission in Kosovo, Freedom House, Reporters without Borders, Media Freedom Index, European Commission Progress Reports, etc.). Consequently, facts of such nature are sufficiently known to the public, and are also included in the report presented by the

⁴ See Law No. 03/L-215 on Access to Public Documents.

⁵ <http://www.ombudspersonkosovo.org/sq/qasja-ne-dokumente-publike>

Association of Journalists of Kosovo (AJK) through the Western Balkans Regional Platform for advocating media freedom and journalists' safety project.⁶

34. However, the Ombudsperson reiterates that it is a special obligation of the state of Kosovo to efficiently guarantee freedom of media and safety of journalists as one of the major standards of democracy. Apart from the provisions of the international acts mentioned above and the Constitution of the Republic of Kosovo, this obligation of the state also derives from the standards set out in some other documents for this purpose.
35. At the global level, the UN Resolution No. 68/163 on **the safety of journalist and the issue of impunity**⁷ is of particular importance, which inter alia “... *Urges Member States to do their utmost to prevent violence against journalists and media workers, to ensure accountability through the conduct of impartial, speedy and effective investigations into all alleged violence against journalists and media workers falling within their jurisdiction and to bring the perpetrators of such crimes to justice and ensure that victims have access to appropriate remedies;*” (point 5). As reference at the European level is the Recommendation of 2016 **on the protection of journalists and safety of journalists and other media actors**,⁸ which notes the necessity of adopting a comprehensive legislative framework by states in order to guarantee freedom of media, with particular emphasis on the effective implementation of criminal legislation in order to guarantee the physical and moral integrity of journalists.
36. The Ombudsperson reiterates the necessity of advancing the legislative aspect in Kosovo, to establish a comprehensive legal framework that guarantees sufficient protection of freedom of media and safety of journalists. It is also of particular importance that all cases of violence and threats be investigated and effectively adjudicated by justice system authorities. For this purpose, it is necessary that the prosecution and judicial system ensure that criminal cases against journalists are treated with priority and based on the principle of efficiency.
37. With the purpose of preventing such cases and increasing the journalists safety in the future, the effective judgment and the implementation of an adequate punitive policy against perpetrators of such acts against journalists and free media is of particular importance.
38. In this regard, the Ombudsperson notes the necessity of increasing efficiency in the investigation and revealing the perpetrators of criminal acts (attacks and threats) against journalists. To this effect, simply prioritizing these cases is not sufficient, as efficiency and concrete outcomes are also required. First and foremost, this requires proper coordination of state prosecutor with the police, and the efficient use of all legal remedies to investigate such offenses.

⁶ <http://www.kosovapress.com/sq/lajme/agk-lanson-raportin-per-lirine-e-medieeve-dhe-sigurine-e-gazetareve-96547/>

⁷ This Resolution was adopted by the UN General Assembly on 18 December 2013 (*Resolution 68/163. The safety of journalists and the issue of impunity*).

⁸ See Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.

39. Subsequently, based on the principle of efficiency, proceedings should be carried out before the court, where cases of threats and attacks against journalists should be handled seriously and when a defendant is proven guilty, a meritorious punishment should be imposed, thereby enforcing a suitable punitive policy.
40. Therefore, one of the fundamental aspects that must be carefully considered by the courts is to making a stricter punitive policy against such offenses in order that the severity of punishment serves the purpose of deterring such acts.
41. Considering that these criminal offenses against journalists are committed with the motive of obstructing the freedom of expression and information of the public, the Ombudsperson considers that such acts should be qualified with aggravating circumstances and the provisions of the Criminal Code apply therefor in terms of severity of punishment.
42. Additionally, with regard to punitive judgments against persons who have committed criminal offenses against journalists, the court should also assess the possibility of publishing the judgment (as a complementary punishment), more so because these cases are usually widely publicized in the media. The Ombudsperson considers that imposing such additional punishment adds to the full achievement of the purpose of punishing the perpetrators (always provided that the main punishment imposed is also adequate in relation to the seriousness of such offenses).
43. In order to guarantee correct information of public and fulfil the journalists' mission without obstruction, it is the responsibility of Kosovo institutions to create an appropriate and safe environment for this purpose.
44. The state of Kosovo has multiple obligations to guarantee the safety of journalists in the exercise of their profession without the fear of threats and attacks. With regard to these obligations, the Ombudsperson also notes the ongoing international initiatives to guarantee the freedom of expression and safety of journalists, which are an obligation for governments of countries around the world. Noteworthy in this context are the efforts at the UN Secretary General level to have a Special Representative that would exclusively deal with the safety of journalists in the world. This initiative was proposed by the largest organizations for the protection of journalists such as "*Reporters Without Borders*"⁹ and "*Committee to Protect Journalists*" (CPJ).¹⁰
45. With regard to obligations of such nature aimed at creating a safe environment for the work of journalists, the Ombudsperson recalls in particular the obligations of the Government of the Republic of Kosovo to include the safety of journalists among its priorities, as a fundamental basis for development of democracy and implementation of human rights in Kosovo. In this way, the Government, in addition to international obligations, would also meet the obligations towards keeping the citizens informed by guaranteeing the freedom of expression and safety of journalists.

⁹ <https://rsf.org/en> (05.09.2017).

¹⁰ <https://cpj.org> (05.09.2017).

46. In addition, the Ombudsperson considers that it is necessary that the Government of Kosovo, in addition to implementing the recommendations provided herein and in other internal reports, should also refer to and apply the recommendations of international organizations regarding the protection of journalists. For this purpose, some of the recommendations of the “Committee for the Protection of Journalists” in one of its reports to state governments are: *“comply with international law by asserting and defending the rights of journalists; publicly condemn attacks on journalists as soon as they occur; prosecute perpetrators who murder, attack, or threaten journalists; follow U.N. recommendations on the safety of journalists; and the creation of national protection mechanisms, etc.”*¹¹
47. Furthermore, this Committee among other proposes, in one of its reports regarding the challenges of the freedom of expression and safety of journalists in relation to European Union (EU) policies, that apart from the fact that the EU has determined the freedom of expression as one of the necessary criteria for negotiations with candidate member states, the EU should also take strong measures when certain countries overlook their obligations with regard to freedom of expression. The Committee also recommends the EU to engage, within its foreign policy framework, to repeal all laws that unduly restrict the freedom of press, and their adoption in accordance with the standards of the Charter of Fundamental Rights and the ECHR.¹²
48. Additionally, in the Report of the Committee to Protect Journalists titled that outlines journalists' challenges in countries of the region for the last five years (by 2015), it is noted that freedom of press, namely freedom of media, is a key factor for countries working for EU membership, where Kosovo is also mentioned as a candidate. With regard to Kosovo, this report emphasizes that the protection of journalists and the rule of law in this respect remains a major challenge.¹³
49. Moreover, the EU in one of its adopted Guidelines¹⁴ clearly attaches the highest priority to the safety of journalists, stating that it will take all appropriate steps to ensure their safety, both in terms of preventive measure and by urging effective investigations when violations occur. With its priorities for this purpose, the EU will:
- a) *Publicly condemn the killings, attack, execution, torture, enforced disappearance or other acts of serious violence or intimidation against any individual for exercising his or her right to freedom of opinion and expression, as well as attacks on media outlets;*

¹¹ For more information, see Report of the Committee to Protect Journalists titled “The Best Defense: Threats to journalists' safety demand fresh approach”, published on 21 February 2017 (<https://cpj.org/reports/2017/02/Best-Defense-Threats-Safety-Journalists-Freelance-Emergencies-Attack-Digital.php>) (08.09.2017).

¹² Shih Report of the Committee to Protect Journalists titled “[Balancing Act: Press Freedom at Risk as EU Struggles to Match Action with Values](https://cpj.org/reports/2015/09/press-freedom-at-risk-europe.php)”, published on 29 September 2015 (<https://cpj.org/reports/2015/09/press-freedom-at-risk-europe.php>), (08.09.2017).

¹³ *Ibidem.*

¹⁴ EU Human Rights Guidelines on Freedom of Expression Online and Offline, Brussels, 2014 (EU Guidelines), point 29.

- b) *Appeal to State authorities to fully abide by their international obligations to effectively, promptly and in an independent manner investigate such crimes and to ensure that both state and non-state perpetrators and instigators of such violence are brought to justice. Where appropriate, the EU will encourage international trial observation to ensure the follow up on cases of violence and promote the fight against impunity.*
- c) *Call on all States to take active steps to prevent violence against journalists and other media actors, enabling them to work in safety and security, without fear of violence and persecution.*
- d) *Strongly encourage state officials and other influential actors in society to publicly denounce acts of violence or intimidation against journalist and other media actors, particularly in cases where state organs have encouraged or condoned such attacks.*
- e) *Support the implementation of UNGA Resolution on "The safety of journalists and the issue of impunity" and the UN Plan of Action on the same subject;*
- f) *Facilitate exchange of experience with media managers, editors, journalists and other media actors in order to raise awareness, develop their capacity to prevent attacks and enhance the safety of journalists, including through training measures.*
- g) *Facilitate exchange of good practices for the safety of journalists with government officials, including members of the judiciary, prosecution and law enforcement.*

50. On this ground, the Ombudsperson recalls that the agenda of the Government of the Republic of Kosovo in the process of EU membership is closely related to the fulfilment of standards for freedom of expression and safety of journalists.

II. Limits of the freedom of expression in relation to other human rights

51. In democratic countries, in principle, the freedom of expression, namely freedom of media, is guaranteed by constitution and laws against the abuse by those who have the power, and there can be no censorship of this fundamental right. However, in all democratic countries, the law limits the use of this right to avoid abuse, in particular with regard to libel and defamation through the media, report fake news for the sole purpose of damaging the dignity and reputation of a person, spreading hate speech, violation of public safety, etc.

52. Courts, regional and international mechanisms and conventions on human rights recognize that freedom of expression can be limited by law in certain, strictly defined way, and under special circumstances. The limitation to the exercise of the freedom of expression should not jeopardize the right.¹⁵

53. In accordance with the standards set out in international documents, the Ombudsperson notes that limitations on the freedom of expression are justified to the extent that its realization is not violated and only to the necessary extent of ensuring that the exercise of such right does not detriment other rights. Therefore, achieving such a balance

¹⁵ Shih Udhërrefyesi i BE-së, pika 19.

requires special attention and establishment of a legal framework and appropriate enforcement mechanisms. This goal can only be achieved based on a thorough scrutiny and analysis to ensure that freedom of expression, or media freedom, is not abused to the detriment of human dignity, privacy, spread of hate speech, intolerance, and other harmful consequences. There are now standards set by international mechanisms, particularly by the ECHR, on the manner of spreading and defining these consequences, as will be addressed in this report.

54. The Ombudsperson reiterates that creating a balance between freedom of expression, namely the media and its limitations to other rights is very complex, because freedom of expression is a fairly broad concept. This is because there are many issues related to it, such as freedom of opinion, freedom of the press, media freedom, tolerance, respect, responsibility, etc., which are not easy to define and set their limitations. Furthermore, even international normative acts and internal states legislation have difficulties in defining freedom of expression as a right within terms a legal definition and to set its limitations with regard to other human rights.
55. Another aspect that makes the freedom of expression more complex is the difficulties of rendering decisions in the judicial jurisprudence, wherein a very careful approach and a profound and systematic interpretation is required to define its limitations.
56. In this regard, there is no unique solution within the judicial jurisprudence of certain countries, based on various legal solutions on the limitations of freedom of expression, launching a broader pattern of freedom of expression (such as the lawmaker case in France) or restrictive patterns such as the case of Hungary and other countries. In this regard, it has been noted that within judicial jurisprudence exists the tendency of defining criteria that help set a standard to adjudicate cases related to freedom of expression and its limitation, for example, the Court of Cassation in Italy (Supreme Court) in terms of guarantying other rights, particularly in protecting human dignity from defamation and insults, with the aim of defining the limitation of the freedom of expression has defined three basic criteria, such as **verity, forbearance and public interest**.

Certainly, the legal grounds for defining the limitations to freedom of expression are set under domestic legislation and international legal framework.

A) Limitations according to international acts

57. Further in, the international acts and legislation of Kosovo will be addressed, which establish the grounds for limitations to freedom of expression, with the purpose of guaranteeing the observance of other rights.
58. International documents referred above, in addition to defining the freedom of expression as the cornerstone for developing a democratic society, in parallel determine the possibility of limiting such right, to the extent necessary, in order to guarantee other human rights from the abuse of freedom of expression.

59. In this regard, the Ombudsperson emphasizes the necessity for lawmakers in Kosovo to ensure that any limitation to the freedom of expression is to be made in the spirit of such documents.
60. Thus, the UDHR, in addition to defining the freedom of expression (as discussed above), also defines the possibility of limiting the rights and freedom of expression in order to protect other freedoms and rights. To that end, reference should be made to Article 29 where it is stipulated that:
1. *Everyone has duties to the community in which alone the free and full development of his personality is possible.*
 2. *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*
 3. *These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.*
61. The fundamental obligation that the limitation to the freedom of expression should be clearly defined by law also derives from these provisions, excluding the possibility of any limitation beyond the legal definition. Also, the legal limitations should be conditioned by the need of respecting the requirements arising from morality, public order and general welfare in a democratic society.
62. Also, the ICCPR defines the grounds for limiting the freedom of expression, where it is foreseen that the exercise of the freedom of expression also includes special duties and responsibilities. In this regard, Article 19, paragraph 3 provides that freedom of expression may be *“subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.*
63. Moreover, Article 20 of the ICCPR provides that: *“Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”* **The Convention on the Elimination of All Forms of Racial Discrimination (1965)** is in the same spirit, which, among others, in Article 4 defines: *“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.... Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination...”* For this purpose, another significant document is the Protocol of the Council of Europe (2003) against online hate speech, adopted for the implementation of the Convention on

Cybercrime for the purpose of combating online hate. The two main objectives of this protocol are the harmonization of criminal law in the fight against racism and online xenophobia, and secondly, the advancement of international cooperation in this field. According to the protocol, online hate speech implies “*racist or xenophobic motivated threat through computer systems.*” While, “*any written material, any photograph or any other presentation of ideas and theories which represent, promote or incite hatred, discrimination or violence against an individual or group of individuals based on: race, colour, ancestor or national or ethnic origin, as well as religion if used as a pretext for any of these factors*” is considered as a material of xenophobic and racist content.

64. It should be noted that this ground has been recognized in most countries criminal laws, incriminating hate speech as a criminal offence (such as the definition of the Criminal Code of the Republic of Kosovo, namely the criminal offence “*Inciting national, racial, religious or ethnic hatred, discord or intolerance*”(Article 147)).
65. The Ombudsperson makes a reference stating that the obligation of the state to ensure that no right (in this case the freedom of expression, i.e. freedom of media) is exploited or abused to the detriment of other rights also derives from the text and spirit of other human rights documents. First of all, the ECHR as the grounds for ECHR decisions, which are mandatory for judicial jurisprudence in the Republic of Kosovo. Moreover, Article 17 of the ECHR defines the principle that: “*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*”
66. This gives rise to the obligation of lawmakers in Kosovo to establish an appropriate legal basis that creates clear premises for implementation of fundamental rights by individuals and groups of citizens, without violating and abusing other fundamental rights in accordance with the ECHR's definitions (as a document directly applicable in Kosovo under Article 22 of the Constitution). Such balancing requires a reasonable limitation in terms of freedom of expression (the media) to the extent that it is necessary to protect other human rights (such as privacy, human dignity, etc.) and does not threaten effective enforcement of this fundamental freedom. The Ombudsperson emphasizes that such limitation should be of restrictive nature and should not result in censorship of the freedom of expression (media) and lose its content and function in society.
67. Such orientation arises from the interpretation of Article 18 of the ECHR whereby it is defined “***Limitation on use of restrictions on rights***”, defining that: “*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed*”. This principle is mandatory both for lawmakers when drafting legislation in this field, as well as for law enforcement bodies when interpreting cases in practice. The possibility of determining the limitations of the use of freedom of expression in order to protect other rights and freedoms is also defined in Article 10, *Para. 2*, where it is expressly stated that: “*The*

exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

68. Based on the above, the Ombudsperson while reiterating that the ECHR represents the key document on the basis of which the right to freedom of expression should be regulated states that the legal limitations of this right should in Kosovo should also be defined on those grounds.
69. For this purpose, the ECHR has set as an essential standard that any limitation to the freedom of expression by states is based on the principle of legality and any arbitrariness of bodies responsible for making decisions related to this right should be avoided. In this regard, the Ombudsperson reminds the obligation of lawmakers in Kosovo to determine the limits to the freedom of expression, and the obligation of courts to strictly ensure that this right is not violated or limited beyond what is guaranteed under the ECHR (Convention) and clarified by ECHR (the Court) decisions.
70. It should also be noted that the ECHR has, with its decisions, intervened in preventing unjustified limitations on states in the area of freedom of expression and freedom of the media. Based on cases adjudicated by the court, it results that the key principle adhered was the principle of proportionality between the freedom of expression and the limitations required for the purpose of preserving other rights, but always emphasizing the obligation of states to render the necessary measures to ensure effective exercise of freedom of expression (as a so-called positive obligation) as a fundamental principle of democracy. Cases decided by the court in this area are numerous.

B) Restrictions under the domestic legislation

71. In accordance with the principles set out in the international documents mentioned above, it is duty of the states to concretely define their freedom of expression (media) in their domestic legislation and stipulate the reasons for its limitation. This adjustment, as the basic premise and starting point, must guarantee the freedom of expression (media), and its limitation must be based on limitations necessary to guarantee other rights.
72. The applicable legislation in Kosovo, apart from affirmation of freedom of expression, also contains provisions on its limitation.
73. Thus, Article 40 *Para. 2* of the Constitution provides for the possibility of limiting this right under the law, specifying that: *“The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.”* This provision is in the spirit of the general provision of the Constitution on the limitation of rights, namely Article 55 [**Limitations on Fundamental Rights and Freedoms**], which provides that:

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfilment of the purpose of the limitation in an open and democratic society.

3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.

4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

74. From this provision, it results that certain principles have been defined in terms of limiting the freedom of expression, such as:

- the principle of legality, which implies that any limitation of freedom of expression (media) is clearly defined by law. This principle constitutes a guarantee that no limitation to the freedom of expression is under discretion of state bodies, neither of the court. Also, this implies that freedom of expression cannot be limited by sub-legal acts and only by law.
- limitation of the freedom of expression must be done restrictively, only to the extent necessary to guarantee other rights in a democratic society.
- limitations of freedom of expression should not exceed the purpose of this right as defined in the Constitution and the law. This aspect should also be guaranteed by public bodies, particularly by courts in their jurisprudence, who should be particularly careful to ensure that the limitations on freedom of expression do not affect the content, i.e. the essence of this right.

75. Other limitations under Kosovo legislation consist in limiting the freedom of expression in order to avoid hate speech, violence incitement, discriminatory, offensive language and defamation.

76. Incitement of hatred is also incriminated in the Criminal Code of the Republic of Kosovo (CCK), where Article 147 defines the criminal offence **“Inciting national, racial, religious or ethnic hatred, discord or intolerance”**. In this provision, the features of this offence are defined as below:

1. Whoever publicly incites or publicly spreads hatred, discord or intolerance between national, racial, religious, ethnic or other such groups living in the

Republic of Kosovo in a manner which is likely to disturb public order shall be punished by a fine or by imprisonment of up to five (5) years.

2. Whoever commits the offense provided for in paragraph 1 of this Article in a systematic manner or by taking advantage of his or her position or authority or causes disorder, violence, or other grave consequences by the commission of such offense shall be punished by imprisonment from one (1) to eight (8) years.

3. Whoever commits the offense provided for in paragraph 1 of this Article by means of coercion, jeopardizing safety, exposing national, racial, ethnic or religious symbols to derision, damaging the belongings of another person, or desecrating monuments or graves shall be punished by imprisonment of one (1) to eight (8) years.

4. Whoever commits the offense provided for in paragraph 3 of this Article in a systematic manner or by taking advantage of his or her position or authority or causes disorder, violence or other grave consequences by the commission of such offense shall be punished by imprisonment of two (2) to ten (10) years.

77. From the legal nature of this criminal offence, it results out that the lawmaker in Kosovo has strictly defined the limitations to the freedom of expression in order to protect values such as national, racial, religious or ethnic diversity. With this definition, the lawmaker also guarantees a fundamental standard of a democratic state, such as the protection and respect of different groups due to differences (national, racial, religious, ethnic) which, in addition to legal-criminal protection, are also constitutional categories with special guarantees (See Constitution, Chapter III “*Rights of Communities and their members*”). The protection of these groups and the respect of their values, even according to international documents, is an integral part of the fundamental human rights and freedoms.

78. With regard to defamation and insult (which in many countries are defined as criminal offenses), the lawmaker in Kosovo has decided to decriminalize them, and therefore such acts shall only be considered as civil liability. The Civil Law against Defamation and Insult¹⁶ defines a balanced solution between sanctioning defamation and insult to a degree that does not affect freedom of expression and the role of media in a democratic society. This definition is stated in the general provisions of the law, where Article 1 stipulates that: “*The rules relating to defamation and insult do not place unreasonable limits on freedom of expression including and the publication and discussion of matters of public interest and importance:*” (point b) and “*the essential role of media in the democratic process as public watchdogs and transmitters of information to the public*” (point d).

79. According to the Civil law for defamation and insult (Article 3) **a) Defamation shall mean the publication of an untrue fact or statement and the publisher knows or should know that the fact or the statement is untrue, the meaning of which injures the reputation**

¹⁶ See the Civil Law against Defamation and Insult, no. 02/L-65

of another person. b) **Insult** shall mean the statement, behaviour, or publication of a statement directed at another person that is humiliating.

80. Article 5 of the law defines “**Responsibility for Defamation and Insult**”, as follows:

5.1. A person is responsible for defamation or insult if he/she made or disseminated the expression of defamation or insult, unless one of the exemptions to liability is established in accordance with this Law.

5.2. For defamation or insult made through media outlets the following may be held jointly or individually responsible: author, editor or publisher or someone who otherwise exercised control over its contents.

5.3. Where the defamation or insult relates to a matter of public concern or the injured person is or was a public official or is a candidate for public office, there may only be responsibility for defamation or insult if the author knew that the information was false or acted in reckless disregard of its veracity.

5.4. Public authorities are barred from filing a request for compensation of harm for defamation or insult. Public officials may file a request for compensation of harm for defamation or insult privately and exclusively in their personal capacity.

81. In addition to other cases of exclusion from liability for defamation and insult,¹⁷ the law pays special attention to declarations of public interest for which there can be no liability. Therefore, Article 7 of the law states that: “No one shall be liable for defamation and insult for a statement on a matter of public concern if they establish that it was reasonable in all the circumstances for a person in their position to have disseminated the material in good faith, taking into account the importance of freedom of expression with respect to matters of public concern to receive timely information relating to such matters.” As such, this exclusion of responsibility due to the public interest is in line with the ECHR and the ECHR practice.

82. The Ombudsperson emphasizes that a specific aspect of limiting or controlling freedom of expression, namely media freedom, is presented in the secondary legislation (or even sub-legal acts) on media monitoring and establishment of mechanisms for this purpose. In this regard, the powers of the state to determine the criteria for the functioning of the media and to grant authorization for their operation can be considered as an affirmative control.

83. In the Republic of Kosovo, the Independent Media Commission (IMC) has been designated as the authority of this nature, which according to Article 141 of the Constitution is “... an independent body, which regulates the Range of Broadcasting Frequencies in the Republic of Kosovo, issues licenses to public and private broadcasters, establishes and implements broadcasting policies and exercises other competencies as set forth by law.” According to the law¹⁸, the IMC regulates the rights, obligations and responsibilities of natural and legal persons who provide audio and

¹⁷ See Articles 6 and 8-11 of the Law No. 02/L-65.

¹⁸ See the Law No. 04/L-44 on the Independent Media Commission (2012).

audio-visual media services. IMC, inter alia, has the power to monitor audio-visual media and, in addition to the terms of the license, in case of violation of the Code of Conduct and other legal acts, it may issue written reprimands or impose sanctions to licensees.¹⁹

84. Furthermore, based on its legal powers, IMC has also adopted the Code of Ethics for Media Service Providers in the Republic of Kosovo (hereinafter MSP Code),²⁰ wherein a normative basis on the standard of ethical and professional conduct to be implemented by MSP has been established “*in accordance with legal provisions that are necessary in a democratic society; in accordance with ethical principles and internationally accepted standards and respect of the diversity of ethnic, cultural and religious heritage in the Republic of Kosovo; in the interests of national security, territorial integrity and public safety; for the prevention of disorder and crime; for the protection of the dignity and human rights; for the protection of health and morals, for the protection of children, ...*”(Article 1 of the MSP Code). Based on the above, it is noted that the provision on the purpose of the MSP Code respects the definition in paragraph 2 of Article 10 of the ECHR. This code defines and provides a framework for limiting the expression and transmission of harmful and offensive content, vulgar and offensive language, and hate speech, inaccurate and biased news, content that violates human rights, with special emphasis on prohibition of inclusion of children and juveniles in broadcasts without respecting their privacy and other rights, etc., (Articles 3-9 of the MSP Code).
85. The Ombudsperson considers the adoption of the code in question as a very important ground which presents a clear framework of defining the standards to be implemented by MSP in order to respect the fundamental human rights. However, the practical application of this code will ultimately assess the impact it will have on achieving the goals set. Likewise, the Ombudsperson emphasizes the lack of IMC's competence for online media (portals), for which the provisions of this code are not applicable.
86. Despite the role IMC may have, the Ombudsperson notes that guaranteeing human rights and general interest against the possibility of abuse of freedom of expression in the media poses a much more complex challenge, which certainly goes beyond the scope of IMC powers, or powers that any similar authority might have.
87. Another aspect of vital importance to guaranteeing freedom of expression (freedom of the media), journalists' safety and to create a reasonable limitation to the freedom of expression is the implementation of legislation, namely the efficiency of the judiciary in this regard. The courts' efficiency represents the main guarantee for freedom of expression and imposition of reasonable limits in relation to respect for other rights as defined by the Constitution and applicable laws. As outlined in the Constitution, judicial

¹⁹ Law No. 04/L-44, Articles 29-30. Some of the sanctions that IMC may impose are to order the licensed entity to publicly transmit the details of the nature and degree of breach of the terms of the license, codes of conduct, and other legal acts, to require the licensee to transmit correction or to ask for forgiveness through transmission, to impose a fine in the amount of not less than one thousand (1,000) Euros and not more than one hundred thousand (100,000) Euros, etc.

²⁰ The Code of Ethics for Media Services Providers in the Republic of Kosovo, approved by the IMC, is in effect from 11 October 2016.

protection of rights constitutes one of the fundamental rights, whereby Article 54 stipulates that: “*Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.*”

88. With regard to interpretation of legislation in this area, the Ombudsperson notes the necessity that courts in Kosovo refer to standards established by the ECHR practice (as a fundamental source for the legal system in Kosovo).

III. Standards established by ECHR

89. Given the specific nature of the freedom of expression and the complexity of defining its limits, the Ombudsperson notes that the standard established by the ECHR's jurisprudence for this purpose is of fundamental importance since it has managed to clarify, at the highest level, the limits of using this right.

90. For this reason, ECHR decisions should be the main reference for addressing the freedom of expression and its limitation in the Republic of Kosovo.

91. This principle is also based on the Constitution, where Article 53 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*”. Also, the ECHR, which is interpreted by this Court, is listed among international documents “*...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.*” (Article 22 of the Constitution).

92. Based on such grounds, it is a constitutional obligation for courts and other public institutions, with regard to any interpretation relating to freedom of expression and setting its limits, to strictly comply with ECHR decisions issued for this purpose, as mandatory sources.²¹ In practical terms, the ECHR jurisprudence is of particular importance, especially to the courts in the Republic of Kosovo, in terms of defining the balance between freedom of expression and protection of other human rights.

93. It should initially be noted that the ECHR's jurisprudence promotes freedom of expression as a value and a necessity for the functioning of democratic societies. In its rich jurisprudence, the Court has established the standard of strong protection of freedom of expression and has justified its limitation only as an exception, under specific circumstances, and when seriously underpins other values of the society. This position has been expressed continuously, while it was best expressed in the decision on the case of *Handyside v. The United Kingdom* dated 17.12.1976, where the Court stated that: “*Freedom of expression constitutes one of the essential foundations of the democratic society, one of the basic conditions for its progress and for the development of every man ... It is applicable not only to "information" or "ideas" that are favourably*

²¹ In this regard, it should be noted that the ECtHR's jurisprudence today is the main source for the courts of other European countries, including those of the EU member states (which, unlike Kosovo which has accepted with constitutional provision the ECHR and the ECtHR's jurisprudence, the other countries which are members of the Council of Europe have accepted this standard through the process of ratifying this Convention).

received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society". Moreover, in the case of *Jersild v. Denmark* (1994), it has been evaluated and debated whether the punishment in these cases is "necessary in a democratic society" or not, i.e. if it is proportional even in cases when "phenomena that shock, strike or offend a group of people or part of society" are conveyed, and the Court has come to the conclusion that the punishment for these offences is not necessary for a democratic society, and the limitation of freedom of expression can only occur when it is indispensable (*ultima ratio*).

94. In its continuance, the ECHR jurisprudence has taken into account and prioritized the **public interest**, particularly in cases where entities (individuals) are active in public life, stressing that they must show a higher degree of tolerance to criticism. Also, on the same basis, the Court has justified the violation of private life of public persons, or the disclosure of information whenever public interest is at a high level. This standard of the ECHR is also represented in the following cases:

- In this respect, the ECHR decision on the case of *Mosley v. the United Kingdom* (2011) is important. The case was about the publication of pictures and articles (in the *News of the World* newspaper) related to a sadomasochistic event organized by Mosley (a public figure, a long-time president of the International Automobile Federation) where he appears in Nazi clothes ..., in this case, Mosley claimed that his right to private life was violated (as defined in Article 8 of the ECHR), and the state authorities have failed to impose a legal obligation on the *News of the World* newspaper to notify him prior to publishing the story and thus to give him the opportunity to request from a court the issuance of a preliminary injunction to prohibit the publication of such material by the newspaper in question. With this, he claimed that United Kingdom legislation is not in compliance with the ECHR. However, the Court did not find that the domestic legislation was inconsistent with the ECHR and stated that there was no violation of Article 8 of the ECHR, giving priority to freedom of expression in this case (under Article 10 of the ECHR), and arguing that, in this case, while Mosley is a public figure, it was of special interest to publish such material and, on the other hand, the limitation of the publication even for such content would pose a risk of censorship of freedom of expression and press. Thus, in this case, the Court gives priority to "the public interest" to be informed and not to the need to maintain privacy.
- In addition, the Court, in the case of *Heinisch v. Germany* (2011), related to a female employee, employed in a specialist company providing care for elderly people in Berlin (Vivantes). This employee reported on the internal irregularities of the organization (such as lack of staff for providing care, failure to perform duties and services to the elderly people, etc.), and therefore was dismissed from work. Based on the absence of a legal provision of such a measure, the ECHR regarded the dismissal from work to have been disproportionate and that Article 10 of the ECHR

(interference with freedom of expression) was violated, giving priority to the need to inform the public even about these aspects, and not to the obligation to maintain the secrecy learned at work.

- Also in the case of ***Lahtonen v. Finland*** (2002), related to the publication of a case involving a police officer who had committed a criminal offence, the ECHR has ruled that the Finnish court which imposed a sentence on a journalist (for breach of privacy of a police officer) has violated Article 10 of the ECHR guaranteeing freedom of expression, arguing that the imposed sentence is an excessive measure and "*unnecessary in a democratic society*" because of the nature of published information (*taken from public sources*) and specific circumstances (*where the offender is a public official*)
- **Axel Springer AG vs Germany** (2012), in this case Axel Springer AG, Publisher for the German tabloid "Bild" appealed against the decision of the German Court, whereby he had been prevented from publishing articles about the arrest of a well-known television actor and on his conviction for possession of cocaine, following the complaint by the famous actor stating that his privacy was violated (because the tabloid had published two articles in relation to this case). ECHR had decided that the prevention of publication of articles was not reasonable "for a democratic state" and the intervention of the German Court in this case constitutes a breach of Freedom of expression (Article 10 of ECHR), due to the public nature of arrest, the published factual situation and the fact that this concerns a famous public person. As it can be seen from this decision, the ECHR, in its jurisprudence has consolidated the standard that public persons cannot be guaranteed privacy with regard to topics of public interest.
- ECHR had also tolerated the violation of privacy of famous persons for the interest of public information in the case **Von Hannover vs. Germany - No.2** (2012). This case was about the publication of some photographs of Princess Caroline of Hanover, during the time while she was on holidays with her family, whereby the article mentioned the disease of the father of the princes, namely Prince Rainier of Monaco. ECHR had decided that this did not constitute a violation of privacy, due to the fact that it was an issue of public interest, and justified the publication of photographs with the reasoning that the persons in question are public figures, thus they cannot have privacy expectations for activities occurring in public and semi-public places. Therefore it was decided that there was no breach of Article 8 of the ECHR, on the Right to respect for private and family life.
- Similarly, in the case **Dalban vs. Rumania (1999)**, the court decided that the criminal conviction of a journalist for defamation following the publication of some articles where some senior public figures were accused for involvement in fraud, constituted a violation of the freedom of expression (pursuant to Article 10 of the ECHR). The court ascertained that the journalist was doing his job as this constituted a duty of the press, who while respecting other peoples reputation, should provide

information and ideas on all the matters of public interest... and in this case the published articles were not directed to the private life of public persons, but rather with their behaviour and positions during performance of their duties. Moreover, the court emphasised that there was no additional evidence that the description of the given events was completely incorrect or that they were aimed at promoting a defamation campaign.

95. Another criteria applied by ECHR in its jurisprudence is the fact that when in whatever way a secret of the court proceeding or another information was disclosed to the public, this in the future shall not represent grounds for responsibility if the same fact is published in media. With this criteria the court has, with its decision, set the standard that even in matters initially guaranteed by law as confidential, should they in any way be disclosed, the same can no longer be considered as restricted to the public.

- In the case **Sürek vs. Turkey** (No. 2) in the *Decision dated 8 July 1999*, the Court determined that there were breaches of Article 10 of ECHR. The applicant was convicted by Turkish court for having published the names of officers responsible on the war against terrorism. However, considering the severity of the criminal offences of terrorism, ECHR decided that the public had legitimate interest to be informed about the behaviour of these officers, including their identity. Moreover, the court took into account the fact that the preliminary information was published in other newspapers as well and hence every interest in the protection of identity of the officers was “significantly reduced”. Another aspect emphasised by the court in this case was the opinion that such conviction can affect the censorship of the press to contribute in open discussions on the matters of public interest. Therefore, by assessing the equilibrium between the right to defend the freedom of press and the identity of officers, the court has given priority to the freedom of press, by considering the conviction as a disproportional intervention. This decision of ECHR undoubtedly discloses the high standard that this court attaches to the obligation of states to guarantee the freedom of expression in the function of public interest.
- In the case **Öztürk vs. Turkey** (1999), the court ascertained that the Article 10 of ECHR (Freedom of expression) was violated. The appellant was convicted for inciting hatred, due to the publication of a second edition of a book about the life of one of the founding members of the Turkish Communist Party. The author, convicted for the same action as the appellant, was set free. The court, relying on the fact that the book did not change in content from other editions, emphasises that it cannot be considered inciting of hatred, without having any concrete action proving the opposite, and the publication did not disclose any purpose other than the one published by the author.
- In relation to this criterion, it is interesting that the ECHR’s argument in relation to the limits of freedom of expression in relation to the preservation of confidentiality in criminal proceeding. In the case *Weber vs. Switzerland* (1990), whereby the Swiss journalist was convicted because in a press conference he had revealed the

confidentiality of a case under investigation that was guaranteed by the Criminal Procedure Code of the Canton of Vaud. The court had concluded that the conviction was in contradiction with Article 10 of ECHR and constitutes an interference with the freedom of expression to the extent “*not necessary for a democratic society*” and that the action of the journalist was in pursuit of a legitimate purpose. The main argument that had influenced this decision was the fact that the information (protected) was revealed in an earlier press conference, and for this reason, as long as the facts were made known to the public, there was no reason to keep them secret.

96. ECHR with its decisions has quite clearly emphasised the need for special protection of privacy of juveniles and the “limitations” to freedom of expression (media) in such cases.

- This standard is reflected in the case **Krone Verlag GmbH vs. Austria** (2002), with regard to relations of the freedom of expression (Article 10 of ECHR) and the right to respect private and family life (pursuant to Article 8 of ECHR). In this case the publisher of a newspaper (Krone Verlag GmbH) submitted a complaint for a violation to the freedom of expression (pursuant to Article 10), since he was convicted for publication of data and photographs in a case of violence a juvenile by the parents. The court in this case assessed that there is no violation to the freedom of expression of the journalist (and publisher) and considered it as a “reasonable limitation to the freedom of expression in a democratic society” in specific circumstances (the requirement of special protection to the private life of the juvenile).
- Similarly, in the case **E.S. vs. Sweden** (2012), the court has, *inter alia*, ascertained that Swedish legislation has provided sufficient protection to the right of respecting private and family life, as stipulated in Article 8 of ECHR, by prohibiting the filming of persons without their consent. The case concerned the filming of a juvenile without her consent in very private situations by her stepfather.

97. In compliance to ECHR, namely parag.2 of the Article 10, ECHR in some cases, clearly set the standard that the freedom of expression can be limited when the same constitutes a threat to spreading hate speech, inciting violence, discrimination, disrupting public order, and the like. For these purposes, the limitation to the freedom of expression was considered by the court as a necessary intervention to guarantee other freedoms and rights.

- This aspect is represented by the Decision of the court in the case **Féret vs Belgium** (2009) as well. Daniel Féret was a member of the Belgian House of Representatives and chairman of the Belgian political party “Front National”, and he was convicted by Belgian court for incitement of racial discrimination, because during the election campaign by his party, some leaflets were distributed calling for: “Stand up against the Islamification of Belgium”, “Send unemployed non-Europeans home” and “Stop the sham integration policy”. For this Mr. was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He applied to the

European Court of Human Rights alleging that the conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression. The European Court however disagreed with this assumption, as it considered that the sanction by the Belgian authorities was prescribed by law sufficiently precisely and was necessary in a democratic society for the protection of public order and for the protection of the reputation and the rights of others, thereby meeting the requirements of Article 10, paragraph 2 of the Convention. Therefore, the conviction of Mr. Féret by local authorities is reasonable and there is no violation to the freedom of expression, while his comments expressed publically hold clear responsibility for causing a feeling of distrust, rejection and hatred toward the foreigners. Moreover, the court clarified that although the freedom of expression was particularly important for elected representatives, this does not justify the public discourse of racist, xenophobic content, inciting hatred and that can disturb public order should be used.

- Similarly, in the other case, **Leroy vs. France** (2008), ECHR had justified the conviction by the local court for expression (through caricature) of content which represent a violation of human dignity and can incite violence and disturb of public order. Denis Leroy, in one of his caricatures, published in the weekly newspaper on 13 September 2001, the attack on the World Trade Centre in New York with the text: "We have all dreamt of it... Hamas did it". After being sentenced with a fine for "condoning terrorism", Mr. Leroy made an application before the ECHR for breach of freedom of expression. The court determined that through his act, the appellant had exaggerated... expressed moral support for the perpetrators of 11 September, and has commented in favour of the violence against thousands of citizens and despised the dignity of the victims. Similarly, the court emphasised that despite the small circulation of the newspaper, the publication of the caricature caused a certain public reaction, a reaction able to cause violence and have an evident impact on public order. As a conclusion, the court decided that there is no breach to the freedom of expression and the intervention of the French court was reasonable.
- ECHR had ascertained that there was no violation to the freedom of expression in the case of **Mark Anthony Norwood vs. United Kingdom** (2004). Mark Anthony Norwood had placed a plaque of twin towers in flames with the words "*Islam out of Britain - protect the British people*". The plaque belonged to the British National Party (BNP) where Norwood was a member. As a result of this, he, among other things, was convicted of aggravated hostility against a religious group. Mr. Norwood alleged before the ECHR that this constituted a violation of his freedom of speech. However, the Court determined that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination, and, accordingly, Mr. Norwood cannot invoke to freedom of expression.

- The court applied the same standard in the case **Pavel Ivanov vs. Russia** (2007). Pavel Ivanov had published several articles describing Jews as the source of all evils in Russia. He accused an entire ethnic group of plotting against the Russian people, whereas the idea of his remarks was interrelated to anti-Semitism. He was found guilty for of inciting racial, national and religious hatred. Following the appeal of Mr. Ivanov, ECHR, inter alia, ascertained that the appellant was trying “to incite hatred towards the Jewish people” through his publications and that he supports the violence against a specific ethnic group, thus cannot invoke protection provided under Article 10 of the ECHR.

Key findings of the Ombudsman

98. Based on all considerations of the freedom of expression as a fundamental right of democracy, it results that this is one of the most complex topics in the entire cohort of human rights and freedoms. This feature derives from the very nature of freedom of expression and its effective implementation in relation to other rights.
99. Considering that freedom of expression constitutes a prerequisite for building a democratic society in every country, the Ombudsperson notes the possibility of abuse of this right and the violation against other rights such as the fundamental right to human dignity, the right to privacy, notably on hate speech and discrimination.
100. In this regard, the main challenge for every country remains to set a standard guaranteeing the freedom of expression in a balanced way, and set the necessary limitations for the protection of other freedoms and human rights.
101. Guaranteeing freedom of expression, namely freedom of the media, remains the main challenge in the Republic of Kosovo as well, whereby one of the prerequisites for effective discharge of this right is to provide access to public documents, considering that there such issues still exist in Kosovo.
102. One of the other fundamental issues remains the safety of journalists to address topics of public interest, the risk of threats and physical attacks against them. Such ascertainment emerges from numerous domestic and international reports on freedom of expression and safety of journalists in Kosovo.
103. In this regard, a special concern remains the handling of cases of threats and physical attacks against journalists by the judiciary, where it results that there is a lack of efficiency and priority handling of such cases.
104. In terms of legal ground regulating the freedom of expression and setting its restrictions, even based on this report, it results that we are dealing with a very broad framework. The main international documents on human rights and freedoms pay particular attention to freedom of expression and at the same time set out the basis of their restrictions to the extent necessary to guarantee other rights and considered reasonable for a democratic society.

105. The international acts, without exception, define as a priority for democratic societies to define a broad freedom of expression, whereas the limitation should only be foreseen as exceptions. This standard has been confirmed by the jurisprudence of the ECHR.
106. The ECHR in its jurisprudence has given priority to the broad use of the freedom of expression, namely to the public interest of being informed (even when this may violate the privacy of public persons), while the limitation was only justified when the freedom of expression can threaten the privacy of citizens who do not live a public life, especially when the privacy of children (which should enjoy special protection from publicity in the media) is threatened. Also, in compliance with the ECHR requirements, the court has justified the limitations to the freedom of expression in cases when hatred is spread, or violence and intolerance against a certain groups in society was promoted. In this way, the ECHR has defined the highest and most dynamic criteria for defining freedom of expression.
107. As such, the freedom of expression as a fundamental right is significantly complex and constantly evolving. This is the result of ECHR decisions based on cases addressed before the court, thereby advancing the standard of deliberation even within European countries' jurisprudence, as a primary source.

Recommendations of the Ombudsperson

108. Based on the analysis of the legal basis and the findings ascertained, pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, Article 18, paragraph 1, subparagraph 1.2, 1.4 and 1.7 of Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends to the institutions of the Republic of Kosovo to take the necessary measures to ensure the freedom of expression (media) and the safety of journalists, namely:

- **The Government of the Republic of Kosovo**, within its constitutional and legal competencies, to take the necessary measures to:
 - Ensure ongoing transparency in the function of public accountability and freedom of expression as a basis for the development of democracy and respect for human rights
 - To refer to and implement recommendations by international organizations regarding freedom of expression and journalists' safety (*especially the UN Recommendations on Journalist Safety and Impunity Issues, and Recommendations issued by EU institutions*).
 - to ensure that legislation on all issues related to freedom of expression is in full harmony with international documents and standards set by the ECHR. For this purpose, it is necessary to advance the legal basis that guarantees the freedom of expression, the media and in particular the safety of journalists.
- **The Judicial Council, the Prosecutorial Council and the Office of the Chief State Prosecutor:**

- that cases of threats and attacks on journalists be treated with priority and effectively resolved by the prosecutorial and judicial system in Kosovo. There should be proper coordination of state prosecutor with police, and efficient use of all legal remedies for investigating these offenses.
- Courts, in deciding cases on freedom of speech shall be based on the standards established by the ECHR practice as a primary source, and in all cases where the guilt of the defendants is proved, pronounce appropriate punishment, by enforcement of preventive policy and by application of punitive measures appropriate to achieve the purpose of punishment.
- **Kosovo Police:**
 - to prioritize cases of threats against journalists as preventive measure for deterioration of situations from verbal threats to physical assaults..

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

Sincerely,

Hilmi Jashari
Ombudsperson