



DECISION AND FINDINGS

Date of adoption: 11 December 2020

Case No. 2019-01

G.T.

Against

EULEX

The Human Rights Review Panel (“the Panel”), sitting on 11 December 2020 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member
Ms Anna AUTIO, Member

Assisted by
Mr Ronald HOOGHIEMSTRA, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as last amended on 11 December 2019,

Having deliberated through electronic means in accordance with Rule 13(3) of the Panel’s Rules of Procedure, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 1 August 2019.
2. The complainant requested not to have her identity disclosed. Having considered the matter, in particular the circumstances of the case, the Panel is satisfied that the request should be granted.
3. By letter of 5 August 2019, the Panel informed EULEX Kosovo (“the Mission”) that this case had been registered with the Panel.

4. On 16 October 2019, the Panel requested the complainant to provide additional information regarding the complaint.
5. On 29 October 2019, the complainant submitted additional information.
6. On 26 November 2019, the Panel transmitted a Statement of Claims and Questions to the Mission, inviting written answers and observations on the complaint no later than 26 January 2020.
7. The Panel received the observations of the Head of Mission on 18 February 2020.
8. By letter of 19 February 2020, the complainant was invited to reply to the Mission's submissions if she wished to do so.
9. On 12 March 2020, the complainant submitted her observations on the Mission's submissions.
10. On 4 June 2020, the Panel declared the complaint admissible with regard to alleged violations of Articles 3 (freedom from torture, inhuman or degrading treatment or punishment) and 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights ("the Convention") (<https://hrrp.eu/docs/decisions/2020-06-04%20Admissibility%20Decision%202019-01%20signed.pdf>).
11. On 3 August 2020, the Panel received the complainant's submissions on the merits.
12. On 7 August 2020, the Panel transmitted these to the Mission for information.
13. On 1 October 2020, the Panel received the Mission's submissions on the merits.
14. On 28 October 2020, the Panel transmitted these to the complainant for information.

II. THE FACTS

15. The facts of the case, as submitted by the parties, and as apparent from documents available to the Panel, may be summarized as follows.
16. The complainant received a summons from a court in Kosovo to appear as a witness at a criminal hearing taking place sometime in 2019 before a court in the Republic of Serbia (hereinafter, "Serbia"). These criminal proceedings concerned serious crimes allegedly committed during the conflict in Kosovo in 1998-99. The complainant had previously provided witness statements, including to the Mission, with regard to the same events.
17. Sometime after the complainant had received the summons and before the scheduled date of the hearing, the Mission approached the complainant with regard to the summons and travel from her domicile in Kosovo to Serbia to testify at the hearing.
18. The Mission subsequently organised transportation and accompanied the complainant to Serbia sometime in 2019.
19. The Mission also selected different accommodation in Serbia for the complainant when it found the accommodation provided by the Serbian authorities inadequate. The Mission

had brought along an Albanian-speaking doctor as it had deemed this precaution necessary.

20. According to the complainant, she was threatened and intimidated while in Serbia, and subsequently also in her family home in Kosovo, as a result of her testimony in Serbia. The complainant suffers from trauma as a result of the intimidation. The detail of what these threats and acts of intimidation consist of is outlined below.

III. COMPLAINTS

21. The complainant alleges that the Mission promised to protect her, but has failed to do so. She was intimidated at the court in Serbia and received anonymous threats while at home in Kosovo.
22. The complainant alleges that the Mission has violated her human rights by exposing her to this intimidation and failing to take appropriate measures to protect her from these. The complainant alleges that this intimidation has caused her stress and trauma. She claims that her health and mental well-being have suffered severely from this experience, and she is receiving medical attention because of it.
23. The complainant alleges violations of the European Convention on Human Rights (“the Convention”), without specifying any particular articles of the Convention. The Panel notes that, consistent with the settled case law of the European Court of Human Rights (“the Court”), a complaint is characterised by the facts, and it is the role of the Court – or, in the present case, the Panel – to characterise the law as applicable to the facts (principle of *jura novit curia*, see e.g. *Şerife Yiğit v. Turkey [GC]*, no. 3976/05, ECtHR Judgment of 2 November 2010, para 52). The Panel considers that the factual allegations put forward by the complainant relate to human rights guaranteed under the following articles of the Convention: Article 3 (freedom from torture or inhuman or degrading treatment or punishment) and Article 8 (right to respect for private and family life, home, and correspondence). The complaint was declared admissible on that basis.

IV. SUBMISSIONS OF THE PARTIES

The complainant

24. The Panel reproduces here the complainant’s initial submissions, as these, together with the complainant’s responses outlined below, are material to the Panel’s assessment on the merits.

Initial submissions

25. In her initial submissions, the complainant alleges that when the Mission approached her, the Mission officials “told us [the complainant and other witnesses] to go to a Court in order to provide statements for a case of [redacted by the Panel]. EULEX promised a lot of security, but what happened was the opposite”. The complainant claims that the Mission promised to guarantee her safety during the trip to Serbia. It is apparent from the complainant’s submissions that she had understood that the Mission would be in charge of her security.
26. The complainant claims that she only accepted to go and testify because of the Mission’s guarantee of security. Replying to the Mission’s observation that it had informed the

complainant that the Serbian authorities would be in charge of security, the complainant states that if she had known that the Serbian authorities would be in charge of her security, she would not have accepted to travel to the court in Serbia, as she does not trust the Serbian authorities.

27. As for her alleged intimidation, the complainant claims that she was threatened twice with consequences for her family while she was giving her witness statement at the court in Serbia. While at the court, the complainant claims that unidentified persons rushed towards her and the other witnesses, saying words in the Serbian language that she could not understand.
28. She claims that the Mission officials witnessed the events but did not react. The complainant claims that, as a result of this intimidation, she required medical attention during the proceedings to cope with the stress.
29. After her return to Kosovo, the complainant claims she received anonymous phone calls and has been disturbed in late hours while in her house. She lives in her house with family members. The complainant claims she reported the case to the Kosovo police. She has continued to require medical attention and has submitted evidence to the Panel of a medical diagnosis of post-traumatic stress disorder and of treatment resulting from it.

Responses to the Panel's questions

30. To the Panel's question of whether she has continued to receive threats and anonymous phone calls since the events described in the original complaint, the complainant answered that although her movements have been restricted by the coronavirus pandemic, when she does go out, she is "constantly hassled by unknown persons". She states she has asked the Kosovo police to provide her with security. However, according to the complainant, the police have refused as they state they cannot open a case without knowing the persons. The complainant states that the police have asked her to take a photo of the persons harassing her, but she claims that she "could not take a photo of them, because [she has] been threatened by them in public places, in an undertone, and then they have left to unknown locations".
31. To the Panel's question of whether she has reported the threats to the Mission, the complainant responded that she has reported these to the Mission, "and everything has been filed in writing, where [she has] specified the forms of the threat".
32. As for the Panel's question on what the Mission told her when she reported the threats to the Mission, the complainant stated that

"[the Mission] has not even taken into consideration my complaints, the threats against [her] which occurred after [she] came back to Kosovo. Nor did they take into consideration the threats that took place in the court in [Serbia], while ignoring [her, and it appears the complainant is also referring to other witnesses at the hearing] that [she and those other witnesses] allegedly were not telling the truth, and [she] said from the beginning that if [she] had known that [she and the other witnesses] would not be provided with security from [the Mission], [she] would not have travelled to testify, even for the fact to have the justice served for the innocent victims of Serbian crimes".
33. To the Panel's question of when and how she reported the threats and anonymous phone calls to the Kosovo police, the complainant stated that she reported these to the police as soon as they happened. She stated that she provided a statement to the police, hoping

they would provide her with security. The Panel has not been provided with any such records.

34. The Panel had further asked that the complainant provide any available evidence of the anonymous calls, the reports to the police, and any steps taken by the police. The complainant did not provide any such evidence and did not explicitly address the question of evidence in her submissions. The Panel has therefore approached some of the submissions made with caution where corroborating information has not been provided although it would have been readily available to the complainant.
35. The Panel had asked the complainant to describe the consequences that the intimidation and the post-traumatic stress disorder have had on her and her family. The complainant responded that she, as the head of the family, has been “extremely worried and fearful that something bad might happen to [redacted; references to the complainant’s close family members living in and outside of Kosovo]”. A reference to police protection in this part of the submissions is unclear.
36. The complainant in her submissions provided further medical reports related to her medical conditions. In her initial submissions, the complainant had provided medical evidence of a diagnosis of post-traumatic stress syndrome after her witness testimony in Serbia.

The Mission

37. To the Panel’s questions, reiterated in its Admissibility Decision, asking the Mission to provide detail of its role and responsibilities in witness protection, and asking for an explanation of how the Mission’s witness protection role is engaged, by whom, or by what authorities, the Mission reiterated that the complainant “is not and has never been in the EULEX Kosovo Witness Protection Programme”. The Mission noted that the complainant is not a protected witness in the criminal proceedings in Serbia, and that the transcript of her testimony is publicly available, disclosing her name. The Mission further noted with regard to these two questions that “EULEX Kosovo provides security to protected witnesses in accordance with existing Kosovo legal provisions (Law on Witness Protection No. 04/L-015, and Kosovo Criminal Procedure Code)” (emphasis in original). The Mission did not provide further detail on its role and responsibilities in witness protection.
38. The Panel has had the opportunity to review the aforementioned transcript.
39. In its Admissibility Decision, the Panel also reiterated its earlier question, asking the Mission to explain the legal basis for the Mission to conduct witness protection activities on the territory of Serbia outside the boundaries of Kosovo and/or on behalf of the courts operating under the authority of Serbia, and also asking for a comprehensive explanation of the legal basis in this particular case for the Mission to accompany the complainant to Serbia to provide witness testimony. In its submissions, the Mission stated that “[it] did not conduct ‘witness protection activities’ on the territory of Serbia outside the boundaries of Kosovo”; rather, it “merely assisted” the complainant “in travelling to [Serbia] in order to testify in the capacity of witness” at the hearing.
40. The Mission further explained that during its executive mandate in the criminal justice system, it could not conduct proceedings in many alleged war crimes cases since suspects and defendants were unavailable. The Mission therefore cooperated with the Serbian authorities in a number of cases being prosecuted in Serbia, such as in this case, to ensure accountability for the most serious crimes under international law. The Mission made reference to an interview of the complainant as witness carried out by the Mission

in April 2010, and stated that the case file containing the witness statement was handed over to the Kosovo institutions on 20 December 2018 in the preliminary investigation stage, recommending to verify the status of the proceedings in Serbia.

41. To the Panel's question of which organs of the Mission were in charge of the complainant's security while in Kosovo, the Mission did not provide a response.
42. To the Panel's question of which part of the Mission accompanied the complainant to Serbia, and to whom they reported, the Mission reiterated that Mission staff from the Operations Pillar had visited the complainant to inform her that the Mission would be in a position to transport her to Serbia, should she be willing to honour the court summons. The Mission did not provide a detailed response on which part of the Mission the officials accompanying the complainant belonged to nor to whom they reported.
43. To the Panel's question of what the Mission communicated to the complainant with regard to which organs of the Mission were in charge of her security while in Kosovo, and from which part of the Mission the officials accompanying her would be, the Mission stated that its officials explained to the complainant that,

“her attendance at the hearing was completely voluntary; that it could be upsetting for her to give evidence in the presence of the defendants but that the Mission plays no role in the criminal proceedings and the Serbian authorities are solely responsible during the entire time during her trip outside of Kosovo's boundaries. The Mission also explained that her acceptance of EULEX Kosovo support would not entitle her to any further assistance afterwards”.
44. The Mission referred to a request made by the complainant for assistance with obtaining a visa for some of her close relatives to a third country, and states that it explained to the complainant it could not meet the request. The Mission notes the complainant then stated she was willing to testify in Serbia and accepted the Mission's “offer of support”.
45. The Mission states none of the conversations with the complainant were recorded, but that the relevant Mission staff “possess a clear recollection of events, particularly given that the actions undertaken were for a person outside the Witness Protection Programme”.
46. The Panel asked the Mission which entity (if not the Mission) was in charge of the complainant's security while in Kosovo, asking for evidence of the relevant agreement between the Mission and the other entity on the arrangements and respective responsibilities. The Mission did not provide a response to this question.
47. To the Panel's question of whether the Mission had carried out a risk assessment, including the necessity for protective measures, as regards the security of the complainant, the Mission responded that it did not conduct such an assessment. The Mission states that

“this was not required given that its role was merely to facilitate [the complainant's] attendance at the court hearing in [Serbia]. However, as already indicated, it took all the necessary steps to ensure her well-being during the trip to [Serbia]”.
48. To the Panel's question on the type of protective measures the Mission deems would be available for a witness who is intimidated because of their testimony, and on the role of the Mission in assessing the necessity of such measures and in their implementation, the

Mission made a reference to Kosovo legislation (*Kosovo Law on Witness Protection No. 04/L-015*) but did not provide further detail.

49. The Mission declined to provide the Panel with access to communications between the Mission and the Serbian authorities on the coordination, the sharing of responsibilities, and practical arrangements, in particular security, with regard to the complainant's travel and testimony in Serbia.
50. The Mission also declined to provide access to the Panel to the request by the Serbian authorities that the Mission had referenced in its initial submissions. The Mission declined access on the grounds that the communication involves the Mission and a third party.
51. The Panel asked the Mission to specify the basis for the request by the Serbian authorities for the Mission's assistance, namely whether the *EU Policy Framework on Support to Transitional Justice (2015)* was this basis, and whether the Mission made the Serbian authorities and the complainant aware that the Mission was assisting on that basis. The Mission in its response reiterates that it provided assistance to the complainant "in the context of [the aforementioned Policy Framework]". The Mission states again that it had explained to the complainant that the Mission was not involved in the proceedings in Serbia, and that the Serbian authorities were exclusively in charge of her security during her stay in Serbia. The Mission further states that

"[h]aving explained this to the complainant, the Mission did not consider it necessary to differentiate between a person enrolled in the Witness Protection Programme and a witness outside the Programme. [The complainant] appeared to understand the commitment given by the Mission and voluntarily consented to travel".

The Mission did not provide a response on the question of the awareness by the Serbian authorities as to the basis for the Mission's assistance.

52. The Panel asked the Mission to explain the procedure of mutual legal assistance referred to in the Mission's submissions on admissibility, and to clarify the respective roles of (a) the Mission; (b) the office of the EU Special Representative in Kosovo; (c) the Kosovo authorities; and (d) the Serbian authorities, in particular as regards assistance and security for witnesses called to testify across borders. The Mission in its submissions states that it plays no role in the procedure of mutual legal assistance, and that it is the role of the EU Special Representative in Kosovo to assist with international legal assistance requests and responses, based on the 2015 Procedure on Mutual Legal Assistance between Belgrade and Pristina deriving from the "Brussels Dialogue".
53. To the Panel's question on the legal and practical differences as regards the security of, and assistance to witnesses in the Mission's activities under the *EU Policy Framework on Support in Transitional Justice (2015)*, and the Witness Protection Programme, the Mission did not provide a response.
54. To the Panel's question of whether the Mission officials encouraged or asked the complainant to testify at the criminal trial, and asking the Mission to provide a copy of any written communication between the Mission and the complainant, the Mission replied that its officials did not encourage or ask the complainant to testify. Instead, the Mission submits, the officials merely informed the complainant that in case she decided to appear at the trial, the Mission could assist with travel. The Mission did not provide a copy of any written communications and did not address this part of the question.

55. To the Panel's question of whether the Mission officials present at the court in Serbia discussed the events and alleged intimidation at the court with the complainant, the Mission replied that it had already replied to this question and had nothing further to add.
56. The Mission did not provide a response to the Panel's request for clarification on whether in its inquiries with the Kosovo police, referred to in the Mission's initial submissions, the Mission had verified the complainant's phone records to ascertain whether the complainant had received the anonymous calls or asked a third party to carry out such a verification.
57. The Mission also did not provide a response to the Panel's request for clarification on whether, during their presence in Serbia, the Mission staff accompanying the complainant were subject to the authority and directions of the Serbian authorities.
58. The Mission in its submissions provides a number of remarks on the complainant's submissions. The Mission notes that it finds the complainant fails to provide details of the threats and anonymous phone calls that she is allegedly receiving or has received in the past. The Mission states that it would expect the complainant to be able to provide at least some detail.
59. The Mission further states, apparently disputing the complainant's claim that she has reported the threats to the Mission, that it has not received any written communication from the complainant after the submission of the complainant's letter to the Mission dated 28 June 2019, which the Mission thereafter forwarded to the Panel.
60. The Mission submits that in its view, the threats that the complainant alleges to have received in the court in Serbia with regard to her not telling the truth would in fact have been the warning from the presiding judge that, as a witness, she was under an obligation to tell the truth. The question of the obligation to tell the truth came up several times during the hearing, as is evident in the hearing transcript, which the Panel has had the opportunity to review.
61. The Mission states also that though it regrets that the complainant suffers from health problems, it cannot find a link between the health problems and the Mission's actions.
62. On the merits of the complaint, the Mission refers to its initial submissions and states that it regards the complaint as not having merit. The Mission states that the complainant has "failed to make an *arguable claim* against EULEX under article 3 of the Convention, both in relation to the events [at the court in Serbia] and also with regard to the events in Kosovo. The medical documentation provided by [the complainant], some of which is unclear, does not prove in any way that any of her medical conditions are attributable to EULEX" (emphasis in original).
63. As for the alleged violation of Article 8 of the Convention, the Mission "reiterates that there was absolutely no interference with the enjoyment of [the complainant's] rights under Article 8 of the Convention, since [the complainant] accepted the Mission's assistance *voluntarily* and thanked its staff for the support afterwards" (emphasis in original).
64. The Panel has had the opportunity to view a confidential document in the Mission's files, which relates to the complainant's prior statement regarding her willingness to testify in Serbia. The Panel takes note of that document, though it cannot disclose the contents in its decision.

V. DELIBERATIONS

65. In its Admissibility Decision in the present case, the Panel observed that “witness testimony is frequently crucial for prosecuting perpetrators of war crimes and crimes against humanity. To encourage witnesses to provide testimony, it is essential that the authorities take adequate measures for their protection (see e.g. *W. against EULEX*, 2011-07, 10 April 2013, para 47; *Recommendation Rec(2005)9 of the Committee of Ministers*, Council of Europe, and paras 1 and 2 in particular, Recommendation referenced also in the Court Judgment *R.R. and Others v. Hungary*, 4 December 2012, para 32; Article 13 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, with regard to witnesses of alleged torture; Article 12(1) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, with regard to witnesses in disappearance cases; Article 18 of the *Directive 2012/29/EU* of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime; *United Nations General Assembly Resolution 60/147* of 16 December 2005, para 12(b))” (see G.T. Against EULEX, 2019-01, 4 June 2020, para 36).
66. Moreover, in an earlier case also involving criminal proceedings in Serbia, the Panel observed that “it is a normal civic duty for individuals to give evidence in criminal proceedings (*Voskuil v. the Netherlands* no. 64752/01, ECtHR Judgment of 22 November 2007, para 86)” (see *W. against EULEX*, 2011-07, 10 April 2013, para 47). In that same case, the Panel further referred to the “strong interest of the international community in detecting, preventing and punishing serious crime, in particular war crimes”, but noted that “the responsibility to investigate and prosecute serious crimes also entails responsibilities on the part of competent authorities to protect those who provide them with information, i.e. witnesses” (*ibid*). The responsibility to protect witnesses may imply a positive obligation on the part of the authorities to take measures to ensure the safety and security of witnesses, although this obligation must not impose an impossible or disproportionate burden onto them (see e.g. *W. against EULEX*, para 48; *Van Colle v the United Kingdom*, Application no. 7678/09, ECtHR Judgment of 13 November 2012, para 88, on the obligation to take preventive measures).
67. The Mission, by virtue of its mandate, is well-aware of security risks to witnesses in war crimes proceedings. In this particular case, the Mission would have been aware of the serious nature of the alleged crimes being prosecuted at the trial in Serbia, and the fact that the complainant was not only a witness but also a victim of those same underlying events. The Panel infers that by proposing to accompany the complainant to Serbia, by taking steps towards ensuring her well-being, by apparently coordinating security considerations with the Serbian authorities, and by discussing security matters with the complainant, the Mission implicitly accepted that there were risks to her security and well-being. In addressing those issues with the complainant, the Mission created the appearance that it was competent to do so and, at least in the complainant’s understanding, would be responsible for these.
68. The Mission has reiterated its claim that the complainant does not come under the Mission’s Witness Protection Programme. The Panel regrets that the Mission again chose not to answer the Panel’s questions regarding its Witness Protection Programme. The Mission also did not provide an answer on the legal and practical differences between the Programme and its activities under the *EU Policy Framework on Support in Transitional Justice (2015)*. The Mission did, however, state that it did not explain to the complainant the distinction between its activities under the Witness Protection Programme, and its activities with regard to the complainant. The legal framework on which the Mission operated is, and remains, entirely unclear and uncertain. This must per force have been

the case too for the complainant, who is not legally trained and would not have been able to draw any meaningful conclusions from the legal basis on which the Mission purported to operate.

69. The Panel observes that it is clear from the information available to it that the complainant was under the belief that the Mission was responsible for her security. While the Panel accepts that the complainant may not have been a protected witness in the Mission's Witness Protection Programme, the Mission may not seek to exclude its responsibility to protect a witness where it engages in activities of the kind in the present case, by referencing the limited scope of the Witness Protection Programme, particularly where by its own admission, the Mission did not make the distinction clear to the complainant.
70. Moreover, the Panel reiterates that the Mission's legal framework does not provide for, nor authorise the Mission to provide assistance and support to witnesses in criminal cases outside of its executive mandate and the witness protection system attached thereto. The Mission's failure to fully address the issue of, and clarify the legal basis on which it operated constitutes, at the very least, an indication of the questionable presence of a valid legal basis for those most directly concerned by it.
71. The Mission did not answer the Panel's question on which entity, if not the Mission, was responsible for the complainant's security within Kosovo. The Panel also regrets that the Mission declined access for the Panel to view the relevant communications related to the security and other arrangements with regard to the witness. These failures – and others mentioned above – call for the Panel to draw certain inferences from the Mission's failure or inability to answer some of these queries.
72. Based on the Mission's actions, the perception that it created in the complainant's mind, the absence of a clear legal basis underlying those actions and the Mission's failure to provide relevant documentation and answers to the Panel's questions, the Panel must conclude that the Mission was responsible for the complainant's security within the boundaries of Kosovo. Regarding the situation while in Serbia, the Panel considers it next.
73. Regarding the situation in Serbia, the Panel accepts that the Serbian authorities would have had primary responsibility for the security and well-being of the complainant while she was in Serbia. Though this would necessarily have limited the Mission's ability to operate with regard to the complainant's security while in Serbia, this does not set aside the Mission's own human rights responsibilities when it undertakes activities such as those in the present case.
74. The Panel is reminded of the fact that the Mission sent its own staff to Serbia to accompany the complainant, that the Mission provided a doctor for her, and that when it was not satisfied with the accommodation arrangements, the Mission made its own alternative arrangements. This would have required a degree of cooperation and coordination with the Serbian authorities and extensive planning by the Mission. The Panel regrets that the Mission declined to provide information on its security arrangements with the Serbian authorities, and the respective roles and responsibilities, in particular. Again, that failure is directly relevant to the inferences to be drawn by the Panel considering that the Mission has this information in its possession and has declined to share it with the Panel without providing any reason.
75. The Panel observes that the Mission did not undertake a risk assessment with regard to the complainant. The Mission in its submissions states that it did not consider that such an assessment was required in this case. The Panel disagrees. In this context, the Panel notes that the Mission would have been aware of the potentially unsafe environment for

the complainant, given the nature of the criminal proceedings in Serbia and the risks to witnesses in such proceedings in the general post-conflict context. To the extent that it would have failed to consider the possibility of such a risk existing, the Mission would have been derelict in the exercise of its responsibilities. The Mission would also have been aware of the fact that the complainant was herself a victim of the events which were the subject of the criminal proceedings. The Mission would also have been aware of the seriousness of the offences in relation to which she was testifying. Moreover, the Mission had in its possession the confidential document described above and which is relevant for the Panel's consideration here insofar as it regards the complainant's expressions of concern with regard to testifying in Serbia. The Mission in fact acknowledged at least some of the risks associated with such a testimony by sending both security and medical support to take care of the complainant.

76. Despite its knowledge of these circumstances, the Mission did not conduct a risk assessment to determine what the risks to the complainant and her family might be, and what additional caution and protection measures, if any, might be warranted. Instead, the Mission informed the complainant that she would not be entitled to any support from the Mission other than assistance with her travel. Nor seemingly did the Mission ask Serbian authorities whether such a risk assessment had been conducted or, if it had, what its conclusions were. This suggests that the Mission did not exercise the level of care and caution that would have been appropriate in the circumstances. The fact that the Mission would have had only subsidiary responsibilities to those of the local authorities does not in any way suggest that its human rights obligations were abrogated by those of the Serbian authorities.
77. The Panel will now turn to its assessment of the alleged violations of Articles 3 and 8 of the Convention. As described above, the Panel regrets that it did not receive much of the information and evidence that it had requested from either party. The Panel will therefore need to make its determination on the basis of the information available to it and draw the necessary inferences from the Mission's failure to provide relevant information where appropriate.

Alleged violation of Article 3

78. Article 3 of the Convention, protecting the freedom from torture or inhuman or degrading treatment or punishment, requires that the ill-treatment attain a minimum level of severity if it is to fall within Article 3 (see e.g. *Krasniqi against EULEX*, 2013-02, 20 August 2013, para 11; *Kudla v Poland* Application no. 30210/96, ECtHR Judgment of 26 October 2000, para 91). The suffering must "go beyond that inevitable element of suffering" that results from a "given form of legitimate treatment or punishment" (see *Kudla v Poland*, para 92). An assessment of whether this threshold has been met may take into consideration several factors. The Court has stated that "[i]t depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects, and, in some cases, the sex, age and the state of health of the victim" (see *Kudla v Poland* para 91). The Court has also considered it relevant to take into account whether the victim also belongs to a category of persons who are 'vulnerable' in some respect (see e.g. *Khlaifia and Others v Italy*, Application no. 16483/12, ECtHR Judgment of 15 December 2016, para 194).
79. The Panel notes again that the complainant is herself a victim of the incident that was the subject of the criminal proceedings in Serbia. As such, she would have been particularly vulnerable, a fact known to the Mission at the relevant time. She lost a close relative during the events, and has since then been asked several times to provide her witness account on those events. The criminal proceedings concern alleged crimes of the most

serious kind under international law, and take place in the general post-conflict context in which the risk of witness intimidation, and indeed its occurrence, is well-known. Such testimony can in itself be quite traumatic for victims. A failure to guarantee for them a safe and secure environment to give their evidence can further heighten the trauma and stress caused by such testimony.

80. The Panel also notes that the Mission does not appear to have taken steps after the complainant's return to ascertain the seriousness of the risks she incurred. This would have created a sense of helplessness and vulnerability that could have contributed to the worsening of the complainant's trauma and an increase of her fear. Having taken upon itself to serve as her custodian for the purpose of her testimony, the Mission was then bound to ensure that no harmful consequences arose from that involvement. The Mission does not appear to have taken any meaningful steps to look into the complainant's.
81. The complainant has produced medical evidence of a diagnosis of post-traumatic stress syndrome, and she has also described the significant stress she experienced while in Serbia, including at the court, and the consequences to her health thereafter. The Panel is also reminded of the complainant's statement in the aforementioned confidential document. The Panel is not in a position to determine the extent to which these are the direct consequence of the Mission's actions. It is clear, however, that the Mission's failure to provide a safe environment for her to give her evidence in Serbia and to act diligently while she was in Kosovo would have been such as to aggravate whatever trauma might have been pre-existent.
82. When assessing the Mission's contribution to the complainant's suffering, the Panel has also accounted for the fact that the Mission has refused or failed to provide all requested information. This has prevented the Panel from establishing the real depth and extent of the Mission's involvement and responsibilities while the complainant was in Serbia. As a result, the Mission also failed to rebut the *prima facie* account of the complainant that she was the victim of serious attacks on her integrity and mental well-being.
83. The Panel notes, however, that the complainant has failed to produce corroborating evidence of the alleged threats that she says she received while in Kosovo and of the Mission's alleged inaction when she allegedly reported those threats to the Mission. The Panel is in no doubt that the complainant felt threatened. It is not in a position, however, to ascertain the nature and gravity thereof in the absence of additional information. The Panel notes in that respect that the Mission could have made inquiries at the time about these facts and should have done so in the diligent exercise of its responsibilities towards the victim. The fact that it failed to do so will impact the Panel's overall assessment of the gravity of the matter at hand.
84. As for the events in Serbia, the Panel, having reviewed the court transcript, accepts the Mission's argument that the threats the complainant has alleged as having occurred in the courtroom may relate to the statements and reminders by the judge as to the obligation to speak the truth. The Panel notes, however, that the complainant alleges that she was also threatened outside the courtroom, but also that no evidence has been provided to corroborate those alleged threats.
85. Applying the Court's reasoning in *Kudla v Poland*, being a witness would not on its own lead to a finding that the witness's suffering meets the level of severity required by Article 3. There would need to be an additional element of suffering attributable to the Mission through its failure to protect the complainant from the threats. In assessing whether the harm caused to the complainant meets the threshold required by Article 3, the Panel has accounted for the following considerations and circumstances:

- i. The trauma and fear of the victim is real and genuine;
- ii. The vulnerability of the complainant as a witness to, and a victim of serious crimes;
- iii. The fear and concern – known to the Mission – that she felt having to testify about those crimes and, more, to do so in Serbia;
- iv. The lack of clarity and transparency regarding the distribution of responsibility for the security and well-being of the complainant while in Serbia;
- v. The failure of the Mission to carry out a risk assessment or/and to ensure that one had been carried out by local authorities;
- vi. The failure of the Mission to diligently investigate (a) claims of threats in Serbia and (b) claims of threats in Kosovo;
- vii. The failure of the Mission to fully engage with the concerns of the complainant and to leave her, instead, having to seek redress and protection on her own.

86. The Panel finds, based on the above, that the circumstances meet the requisite threshold of gravity required under Article 3 of the Convention. However, the Mission is not responsible for everything that led to causing the complainant such harm. In particular, the Mission is not responsible for the pre-existing vulnerability of the complainant as a witness and victim of serious criminal offences. Nor was the Mission exclusively or even primarily responsible for what happened in Serbia. The Mission is therefore only responsible for what may seem like a marginal contribution to the harm and injury caused to the complainant's rights under Article 3. That contribution is, however, serious in nature as it is attributable to a rule of law mission the responsibility of which it was to ensure and protect those rights. The complainant trusted the Mission on that basis and put herself in a situation of having to depend on the care and diligence of the Mission. That trust was not fully rewarded.

87. For those reasons, the Panel finds that the Mission contributed, to the rights of the complainant under Article 3 of the Convention being violated.

Alleged violation of Article 8

88. Article 8 of the Convention guarantees a right to respect for private and family life, home, and correspondence. The complainant claims that the alleged threats resulting from her testimony in Serbia, and the failure by the Mission to protect her from those threats, have had a significant negative impact on her health.

89. In this respect, the Panel notes that the right to private life guaranteed under Article 8 includes the physical and psychological integrity of a person, and imposes a positive obligation on the authorities to provide adequate protection for dangerous situations, particularly where the authorities should have known of a particular danger (see e.g. *X and Y v. the Netherlands*, Application no. 8978/80, ECtHR Judgment of 23 March 1985, para 22; *Ebcin v Turkey*, Application no. 19506/05, ECtHR Judgment of 1 February 2011, paras 36-37).

90. The Panel notes, however, that the Court has established that there must be a connection between the authorities and the injury suffered, and that for an obligation to act to arise, the allegations of violence must be specific and detailed (see *Đurđević v. Croatia*, Application no. 52442/09, ECtHR Judgment of 19 July 2011, paras 117-118). The Panel refers again to the fact that the complainant has failed to produce evidence or detailed information as to the alleged threats, or the steps she took to bring those threats to the Mission's attention. The Panel therefore finds that there are insufficient elements to

establish that the Mission failed to protect the complainant from harm to her physical and psychological integrity in violation of her rights under Article 8 of the Convention.

91. Given the above findings, it is apparent from the record of this case that the complainant's testimony in Serbia may have created a potentially unsafe environment for her and her family. The Panel is concerned that the Mission did not undertake a risk assessment or put in place protective measures for the complainant, given that she came under the Mission's security responsibility while in Kosovo. The Mission's actions, and inaction with regard to security, in this case do not demonstrate the level of care and caution that would be expected of a rule of law mission in a post-conflict context with regard to a vulnerable witness in court proceedings for the most serious crimes under international law. The Panel observes that the Mission's legitimate overall pursuit of seeking accountability for such crimes cannot be done at the expense of adequate arrangements for the protection of witnesses, that is, those whose testimonies are fundamental to meeting that objective.
92. Therefore, the Panel will invite the Mission to consider the possibility of communicating with its local counterparts to ascertain what measures should be taken to guarantee the safety and well-being of the complainant.

FOR THESE REASONS, THE PANEL, BY MAJORITY,

FINDS that the Mission has contributed to the violation of the complainant's rights under Article 3 of the Convention to the limited extent outlined above;

FINDS that the Mission has not violated the rights of the complainant under Article 8 of the European Convention of Human Rights;

INVITES THE MISSION TO

- i. Acknowledge that its conduct contributed to the violation of the rights of the complainant; and
- ii. Contact the complainant and local authorities to establish the need for additional security arising from the complainant's testimony in Serbia.

ASKS THE MISSION to circulate the present Decision to relevant officials of the Mission and authorities outside of it.

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations and to respond to its enquiries at its earliest convenience and no later than 28 February 2021.

For the Panel,

Mr Guénaël METTRAUX
Presiding Member

Ms Anna BEDNAREK
Member

Ms Anna AUTIO
Member