



## **ADMISSIBILITY DECISION**

**Date of adoption: 4 June 2020**

**Case No. 2019-01**

**G.T.**

**Against**

**EULEX**

The Human Rights Review Panel (“the Panel”), sitting on 4 June 2020 with the following members present:

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

Assisted by  
Mr Ron HOOGHMSTRA, 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 by 20 March 2020, if she wished to do so.
9. The complainant submitted her observations on the Mission's submissions on 12 March 2020.

## **II. THE FACTS**

10. The facts of the case, as submitted by the parties, and as apparent from documents available to the Panel, may be summarized as follows:
11. 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 (hereafter "Serbia"). These criminal proceedings concerned serious crimes allegedly committed during the conflict in Kosovo in 1998-99.
12. 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 the travel from her domicile in Kosovo to Serbia to testify at the hearing.
13. The Mission subsequently organised transportation and accompanied the complainant to Serbia sometime in 2019.
14. 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.
15. 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**

16. 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.
17. The complainant alleges that the Mission has violated her human rights by exposing her to this intimidation. 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.
18. 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, 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).

19. These Convention provisions read as follows:

**Article 3 Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

**Article 8 Right to respect for private and family life**

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **IV. PARTIES’ SUBMISSIONS**

##### **The complainant**

20. 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.
21. The complainant claims that she only accepted to go and testify because of the Mission’s guarantee for 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.
22. As for the 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. At some point in time while at the court, the complainant claims that some persons rushed towards her and the other witnesses, saying words in the Serbian language that she could not understand.
23. 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.

24. 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 the requisite treatment.

### **The Mission**

25. As an initial matter, the Panel notes that the Mission does not appear to dispute the basic underlying facts of the complaint, namely, that she was subject to threats and intimidation as described by her, although it points to the fact that the complainant has failed to provide evidence of the alleged threatening phone calls.
26. The Mission submits, however, that the complainant was and is not a protected witness and as such, the Mission's actions in this case are unrelated to its Witness Protection Programme. This Programme is mentioned as an executive responsibility in the document forming the legal basis for the Mission, i.e. Council Joint Action 2008/124/CFSP of 4 February 2008 as last amended by Council Decision (CFSP) 2018/856 of 8 June 2018.
27. As for the context of the assistance in this case, the Mission claims that it provided such assistance pursuant to a request from the court in Serbia, and in connection with the EU's overall efforts to support the fight against impunity for serious crimes under international law, in line with the EU Policy Framework on Support to Transitional Justice.
28. The Mission claims that it offered the complainant assistance with her travel to Serbia, and that "the assistance to the complainant was limited to accompanying her from her home address to [Serbia] and back so that she could voluntarily testify in ongoing criminal proceedings against a number of defendants."
29. The Mission submits that it informed the complainant that the Mission was not involved in the proceedings in Serbia, and that "although the Mission was in the position to accompany her to the court premises, Serbian authorities were exclusively in charge of her security during her stay in [Serbia], (including in the court premises), as well as on her way there from Kosovo and back."
30. As regards the events at the court in Serbia, the Mission claims it was present in the public gallery from which it observed the court proceedings. The Mission also claims it observed a tense exchange between the complainant and the defendants during the hearing, and another such exchange when the complainant and the defendants exited the courtroom at the same time.
31. The Mission claims that the complainant did not complain to the Mission about her treatment at the time. The Mission alleges it carried out a follow-up welfare visit to the complainant some days after the trip to Serbia. At this visit, according to the Mission, the complainant did not report any problems, but rather expressed her gratitude for the assistance provided.
32. The Mission submits that the claim with respect to the events that took place in Serbia and the post-traumatic stress disorder that is the direct consequence of those same events outside the boundaries of Kosovo is outside the Panel's competence both *ratione materiae* and *ratione personae*, and therefore inadmissible.
33. As for the claim with respect to the events in Kosovo, the Mission submits that the Panel should declare this part manifestly ill-founded. The Mission claims that the complainant's

post-traumatic stress disorder is outside of the Panel's competence, as directly resulting from the events outside of Kosovo, and cannot be attributed to the Mission. The Mission considers that it provided the best possible assistance to the complainant, to care for her well-being in the difficult circumstances, upon the complainant's voluntary acceptance of such assistance.

34. Regarding the threats and anonymous phone calls, the Mission submits that the complainant does not provide evidence to substantiate her claims. Following its inquiries with the Kosovo police, the Mission claims there is no criminal report filed by the complainant for these events.

## **V. PANEL'S ASSESSMENT REGARDING ADMISSIBILITY**

### **Timely filing of complaint**

35. The Panel notes that the complainant filed her complaint within six months from the date of the alleged violation, thereby complying with Rule 25(3) of the Panel's Rules of Procedure. The Mission did not contest the admissibility of the complaint on these grounds.

### **Security of witnesses**

36. The Panel observes, on a general point, 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's 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)).
37. The requirement to provide protection is particularly important in post-conflict contexts, such as Kosovo, in which witness intimidation and retaliation against witness and their families are genuine risks. Furthermore, in such cases, witnesses are also often victims themselves, as is the case with the complainant in the present case, and they may suffer from pre-existing trauma, which providing testimony may exacerbate.
38. The Mission claims that the actions taken with respect to the complainant are not related to witness protection. The Panel notes in this context that the Mission failed to answer several of the Panel's questions on the Mission's witness protection activities. The Panel is aware that information pertaining to witness protection programmes and activities is necessarily highly confidential. Nevertheless, further information on the Mission's activities in this field could have been useful for the Panel's analysis. The Panel will therefore reiterate those questions in the present decision and invites the Mission to carefully address these.

39. The Mission does not contest that the complainant is a witness in a criminal trial. 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. The Mission, by virtue of its mandate, is also well aware of such risks to witnesses in war crimes proceedings. In this particular case, the Mission would have been well 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 events.
40. Where the Mission undertakes actions that go towards ensuring the security and well-being of a witness, it cannot seek to exclude its human rights responsibility on the basis of a distinction – particularly one that would not be apparent to those being assisted – between a formal witness protection programme and actions aiming to protect a witness but which fall outside of such a programme. Here, it appears that the complainant was under the impression that the Mission was in charge of her security.
41. 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 EU Policy Framework on Support to Transitional Justice to which the Mission makes reference does not create a legal basis on which the Mission would gain the authority to do so. Instead, as the document itself makes clear, it is a ‘policy’ that outlines certain objectives of relevance to the EU. It does not, therefore, create an independent legal basis on which the Mission could act outside of the one set out in the Council Joint Action 2008/124/CFSP and the regime derived from it.
42. The Mission appears to suggest that its actions while in Serbia were exclusively regulated by the agreement that the Mission had reached with the Serbian authorities regarding this matter. This is not convincing.
43. First, the authority of the Mission to enter into such an agreement depends on a valid legal basis providing for it. Third party agreements do not create legal authority for the Mission to act. They merely set the framework and conditions under which it can exercise its competence in a particular context or circumstances.
44. Second, the tenor of such an agreement and the manner of its execution would at all times have to be and remain consistent with the authority that the Mission is given by its founding instruments, i.e., first and foremost the Joint Action and regulations that derive from it.
45. Third, the fact that Serbian authorities had primary responsibility for the security and well-being of the complainant while on Serbian territory does not mean that the Mission’s own responsibility were thereby set aside. This is apparent already from the fact that the Mission sent its own staff to accompany her, that the Mission provided a doctor for her and that, when it was unsatisfied by accommodation arrangements made for her, the Mission made its own alternative arrangements. What the scope of its responsibilities were and what it could do in a given situation is not therefore relevant to the question of this matter’s admissibility, although it could affect the merits of this case.

### **Events in Serbia**

46. The Panel has previously established that it has no jurisdiction over proceedings that take place outside of Kosovo (*Family of Mr. Dedë Gecaj against EULEX*, 2011-01, 23

November 2011, para 53). The Panel is, however, competent to review conduct by the Mission, consistent with its mandate. The Panel notes that in a case brought before the Panel, *F and Others against EULEX*, 2011-27, 5 December 2017, the fact that some of the events relevant to the case took place outside of Kosovo did not affect the Panel's competence to review the complaint.

47. The Panel is of the view that to the extent that the Mission carries out its activities outside the territory of Kosovo that come under the Mission's human rights obligations, the Panel is generally competent to review such conduct. To draw a line for the Panel's competence in a manner argued by the Mission would deprive complainants of the effective protection of their rights and of the one accountability mechanism to which they may complain for alleged human rights violations resulting from actions taken by the Mission outside the territory of Kosovo.
48. The Panel wishes to highlight that in the present case, the Mission's actions were by design cross-border in nature and related to a serious and significant matter – witness testimony in a war crimes trial – which is part of the core considerations for a rule of law mission in a post-conflict context.
49. Moreover, the Panel notes that the Mission's involvement appears to have encouraged the complainant to agree to travel to Serbia to provide testimony. The Mission also accompanied the complainant throughout her stay in Serbia. The Panel notes that in a previous case, it found that a complainant's cooperation with the Serbian authorities as a witness did not absolve the Mission of its own responsibilities towards the complainant (*W against EULEX*, 2011-07, 10 April 2013, paras 50 and 53). Therefore, the Panel is not persuaded by the Mission's claim that the Panel lacks competence with respect to the events in Serbia or the events in Kosovo resulting from the events in Serbia.

### **Events in Kosovo**

50. As for the Mission's contention that the complainant's claim of threats and anonymous phone calls is unsubstantiated, the Panel notes that the parties' submissions, contradictory on certain issues of fact, do not enable the Panel to dismiss that part of the complaint as manifestly ill-founded. The Panel also notes that the procedure before the Panel is not a criminal trial with the requisite evidentiary requirements. It is therefore the practice of the Panel to rely upon the statements of the complainant unless the truth or accuracy of those is being challenged by the other party, in which case the Panel engages in an evaluation of the reliability and credibility of the account given based on all relevant information.
51. The Panel also makes a reference to the aforementioned evidence of the post-traumatic stress disorder, submitted by the complainant, which appears to corroborate her account.
52. The Panel considers that, in the light of the parties' submissions, the complaint raises issues of fact and law under Articles 3 and 8 of the Convention, the determination of which requires an examination on the merits.

### **FOR THESE REASONS, THE PANEL UNANIMOUSLY**

**DECLARES ADMISSIBLE**, without prejudging the merits, the complaint with regard to alleged violations of Articles 3 and 8 of the European Convention of Human Rights;

**INVITES THE MISSION** to respond to the following questions in its submissions on the merits of this case:

1. Reiterating the Panel's earlier question, please provide detail of the Mission's role and responsibilities in witness protection, beyond the reference to the Witness Protection Programme in the Council Joint Action 2008/124/CFSP of 4 February 2008 as last amended by Council Decision (CFSP) 2018/856 of 8 June 2018;
2. Reiterating the Panel's earlier question, please explain how the Mission's witness protection role is engaged, and by whom, or by what authorities it can be called into action;
3. Reiterating the Panel's earlier question, please 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; please also provide a comprehensive explanation of the legal basis in this particular case for the Mission to accompany the complainant to Serbia to provide witness testimony;
4. Please clarify which organ(s) of the Mission were in charge of the complainant's security while in Kosovo, and from which part of the Mission the officials accompanying the complainant were, as well as to whom they reported. Please also clarify what the Mission communicated to the complainant in this respect, when and how. If an entity other than the Mission was in charge, please provide evidence of the agreement between the Mission and the entity in question on the arrangements and respective responsibilities;
5. Please clarify whether the Mission carried out a risk assessment, including the necessity for protective measures, as regards the security of the complainant, and if so, please provide detail on the assessment, when it was carried out, and specify whether the Mission shared its assessment with the complainant;
6. Please outline the type of protective measures that the Mission deems would be available with respect to a witness who has been intimidated because of their testimony in a war crimes trial; please also provide detail on the Mission's role in assessing the necessity for such measures and for their implementation;
7. Please give the Panel access to the 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 to and testimony at the court in Serbia, including the request by the authorities of Serbia referred to in the Mission's submissions;
8. Please 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 when it agreed to provide assistance;
9. Please explain the procedure of mutual legal assistance referred to in the Mission's submissions on admissibility, and 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;
10. Please explain the legal and practical differences as regards the security of and assistance to witnesses in the Mission's activities when those come under (a) the EU Policy Framework on Support to Transitional Justice (2015); and (b) the Witness Protection Programme;
11. Please clarify whether the Mission officials encouraged or asked the complainant to testify at the criminal trial; please also provide a copy of any written communications between the Mission and the complainant;
12. Please specify whether the Mission officials present at the court in Serbia discussed the events at the court, in particular the alleged intimidation, with the complainant;



13. Please clarify whether in its inquiries with the Kosovo police, the Mission 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; and
14. Please clarify whether, during their presence in Serbia, the Mission staff accompanying the complainant were subject to the authority and directions of the Serbian authorities.

**INVITES THE COMPLAINANT** to respond to the following:

1. Please specify whether you have continued to receive threats and anonymous phone calls since the events described in your original complaint; if so, please provide details;
2. Please specify whether you reported these threats to the Mission and, if so, when and to whom;
3. If you reported these threats to the Mission, please specify what you were told by the Mission;
4. Please describe when and how you reported the threats and anonymous phone calls to the Kosovo police. Please provide evidence, if available, of the calls, the report to the police, and any steps taken by the Kosovo police; and
5. Please describe the consequences that the intimidation and the post-traumatic stress disorder have had on you and your family.

For the Panel

Guénaël METTRAUX  
Presiding Member

Anna BEDNAREK  
Member

Anna AUTIO  
Member