EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF D.L. v. AUSTRIA

(Application no. 34999/16)

JUDGMENT

STRASBOURG

7 December 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

In the case of D.L. v. Austria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 14 November 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34999/16) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr D.L. ("the applicant"), on 20 June 2016.

2. The applicant was represented by Mr O. Dietrich, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant complained under Articles 2 and 3 of the Convention that he would run risk of torture, inhuman or degrading treatment or even death if he were extradited to Kosovo[1].

4. On 22 June 2016 the Vice-President of the Section to which the case had been allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be extradited to Kosovo for the duration of the proceedings before the Court, and granted priority to the application under Rule 41 of the Rules of Court.

5. On 5 September 2016 the complaints concerning Articles 2 and 3 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. At the same time, the President of the Section granted anonymity to the applicant under Rule 47 § 4 and decided that the case file be treated confidentially (Rule 33).

[1] All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

6. The parties submitted observations in writing and subsequently replied to each other's observations. In addition, third-party comments were received from the Serbian Government, having exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court). The parties replied to those comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1973, lives in Austria since 2001 and is currently in detention pending extradition at Vienna-Josefstadt Prison.

8. The application concerns proceedings for extradition from Austria to Kosovo, which have the following background:

9. S.Lu. is the former husband of the applicant's sister, T.L. In the course of an argument on 9 October 2001, S.Lu. stabbed the applicant in the chest. On 27 May 2002 S.Lu. was convicted in Austria of attempted intentional homicide (*versuchter Totschlag*) committed in a comprehensible state of emotion (*in einer allgemein begreiflichen heftigen Gemütsbewegung*) under Articles 15 and 76 of the Criminal Code (*Strafgesetzbuch*) and sentenced to five years' imprisonment. The applicant testified as a witness during that trial.

10. After S.Lu. was released from prison in 2005, the applicant's sister reported him to the police for having repeatedly raped her during their marriage, and for threatening to kill her and her family. Out of fear of her husband, she changed her and her children's names. An order to determine S.Lu.'s whereabouts (*Ausschreibung zur Aufenthaltsbestimmung*) was issued by the Vienna public prosecutor's office in 2008 and is in effect until 2 February 2018.

11. On the basis of an international arrest warrant issued by the Mitrovica District Court (Kosovo) on 26 November 2010 and 6 May 2011, the applicant was apprehended and taken into detention pending extradition by a decision of the Vienna Regional Criminal Court (*Straflandesgericht Wien* – hereinafter "the Criminal Court") of 15 January 2016. On 20 January 2016 the Ministry of Justice of Kosovo requested the applicant's extradition. According to the arrest warrant, the applicant was suspected of aggravated murder under Article 147 § 7 in conjunction with Article 24 of the Kosovo Criminal Code. He had allegedly ordered L.Q. in July 2010 to murder S.Lu. (his former brother-in-law) for a payment of 30,000 euros (EUR). On 3 August 2010 L.Q. fired gunshots at a car in the vicinity of the intended victim S.Lu., but instead killed N.Lu., S.Lu.'s cousin.

12. During the extradition proceedings, the applicant alleged that he had nothing to do with the murder in Kosovo. He claimed that the accusations had been invented by S.Lu. as revenge for the applicant's having testified against him during the criminal proceedings in Austria. Furthermore, the "Lu. clan" (the family of S.Lu.) was very influential in Kosovo and had connections to the highest Government officials and the justice authorities there, which is why the applicant could not expect a fair trial in that jurisdiction. In addition, the conditions of detention in Kosovo prisons were deplorable and would amount to torture, inhuman and degrading treatment. Because of the threat emanating from S.Lu. and his family, the applicant would have to fear for his life there. They could easily get to him in prison by using their connections.

13. On 24 February 2016, after having held an oral hearing, the Criminal Court declared the applicant's extradition to Kosovo permissible. It held that during the extradition proceedings, the court was not called on to examine whether the applicant was guilty or innocent, but merely to assess whether there was enough evidence to raise suspicions against him, which according to the documents submitted by the Kosovo authorities was the case. None of the evidence offered by the applicant had been capable of dispelling these suspicions immediately and without doubt, as would have been required by section 33(2) of the Extradition and Legal Aid Act (*Auslieferungs- und Rechtshilfegesetz* – hereinafter "the Extradition Act"). The fact that S.Lu. had been convicted of attempted intentional homicide in 2002 and the allegation that he wanted to take revenge on the applicant did not dispell the suspicion either. Furthermore, the court remarked that S.Lu.'s cousin had actually been killed, which called into question the applicant's theory of that being a contrived story. It could equally be argued that the applicant had wanted to take revenge on S.Lu. for stabbing him. Concerning the applicant's fear for his life in Kosovo, the court stated that the mere possibility of inhuman or degrading treatment did not suffice. The applicant had failed to adduce specific evidence of an actual, individual threat of treatment contrary to Article 3 of the Convention. Furthermore, in case of extradition to a member state of the Convention, the responsibility of the extraditing state was limited, as the person concerned could seek protection against a violation of the Convention in the receiving state.

14. On 24 March 2016 the applicant appealed. He submitted that if extradited to Kosovo, he risked treatment contrary to Article 3, because Lu. Clan wished to take revenge on him. In fact, Sm. Lu., a very influential member of that clan, was detained at Mitrovica prison and following extradition to Kosovo, he would be detained at that prison as well. Security in prison in Kosovo was a problem, as prisoners became frequently victims of aggression, and he would therefore also risk to become the victim of an assault.

15. On 31 May 2016 the Vienna Court of Appeal (*Oberlandesgericht Wien* - hereinafter "the Court of Appeal") dismissed the applicant's appeal. It confirmed the Criminal Court's finding that the applicant had failed to substantiate a real and individual risk of being subjected to torture, inhuman or degrading treatment, or that the Kosovo authorities would not be able to protect him from third, private parties. Furthermore, members of the allegedly influential Lu. clan were themselves imprisoned in Kosovo. In particular, on 21 January 2008 S.Lu. was convicted in Kosovo for issuing a dangerous threat against the applicant, which demonstrated that the Kosovo authorities were indeed capable of taking adequate measures to protect the applicant. Moreover, the Lu. clan could not be that influential if it was not capable of keeping its own members out of prison. Concerning the conditions of detention, the court held that the report on Kosovo by the Committee for the Prevention of Torture (hereinafter "the CPT") of 2011 (see paragraph 30 below) did not state that ill-treatment was the rule in Kosovo prisons, but that there were merely sporadic incidents of violence. The mere possibility of ill-treatment by prison officers did not suffice to stop the applicant's extradition. In relation to the material conditions of detention in Mitrovica Detention Centre, where the applicant alleged he would most likely be held if extradited, the Court of Appeal again quoted the above-mentioned CPT report of 2011, where it was found that inmates were able to move freely within that facility during the day and could exercise outside on a daily basis for three and a half hours, and that fitness and computer rooms have recently been installed.

16. On 13 June 2016 the Austrian Federal Minister of Justice (*Justizminister*) approved the applicant's extradition to Kosovo.

17. On 20 June 2016 the applicant requested that the Court indicate to the Austrian Government to stay his extradition to Kosovo under Rule 39 of the Rules of Court. He complained under Articles 2 and 3 of the Convention that he would run the risk of torture, inhuman or degrading treatment or even death, as the Lu. clan wanted to take revenge on him and the Kosovo authorities were not willing or able to afford him protection.

18. On 22 June 2016 the Court granted the applicant's request.

19. On 17 June 2016 the applicant lodged applications for the reopening (*Wiederaufnahme*) of the extradition proceedings and a stay of the extradition with the Criminal Court. He produced a certified declaration by L.Q., who had retracted his previous confession to the police that the applicant had ordered the murder of S.Lu. He asserted that he had been tortured by the Kosovo police during his questioning and had been pressured into blaming the applicant for ordering the murder. L.Q. alleged that he had fallen unconscious several times because of the "mental and physical torture". L.Q. averred that he did not even know the applicant in person. The applicant further submitted into evidence several sworn

statements from family members and friends, who attested that his life was in danger in Kosovo because of threats from S.Lu. and his clan.

20. On 23 June 2016 the Criminal Court dismissed the applicant's applications. It held that in accordance with section 33(2) of the Extradition Act, the applicant had failed to adduce evidence which would have been capable of immediately dispelling the suspicion against him raised in the extradition request. L.Q.'s declaration did not constitute objective evidence and did not indicate any violations in Kosovo of the applicant's rights under the Convention either. The applicant appealed.

21. On 18 July 2016 the applicant lodged an application for a renewal (*Erneuerung*) of the extradition proceedings with the Supreme Court under Article 363a of the Code of Criminal Procedure (*Strafprozessordnung* – hereinafter "the CCP"), requesting suspensive effect at the same time.

22. On 6 September 2016 the Supreme Court rejected the applicant's application. It found that the new evidence the applicant had produced in the proceedings before it were a matter for the pending reopening proceedings, not for requesting a renewal of the extradition proceedings. In relation to the alleged violations of Articles 2 and 3 of the Convention in the event of his extradition, the Supreme Court found that mere allegations referencing general reports on the human rights situation were not capable of substantiating a real and immediate risk to the applicant under these provisions. Furthermore, the Supreme Court held that the applicant did not have a right under the law to request suspensive effect, which is why that request had to be rejected.

23. On 24 January 2017 the Court of Appeal dismissed the applicant's appeal against the Criminal Court's decision of 23 June 2016 (see paragraph 20 above). The court found that the applicant had failed to produce objective evidence which would have indicated a real and immediate risk of treatment contrary to Article 3 of the Convention if extradited to Kosovo and therefore would have warranted a reopening of the extradition proceedings. While the sworn statement by L.Q. in principle raised doubts in relation to the suspicions against the applicant, it had not constituted the only evidence against him. More pertinent had been the fact that, during the criminal proceedings against L.Q. in Kosovo, a microcassette had been put into evidence by S.Lu. which had allegedly contained a conversation confirming his statements that the applicant had been to blame for the murder. In addition, L.Q.'s initial incriminating statements against the applicant had been made in the presence of his lawyer. Moreover, L.Q. had not specified what exactly the police had allegedly done to him, which had made it impossible to evaluate whether the alleged treatment had actually amounted to torture, inhuman or degrading treatment. The Court of Appeal reiterated that it was in any event for the Kosovo courts to evaluate the evidence against the applicant. In sum, it confirmed that the statement by L.Q. was not capable of immediately

dispelling the suspicion against the applicant on which the extradition request was based. Lastly, the Court of Appeal found that despite not being a State Party to the Convention or the Council of Europe, Article 22 of the Constitution of Kosovo granted the Convention direct effect under and superiority to national law, therefore domestic law equally offered protection from violations of the Convention. The Court of Appeal's decision to dismiss the applicant's appeal was served on his counsel on 30 January 2017.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law

24. Following an exchange of diplomatic communiqués between Kosovo (which is recognised by Austria as a subject of international law) and Austria, the bilateral agreement on extradition between the Republic of Austria and the Socialist Federal Republic of Yugoslavia (Federal Law Gazette no. 546/83) continues to apply between them. Article 4 § 2 of that agreement provides that an extradition shall not be granted if incompatible with the obligations of the requesting State stemming from multilateral agreements.

25. Section 19 of the Extradition Act stipulates that extradition is not permissible:

> "if it is to be feared that
>
> 1. the criminal proceedings in the requesting State will not be or have not been in compliance with the principles of Articles 3 and 6 of the Convention ...,
>
> 2. the penalty or preventive measure imposed or expected in the requesting State will be executed in a manner not in compliance with the requirements of Article 3 of the Convention ..., or
>
> 3. the person to be extradited will be subjected to persecution because of his or her origin, race, religion or affiliation with a particular ethnic or social group, nationality or political views, or owing to one of these reasons will have to expect severe repercussions (extradition asylum)."

26. Section 33 § 2 of the Extradition Act provides as follows:

> "It is to be examined only whether the person concerned is sufficiently suspected of having committed the offence he or she is accused of according to the extradition request where there are serious doubts in that respect, in particular where evidence is available or offered which would be capable of dispelling the suspicion without delay."

In examining the permissibility of an extradition, section 33 (3) of the Extradition Act requires the courts to take into account all possible obstacles emanating from inter-State obligations and constitutional requirements, including the Convention and the Additional Protocols thereto in accordance with the Court's case-law.

27. Under the heading "Renewal of criminal proceedings" (*Erneuerung des Strafverfahrens*), Article 363a of the CCP provides, in so far as relevant:

> "1. If it is established by a judgment of the European Court of Human Rights that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette [*Bundesgesetzblatt*] no. 210/1958) or one of its Protocols on account of a decision or order of a criminal court, a retrial shall be held upon request, in so far as it cannot be ruled out that the violation might have affected the decision in a manner detrimental to the person concerned.
>
> 2. All applications for the renewal of proceedings shall be decided by the Supreme Court. Such an application may be lodged by the person affected by the violation or the Prosecutor General's Office; ..."

28. On 1 August 2007 (in case no. 13 Os 135/06m) the Supreme Court allowed an application for the renewal of criminal proceedings under Article 363a of the CCP, where the applicant had not previously lodged a human-rights complaint with the Court. In so far as relevant, the Supreme Court stated:

> "Given that Article 13 of the Convention requires a Contracting State to provide any person who shows with some plausibility that there has been a violation of his or her rights under the Convention and its Protocols with an effective remedy, in other words to ensure that there is a court at domestic level which examines questions of whether there has been a violation of Convention rights, Article 363a § 1 of the CCP must not be interpreted so as to allow an application for the renewal of criminal proceedings only in those cases where the European Court of Human Rights has already issued a judgment finding a violation of the Convention."

For an extensive summary of the Supreme Court judgment, see *ATV Privatfernseh-GmbH v. Austria* ((dec.), no. 58842/09, § 19, 6 October 2015).

29. Pursuant to section 19 of the Proceedings before the Federal Office for Migration and Asylum Act (*Bundesamt für Fremdenwesen und Asyl-Verfahrensgesetz*, Federal Law Gazette vol. I no. 87/2012), Kosovo is regarded as a "safe country of origin" by Austria.

B. International reports on Kosovo

1. *Conditions of detention*

(a) Committee for the Prevention of Torture (CPT)

30. In its report to the United Nations Mission in Kosovo (UNMIK) on its visit to Kosovo from 8 to 15 June 2010 (published on 6 October 2011, CPT/Inf (2011) 26), the CPT stated the following:

> "37. Contrary to the situation found in 2007, some allegations of physical ill-treatment (such as slaps and/or punches to the head or face) by custodial staff were

received at the detention centres in *Mitrovica/Mitrovicë, Prishtinë/Priština* and *Prizren*. ...

At *Dubrava Prison*, the delegation once again received many consistent and persistent allegations of physical ill-treatment and/or excessive use of force (slaps, kicks, punches, and blows with batons, etc.) by members of the establishment's special intervention group. Allegedly, such incidents often occurred during cell-search operations at night. The delegation also heard allegations that certain prisoners had 'hired' members of the establishment's special intervention group to physically assault other prisoners who were causing them trouble.

Moreover, in contrast to the situation found in 2007, a number of allegations were heard about physical ill-treatment of prisoners by custodial staff at *Dubrava Prison*. Several prisoners also affirmed to the delegation that they had been warned by prison officers not to complain to (or have any contact with) EULEX monitors.

To sum up, the situation seems to have deteriorated since the 2007 visit both at *Dubrava Prison* and elsewhere. ...

43. Material conditions of detention had significantly improved since the 2007 visit in most of the establishments visited, and can be described as generally satisfactory. It is particularly noteworthy that overcrowding was not a problem in any of the establishments visited. ...

44. The situation was less satisfactory at the *Prishtinë/Priština Detention Centre* where access to natural light and ventilation in certain cells was still poor, and the fire alarm system in this establishment was out of order. Further, at the *Prizren Detention Centre*, ventilation was insufficient in most of the cells (with temperatures rising to more than 30º C in the summer). ...

47. ... At the *Mitrovica/Mitrovicë Detention Centre*, sentenced prisoners also had the possibility to move freely within the detention area during the day; they could also go out into the open air and engage in sports activities (football, basketball or volleyball) for 3 ½ hours per day. ..."

31. In its report to UNMIK on its visit to Kosovo from 15 to 22 April 2015 (published on 8 September 2016, CPT/Inf (2016) 23), the CPT noted the following on the issues of corruption, favouritism and ill-treatment in Kosovo prisons and places of detention:

"**A. Police establishments**

...

9. In the course of the visit, the delegation received a significant number of allegations of physical ill-treatment by KP officers from detained persons (including juveniles). Most of the allegations concerned slaps, punches and kicks, in the context of police questioning, with a view to extracting confessions or obtaining other relevant information. ... Further, a number of allegations referred to punches and kicks at the time of apprehension after the person concerned had been brought under control.

Notwithstanding the above, the delegation gained the impression that, as compared to 2010, the overall situation had somewhat improved in terms of both the number and severity of allegations of police ill-treatment. However, it is clear from the information gathered during the visit that there are no grounds for complacency. Additional vigorous action is still required to combat the phenomenon of ill-treatment by the Kosovo Police, which often appears to be related to an overemphasis on confessions during criminal investigations. ...

25. The delegation observed further improvements regarding material conditions in various police stations. In particular, at Gračanica/Graçanicë, Leposavić/Leposaviq, Mitrovicë/Mitrovica South and Obiliq/Obilić, police custody cells have been newly constructed or renovated, and most of the deficiencies observed during previous visits to other police stations have been remedied.

That said, at Pejë/Peć Police Station, artificial lighting in the custody cells was very poor and, in several of the police stations visited, cells were not equipped with a call system. Steps should be taken to remedy these deficiencies.

B. Prison establishments

...

26. The CPT's delegation carried out follow-up visits to the following establishments under the authority of the Kosovo Correctional Service (KCS): Dubrava Prison, Lipjan/Lipljan Correctional Centre for Women and Juveniles, and the detention centres in Gjilan/Gnjilane, Mitrovica/Mitrovicë, Pejë/Peć and Prishtinë/Priština. ...

32. As compared to the findings of the 2010 visit, the situation seemed to have improved significantly in most of the KCS establishments as regards the manner in which prisoners were treated by staff. In particular, at Dubrava Prison, the delegation received no allegations of recent physical ill-treatment or excessive use of force by members of the establishment's special intervention group or by custodial staff. Further, no allegations of ill-treatment were heard at Lipjan/Lipljan Correctional Centre and the detention centres in Mitrovica/Mitrovicë, Pejë/Peć and Prishtinë/Priština.

33. However, a number of allegations of physical ill-treatment (such as punches and/or kicks) as well as threats of being beaten by prison officers were received (for the first time) at Gjilan/Gnjilane Detention Centre and at the High Security Prison. In some cases, the allegations made were supported by medical evidence. ...

34. Compared to the situation found in 2010, inter-prisoner violence did not appear to be a major problem at Dubrava Prison, nor in any of the other KCS establishments visited. ..."

32. In the executive summary of the 2016 report, the CPT summarised the material conditions of detention in Kosovo prisons as follows:

"Material conditions varied widely amongst the different KCS establishments. At Lipjan/Lipljan Correctional Centre, conditions for all inmates remained on the whole adequate, and improvements were observed at Dubrava Prison and Mitrovica/Mitrovicë Detention Centre. The CPT welcomes the existing plans to close down the detention centres in Gjilan/Gnjilane, Pejë/Peć and Prishtinë/Priština where material conditions are generally poor. Conditions at the High Security Prison were generally good, the establishment being virtually brand new. ..."

(b) German Federal Office for Migration and Refugees

33. In its Kosovo country report of May 2015, the German Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) noted the following (page 23):

"Nevertheless, the judiciary is the weakest of all institutions and still has significant flaws, despite some progress. In addition to insufficient resources and skills of the staff, they often lack the willingness to enforce the law and anti-corruption measures. Salaries and social security of the staff are poor. The strong network of traditional clan and extended family structures means that officials are often exposed to strong social pressure and bribery attempts. According to the recent progress report of the EU of October 2014, the rule of law, including an independent judiciary, and limited results in combating crime and corruption are still a major problem. The Constitution states that the judiciary is independent. The local judicial organs are, however, exposed to external influences and a fair trial is not always ensured. There are constantly reports of corruption, political interference and lack of efficiency in the judiciary. The fight against crime is still in need of improvement."

(c) United States Department of State

34. In relation to the prison and detention centre conditions in Kosovo, the United States Department of State noted in its Country Reports on Human Rights Practices for 2016 (page 6):

"Prison and detention center conditions generally met international standards, but significant problems persisted for prisoners in penitentiaries, specifically, the lack of rehabilitative programs, prisoner-on-prisoner violence, corruption, and substandard medical care. ...

During the year the Kosovo Rehabilitation Center for Torture Victims (KRCT) received complaints from prisoners regarding inappropriate behavior, verbal harassment, and, in one instance, physical mistreatment by correctional officers, mainly at the Dubrava KRCT and the High Security Prison. ...

[I]nternal complaint mechanism mandated by law did not function in prisons as inmates were not able to report human rights violations and other concerns confidentially. ...

Physical Conditions: According to the KRCT, physical and living conditions remained substandard in some parts of the Dubrava Prison, which held 750 prisoners. Deficiencies at Dubrava included poor lighting and ventilation in some cells, dilapidated kitchens and toilets, lack of hot water, and inadequate or no bedding, as well as poor-quality renovations and significant delays in repairs. ...

As of October the KRCT received seven complaints from prisoners that correctional staff verbally, and in some cases physically, abused them in the Dubrava Prison and the High Security Prison. ...

Due to corruption and political interference, authorities did not always exercise control over the facilities or their inmates. According to the KRCT, inmates complained that officials at the Dubrava and the Smrekovnica prisons unlawfully granted furloughs and additional yard time due to nepotism or bribery..."

(d) European Commission

35. In its Kosovo 2016 Report (9 November 2016), the European Commission stated the following:

"[A]dministration of justice is slow and inefficient, and there is insufficient accountability of judicial officials. The judiciary is still vulnerable to undue political influence and rule of law institutions suffer from lack of funding and human resources.” (page 12)

“As regards **prevention of torture and ill treatment**, there were no reports of violations of internationally recognised human rights standards. In January 2016, in compliance with the Optional Protocol to the Convention against Torture, a National Preventive Mechanism against Torture was established. This is a separate body within the Ombudsman Institution responsible for inspecting all places in which persons are deprived of their full liberty.

In the **prison system**, compliance with the UN Standard Minimum Rules for the Treatment of Prisoners and European Prison Rules has continued. ... Serious concerns remain over privileges for certain high-profile detainees.” (page 22)

2. Blood feuds

(a) Immigration and Refugee Board of Canada

36. The following are extracts from a report of the Immigration and Refugee Board of Canada titled “Kosovo: Blood feuds and availability of state protection” (KOS104577.E, 10 October 2013):

“1. Historical Overview

Blood feuds ... are part of a centuries-old tradition in Kosovo .... They trace back to the Dukagjin code [also known as the Kanun or Code] ..., a set of customary laws dating back to at least the fifteenth Century. According to the Kanun, if a man’s honour is deeply affronted, his family has the right to kill the person who insulted him. However, after such a killing, the victim’s family can avenge the death by targeting male members of the killer’s family, possibly setting off a pattern of reprisal killings between the families. ...

2. Prevalence of Blood Feuds

... Statistics on blood feuds during 2010-2013 could not be found among the sources consulted by the Research Directorate. The Professor said that, to his knowledge, neither the government nor other organizations keep statistics about blood feuds in Kosovo (Professor 18 Sept. 2013). He was aware of at least 10 cases of blood feuds between 2010 and 2013, but also indicated that some of these may have traced back to murders committed in earlier years (ibid.). He noted that because there are no statistics, it is hard to know the full extent of the blood feud problem (ibid.). ...

In contrast, both the Ombudsperson and Partners Kosova expressed the opinion that there has not been an increase in the number of blood feuds (Kosovo 12 Sept. 2013; Partners Kosova 12 Sept. 2013). The Mediation Manager at Partners Kosova Centre for Conflict Management ... said that blood feuds are ‘not a large-scale problem’ but that there are still a few cases each year (Partners Kosova 13 Sept. 2013). ...

3. Causes

Sources indicate that current triggers to blood feuds in Kosovo include: property disputes (Kosovo 13 Sept. 2013; Partners Kosova 13 Sept. 2013; Professor 18 Sept. 2013); moral disputes (Kosovo 13 Sept. 2013); and issues related to family honour (Partners Kosova 13 Sept. 2013).

...

6. Legislation

Sources state that there is no legislation that specifically addresses the issue of blood feuds (Kosovo 13 Sept. 2013; Partners Kosova 13 Sept. 2013; Professor 13 Sept. 2013). However, the Ombudsperson explained that the practice of blood feuds is ‘implicitly forbidden by the Constitution and legislation in force in Kosovo’ and noted that law enforcement authorities are obliged to provide protection to individuals who are threatened (Kosovo 13 Sept. 2013). He further stated that ‘[b]lood feud, as a deed, is banned by law. No one is entitled to take justice into his/her hands’ (Kosovo 13 Sept. 2013).

Article 178 of Kosovo’s criminal code prescribes a minimum punishment of 5 years imprisonment for murder, and Article 179 prescribes a minimum punishment of 10 years for ‘aggravated murder’, which includes murder that ‘deprives another person of his or her life because of unscrupulous revenge’ (2012a, Art. 178-179). In correspondence with the Research Directorate, the spokesperson for the Organization for Security and Cooperation in Europe (OSCE)’s mission in Kosovo said blood feud- motivated crimes are not listed as separate offenses in the criminal code, but the blood feud motive is considered an aggravating circumstance when courts determine the punishment (OSCE 16 Sept. 2013).

...

7. State Protection

The spokesperson for the OSCE mission in Kosovo said that there are no institutions that deal with the issue of blood feuds (16 Sept. 2013). Similarly, both the Professor and the Mediation Manager at Partners Kosova said that they are unaware of any state programs or special protection for people involved in blood feuds (Partner Kosova 13 Sept. 2013; Professor 18 Sept. 2013).

The Ombudsperson indicated that in the two cases reported to its institution between 2010 and 2013, state authorities did not ‘react properly and in compliance with the law’ (Kosovo 13 Sept. 2013). In particular, threats from victims’ families to perpetrators’ families ‘are not taken seriously and accordingly’ (ibid.).

The Mediation Manager said that someone who feels threatened by a blood feud can go to the police, and that the police may patrol the area more frequently, but that there is no protective custody and the police are unable to guard people ‘24 hours’ a day (Partners Kosova 13 Sept. 2013). The Professor said that the police generally have a ‘fairly good reputation’ but often do not want to get involved in blood feuds ‘due to personal safety issues’ (18 Sept. 2013). ...”

(b) Swiss Refugee Council *(Schweizer Flüchtlingshilfe)*

37. In its report "Kosovo: blood feuds" of 1 July 2016, the Swiss Refugee Council stated the following (page 5):

> "According to information given by Bernd Fischer, Professor at the University of Indiana, ... there have been reports in the past years of killings due to blood feuds. However, to his knowledge, there was no organisation which systematically collected such information. While the Kosovo press was not very reliable, the Government tended to ignore the topic, as they considered it to be primitive and not worthy of a State which aimed at accession to the EU. Like in Albania, official reports underestimated the extent of the phenomenon. The Ombudsman of Kosovo stated in June 2016 ... that there was no category 'blood feud' in the database of the Kosovo police, and that respective cases were registered under 'murder', but the motive for the murder was mentioned in the decisions of the justice authorities. ..."

THE LAW

ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

38. The applicant complained under Articles 2 and 3 of the Convention that he would run risk of torture, inhuman or degrading treatment or even death if he were extradited to Kosovo, as the Kosovo authorities were not willing or able to afford him protection from S.Lu. and his clan. Furthermore, he alleged that the detention conditions in Kosovo prisons fell short of Article 3 standards, and that he could be subject to police violence. Articles 2 and 3 read as follows in their relevant parts:

Article 2

> "1. Everyone's right to life shall be protected by law. ..."

Article 3

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

39. The Court finds that the issues raised in the present case under Articles 2 and 3 of the Convention are indissociable and will therefore examine them together (see *F.H. v. Sweden*, no. 32621/06, § 72, 20 January 2009, and, *mutatis mutandis*, *F.G. v. Sweden* [GC], no. 43611/11, § 110, ECHR 2016).

A. Admissibility

40. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

41. The applicant submitted that all sworn declarations submitted by him in the course of the domestic proceedings had been consistent in stating that he would be at great risk if extradited to Kosovo. These declarations just as much as L.Q.'s sworn statement that his confession had been made to the Kosovo police under duress were in fact quite adequate to prove that his life was in danger. There was no reason not to believe these statements, nor did the authorities present any arguments as to why the evidential value of these documents should be disputed. The applicant took the view that he had sufficiently substantiated that the Kosovo authorities were not able to provide sufficient protection from private parties, as evidenced by the international reports he had submitted. As an example, in its 2015 Human Rights report on Kosovo, the US Department of State found that violence between inmates still constituted a significant problem, and that corruption and political interference had led to the authorities not always having actual control over prisons and inmates.

42. The applicant stated that the conviction of S.Lu. by a court in Kosovo did not allow the conclusion that the courts and the authorities there were generally in a position to adequately react to the threats posed by a clan. Apart from this, the Kosovo authorities themselves posed a threat, as the case of the ill-treatment of L.Q. when making his statement to the police demonstrated.

43. Concerning the fact that Kosovo was considered a safe country of origin by Austria, the applicant considered that it might be correct that the general situation in the country was not an argument against extradition. However, certain circumstances and evidence provided by the party concerned could still justify the conclusion that an individual would be persecuted there – such as in the present case.

44. In relation to the CPT report following the 2015 visit to Kosovo, the applicant submitted that the Committee had still expressed concerns over the large number of accusations regarding the exertion of physical violence by the police in the form of beatings and kicks, in particular for the purpose of obtaining confessions or other relevant information. The CPT's

observations in that connection corroborated the statements made by the immediate perpetrator, L.Q., specifically that he had only identified the applicant as the one who ordered the murder in order to avoid violence by the police.

(b) The Government

45. The Government argued that the applicant had failed to sufficiently substantiate that if expelled, he would face a real risk of ill-treatment (see *Findikoglu v. Germany* (dec.), no. 20672/15, § 31, 7 June 2016). The Austrian courts and the Federal Minister of Justice had comprehensively examined in proceedings before several instances adhering to the rule of law whether, if extradited to Kosovo, the applicant would be subjected to treatment contrary to Article 3 of the Convention. Taking into account specific information and the applicant's submissions, they answered this question in the negative. The applicant referred to former attacks by the Lu. clan to corroborate the alleged danger to his life if extradited. However, at the same time it was evident that the Kosovo authorities had been able to react to these threats appropriately themselves, for example, by the criminal conviction of S.Lu. for issuing a threat against the applicant. Repeated convictions of members of the Lu. clan in Kosovo demonstrate that the authorities were indeed capable of removing risks for the applicant's life by taking measures in accordance with the rule of law.

46. The Government submitted that there had been no recent international reports about violence among prisoners in Kosovo prisons. The 2016 CPT report in particular demonstrated that the Kosovo authorities had examined and prosecuted attacks in prisons, and that inter-prisoner violence had decreased compared to the previous visit in 2010, which further demonstrated the successful efforts by Kosovo to comply with international requirements (see paragraphs 31-32 above). The Government pointed out that the latest CPT report had also included Mitrovica Detention Centre, where the applicant – according to his own statements – would probably be held.

47. Lastly, the Government pointed out that Kosovo was considered a "safe country of origin" under Austrian law (see paragraph 29 above).

(c) The third party

48. In relation to the applicant's complaint under Article 2 of the Convention, the Serbian Government considered that the applicant had adduced sufficient evidence that there was a real risk of being murdered by S.Lu. and his clan in Kosovo, in particular because S.Lu. had already tried to kill the applicant, had threatened to kill his sister and her family, and because the applicant had allegedly ordered L.Q. to murder S.Lu. In addition, blood feuds were a centuries-old tradition in Kosovo.

49. The Serbian Government asserted that several reports, those issued for example by the OSCE and the German Federal Office for Migration and Refugees, clearly indicated that the Kosovo authorities were not able to provide sufficient protection against acts of violence or even murder.

50. Turning to the complaint under Article 3, the Serbian Government considered that the Austrian authorities had failed to thoroughly examine the applicant's claim under that provision, as evidenced by the wrong assumption of the Criminal Court that Kosovo was a party to the Convention. Moreover, that court's argument that the fact of S.Lu.'s cousin's actual killing called into question the applicant's theory that S.Lu. intended to take revenge on him was logically incorrect. If the applicant had really ordered L.Q. to murder S.Lu., then this fact would have constituted a motive for S.Lu. to avenge his cousin's death, especially considering the prevalence of blood feuds in Kosovo.

51. In addition, the Serbian Government noted that the Austrian Government had failed to obtain diplomatic assurances from the Kosovo authorities in respect of the applicant. However, the Serbian Government alleged that even potential assurances would not suffice to ensure adequate protection from ill-treatment, given the circumstances of the case.

2. *The Court's assessment*

(a) General principles

52. The Court reiterates at the outset that the Convention does not guarantee a right not to be extradited as such (see *Soering v. United Kingdom*, 7 July 1989, § 85, Series A no. 161). Likewise, the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (see *Öcalan v. Turkey* [GC], no. 46221/99, § 86, ECHR 2005-IV). Inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice (see ibid., § 88, and *Soering*, cited above, § 89).

53. The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition

cannot as such be regarded as being contrary to the Convention (see *Öcalan*, cited above, § 89).

54. Notwithstanding the above considerations, the protection against the treatment prohibited under Article 3 is absolute, and as a result the extradition of a person by a Contracting State can raise problems under this provision and therefore engage the responsibility of the State in question under the Convention, where there are serious grounds to believe that if the person were extradited to the requesting country he or she would run the real risk of being subjected to treatment contrary to Article 3 (see *Soering*, cited above, § 88). If the extradition is likely to have consequences in the requesting country which are incompatible with Article 3 of the Convention, the Contracting State must not extradite. It is a matter of ensuring the effectiveness of the safeguard provided by Article 3 in view of the serious and irreparable nature of the alleged suffering risked (ibid., § 90).

55. The fact that the ill-treatment is inflicted by a non-Convention State is beside the point (see *Saadi v. Italy* [GC], no. 37201/06, § 138, ECHR 2008). In such cases Article 3 implies an obligation not to remove the person in question to the said country, even if it is a non-Convention State. The Court draws no distinction in terms of the legal basis for removal; it adopts the same approach in cases of both expulsion and extradition (see *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, § 120, 17 January 2012, and *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 and 4 others, § 168, 10 April 2012).

56. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from individuals or groups of people who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *J.K. and Others v. Sweden* [GC], no. 59166/12, § 80, ECHR 2016; *H.L.R. v. France*, 29 April 1997, § 40, *Reports of Judgments and Decisions* 1997-III).

57. The assessment of the existence of a real risk under Article 3 must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports* 1996-V, and *Saadi*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see, for example, *Saadi*, cited above, § 129, and *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts raised by it (see *Saadi*, cited above, § 129).

58. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (see *Chahal*, cited above, § 86). A full and *ex nunc* evaluation is required

where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see *F.G. v. Sweden* [GC], no. 43611/11, § 115, ECHR 2016 with further references). This situation typically arises when, as in the present case, the extradition is delayed as a result of the indication by the Court of an interim measure under Rule 39 of the Rules of Court. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill‑treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007, and *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, §§ 107 and 108, Series A no. 215).

(b) Application to the present case

(i) Individual risk assessment

59. At the outset, the Court must agree with the applicant that as concerns his individual case, it was irrelevant whether Kosovo was declared a "safe country of origin" by law. Such a declaration does not relieve the extraditing State from conducting an individual risk assessment. The question of whether this has been done in the instant case will be assessed in the following paragraphs.

60. The Court reiterates that the question of the permissibility of the applicant's extradition was the subject of three rounds of proceedings, namely the initial extradition proceedings, the proceedings following the applicant's application for their reopening, and the proceedings before the Supreme Court concerning his application for their renewal. In the initial extradition proceedings, the domestic courts comprehensively examined the question of the alleged influence of the Lu. clan and any risks contrary to Articles 2 and 3 the applicant might face if extradited. In the reopening proceedings, they examined whether the sworn statement by L.Q. was capable of immediately dispelling the suspicion against the applicant, as well as taking into account the latest Kosovo country reports relating to the applicant's allegations. In the renewal proceedings, the Supreme Court equally assessed the alleged threats of violations of Articles 2 and 3 of the Convention.

61. The Court finds that in all three sets of proceedings, the domestic courts comprehensively examined the applicant's claims and extensively gave reasons as to why they believed that his extradition was permissible.

The Court is therefore satisfied that they have complied with their duty to conduct an individual risk assessment in his case.

62. Concerning the substance of this risk assessment, the Court reiterates that there are essentially two complaints to be examined, namely (ii) the applicant's claim that his life and limb were in danger in Kosovo because of the alleged threat emanating from a blood feud with the Lu. clan, which the Kosovo authorities were not willing or able to protect him from, and (iii) the allegation that the detention conditions in Kosovo fell short of Article 3 standards, in particular that ill-treatment by the police and prison officers, inter-prisoner violence and corruption were prevalent in places of detention and prisons in Kosovo. The Court will consider them separately below.

(ii) Protection from alleged blood feuds

63. When it comes to the substance of the applicant's allegations that his life and limb were in danger in Kosovo because of the alleged threat emanating from a blood feud with the Lu. clan, the Court notes that there is only little information available on the phenomenon of blood feuds in Kosovo, and that there seem to be no official statistics on violence resulting from their occurrence (see paragraphs 36-37 above). What can be said from the available material is that blood feuds still exist in Kosovo and persons at liberty who are affected by blood feuds appear to have little State protection, as they would have to be constantly monitored, which is not considered feasible. However, firstly, even if one assumed that there was an ongoing blood feud involving the applicant in Kosovo, his situation is different from that of individuals in liberty, as he would be in a prison, where he would be monitored by the authorities twenty-four hours a day. Contrary to what the applicant alleged, the international reports on Kosovo do not indicate that the issue of corruption among detention officers was so widespread and systematic that third parties could exert any amount of influence there. The issue rather arises in the context of favouritism, concerning the use of mobile phones and other contraband, or unwarranted privileges, but none of the international reports consulted (see paragraphs 31-35 above) mention any instance of a prison officer being bribed into allowing a blood-feud killing to be carried out in prison (contrary to what the applicant suggested could be the case with him and the Lu. clan). In this respect the Court observes that, from the material before it, it appears that Sm. Lu., to whom the applicant referred to in particular in his appeal of 24 March 2016, was no longer detained in prison in Kosovo. There is no further indication that a member of the Lu. clan was detained in prison in Kosovo, in Mitrovica prison in particular or that the Kosovo authorities were not able to protect the applicant against such person.

64. Secondly, the Court notes that the Kosovo authorities have already demonstrated – even specifically with regards to the applicant – that they were indeed capable of responding to threats against him, specifically by

convicting S.Lu. of aggravated threat (see paragraph 15 above). The Court therefore finds it safe to conclude that the Kosovo authorities would be willing and able to equally respond to any new threats against the applicant while in prison.

65. Thus, the Court concludes that, regarding the complaint of a lack of State protection from a blood feud, the applicant has not substantiated a further threat concerning Article 2 or 3 of the Convention if returned to Kosovo.

(iii) Detention conditions

66. According to the latest international reports (see paragraphs 31-35 above), the Court notes that incidents of ill-treatment of detainees and prisoners by the police and, to a lesser extent, prison officers remain a concern, and that the Kosovo authorities have yet to bring the problem of favouritism and corruption under control, in particular at Dubrava Prison (see paragraph 31 above). No allegations of ill-treatment were however reported at Mitrovica Detention Centre, where the applicant alleged he would most likely be held if extradited.

67. Furthermore it appears that the overall situation has improved, as noted by the CPT in its report on the 2015 Kosovo visit. Inter-prisoner violence did not appear to be a major problem anymore at any of the visited facilities, and those prisons where material deficiencies had previously been found were in the course of being closed down and replaced by new facilities. The Court therefore cannot deduce from the information available that there was a situation of widespread or systematic violence against prisoners in Kosovo prisons which would render any extradition to Kosovo incompatible with Article 3 of the Convention.

68. The Court must therefore examine whether the applicant’s personal situation and circumstances are such that his extradition to Kosovo would contravene Article 3 of the Convention (compare, for example, *Tershiyev v. Azerbaijan*, no. 10226/13, § 55, 31 July 2014). In his submissions to the Court, the applicant relied on international reports. He did not allege that he had ever experienced ill-treatment by the Kosovo authorities himself before, nor were his allegations that he personally would be at a specific risk if imprisoned in Kosovo sufficiently substantiated. The Court considers therefore that the applicant has failed to substantiate that he was under any kind of particular, individual threat to be subjected to treatment contrary to Articles 2 or 3 of the Convention.

(iv) Conclusion

69. The Court concludes that the applicant has failed to show substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 2 or 3 of the Convention if extradited to Kosovo. This being so, the Court deems it irrelevant that

Austria has not requested diplomatic assurances from Kosovo in his case (compare, *mutatis mutandis*, *Oshlakov v. Russia*, no. 56662/09, § 90, 3 April 2014). Accordingly, the implementation of the decision to extradite the applicant to Kosovo would not give rise to a violation of Articles 2 and 3 of the Convention.

II. RULE 39 OF THE RULES OF COURT

70. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

71. It considers that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention (see *F.H. v. Sweden*, no. 32621/06, § 107, 20 January 2009).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that the extradition of the applicant to Kosovo would not give rise to a violation of Articles 2 or 3 of the Convention;

3. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to extradite the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 7 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Deputy Registrar	Angelika Nußberger President