

Prison Cell Rental Agreements: How Countries Help Each Other Manage Their Prison Populations in the Twenty-First Century

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I. INTRODUCTION

On Monday February 3, 2025, United States Secretary of State Marco Rubio and Salvadoran President Nayib Bukele appeared to make a tentative agreement for the United States to send prisoners to El Salvador in exchange for paying a small fee.¹ The news of this plan spurred debate over whether criminal aliens, and potentially U.S. citizens, can be imprisoned in third countries if their country of origin refuses to

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1. Philip Marcelo and Marcus Aleman, *El Salvador's Offer to Take In U.S. Deportees and Violent Criminals is Unlike Any Other Migrant Deal*, A.P. (Feb. 4, 2025), <https://apnews.com/article/deportation-criminals-us-citizens-el-salvador-prison-948be810e523600baa1f82e4238e6e87>; Press Release, Office of the Spokesperson, U.S. Dep't of State, Secretary Rubio's Meeting with Salvadoran President Nayib Bukele (Feb. 3, 2025), <https://www.state.gov/secretary-rubios-meeting-with-salvadoran-president-nayib-bukele/>.

receive extradition, and other similar questions.² The United States is not the only country to have discussed this possibility. On January 29, 2025, five days before the tentative agreement between Rubio and Bukele, a government-appointed commission in Sweden stated that it would legalize sending criminals to serve their sentences in prisons abroad.³ This comes amidst Sweden's recent crackdown on increased gang violence in the country, which has overwhelmed its prison system.⁴ However, the practice of sending prisoners to other countries to serve their sentences is not a new phenomenon, but one that has been undertaken by several countries in recent years. Over the past ten years, the Netherlands has made deals with Norway and Belgium, whose own prisons experienced overcrowding, to house prisoners sentenced in those countries.^{5,6} More recently, Denmark reached a similar deal with Kosovo, where for €15 million per year, the Danish government would send 300 prisoners to a prison in Kosovo to ease capacity issues in Danish prisons.⁷

The recent trend of countries forming treaties that send prisoners from one country to another to serve their sentences has raised questions regarding the underlying policy. Broadly: How do countries help each other manage their prison populations and deal with criminals? To analyze this, established methods previously utilized by countries to tackle this problem serve as a useful guideline, discussed in part II.

2. Marcos Aleman, *What to Know About El Salvador's Mega-Prison After Trump Deal to Send People There*, A.P. (Feb. 4, 2025), <https://apnews.com/article/el-salvador-us-rubio-prison-de912f6a8199aaa7c8490585dcaa3b87>.

3. Reuters, *Sweden Eyes Sending Inmates Abroad as Prisons Full Due to Gang Crime Wave*, REUTERS (Jan. 9, 2025), <https://www.reuters.com/world/europe/sweden-eyes-sending-inmates-abroad-prisons-full-due-gang-crime-wave-2025-01-29/>.

4. *Id.*; See also Lisa Kim, *Sweden's Brutal Gang Problem: Here's What Officials Blame It On*, FORBES (Oct. 22, 2022), <https://www.forbes.com/sites/lisakim/2021/10/22/swedens-brutal-gang-problem-heres-what-officials-blame-it-on/> (explaining that between the years 2012 and 2020, the number of deaths involving guns in Sweden tripled, and there has been an increase in the number of explosives used); SWED. NAT'L CRIME COUNCIL, *Shootings and Violence* (last updated Sep. 9, 2025), <https://bra.se/english/statistics/shootings-and-violence#:~:text=In%202024%2C%20firearms%20were%20used,the%20victim%20was%20a%20female>.

5. Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België over de terbeschikkingstelling van een penitentiare inrichting in Nederland ten behoeve van de tenuitvoerlegging van bij Belgische veroordelingen opgelegde vrijheidsstraffen; Tilburg, 31 Oktober 2009 *Trb.* 2009, 202 [hereinafter Belgium-Netherlands Treaty].

6. Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk Noorwegen inzake het gerubik van een penitentiare inrichting in Nederland voor de tenuitvoerlegging van bij Noorse vonnissen opgelegde vrijheidsstraffen; Veenhuizen, 2 Maart 2015 *Trb.* 2015, 53071 [hereinafter Norway-Netherlands Treaty].

7. Treaty on the Use of the Correctional Facility in Gjilan for the Purpose of the Execution of Danish Sentences, Den.-Kos., May 23, 2024 [hereinafter Denmark-Kosovo Treaty].

Among these methods are extradition treaties, wherein countries send captured criminal suspects back to the jurisdiction in which the alleged offense was committed where the accused then stands trial, and prisoner exchange treaties, wherein prisoners incarcerated in foreign countries may voluntarily agree to serve the remainder of their sentences in their country of origin, provided both the sending and receiving countries agree to such a transfer.

In this Comment, an analysis of the more novel concept of foreign prison cell rentals is undertaken by examining recent instances where such treaties have been implemented or ratified. These include the prison cell rental agreements the Netherlands has signed with both Belgium and Norway, and a similar agreement signed by Denmark and Kosovo, discussed in Part III. Afterwards, a discussion of the potential legal ramifications of the United States' agreement to enter a similar arrangement with El Salvador is undertaken, discussed in Part IV. Finally, a discussion of whether the foreign prison cell rental agreements are a viable method to deal with prison overcrowding, or whether countries are better suited to seek alternatives to foreign prison cell rental treaties to help alleviate overcrowding, follows in Part V.

II. HISTORICAL METHODS IMPLEMENTED THAT HELP COUNTRIES DEAL WITH EACH OTHER'S PRISON POPULATIONS

The International Prisoner Transfer Program is comprised of a series of treaties in which citizens imprisoned in foreign countries may be transferred back to their country of origin to serve the remainder of their sentence.⁸ Today, eighty-six countries have ratified Prisoner Transfer Treaties with the United States.⁹ As part of a prisoner transfer agreement, persons imprisoned in a foreign country may be transferred back to their country of origin, provided they meet the statutory and treaty requirements:¹⁰ (1) The prisoner is a national or citizen of the country they wish to be transferred to,¹¹ (2) A transfer treaty must exist between both

8. Amanda Craig, *Let It Be Known: The International Prison Transfer Program*, 44 SUFFOLK TRANSNAT'L L. REV. 41 (2021); see also David S. Finkelstein, "Ever Been In a [Foreign] Prison?": *The Implementation of Transfer of Penal Sanction Treaties by U.S. States*, 66 FORDHAM L. REV. 125 (1997).

9. U.S. Dep't of Just., Criminal Div., *List of Participating Countries/Governments*, <https://www.justice.gov/criminal/criminal-oia/list-participating-countriesgovernments> (last updated Sep. 8, 2025).

10. Craig, *supra* note 8; See Transfer of Offenders To and From Foreign Countries Act, 18 U.S.C. §§ 4100-4115 (1977).

11. U.S. Dep't of Just., Just. Manual § 9-35.000 (2020); 18 U.S.C. § 4102(6).

the sending and receiving countries,¹² (3) The prisoner is convicted and sentenced, and that conviction and sentence must be final,¹³ (4) The offense for which the prisoner has been punished is also a criminal offense in the receiving country (referred to as “dual criminality”),¹⁴ (5) The time remaining of the sentence exceeds the minimum provided by treaty (typically six months),¹⁵ and (6) Both the sending and receiving country, as well as the prisoner themselves, must consent to the transfer.¹⁶

Only when all of these requirements are met may a prisoner be transferred. In the United States, it is the authority of the attorney general to receive and transfer offenders who are either imprisoned, on parole, or on probation.¹⁷ A large percentage of the applicants for foreign prison transfer are denied, so only a few hundred foreign prisoners are typically transferred to their country of origin annually.¹⁸

Although the International Prisoner Transfer Program consists of a set of international treaties, and thus falls under the purview of the federal government, for non-federal crimes in federalist countries, the federal government does not enforce the treaty.¹⁹ Instead, states are responsible for enforcing the treaty when foreign criminals commit state offenses.²⁰ This can become problematic in instances where individual states or provinces may not be directly bound to the specific provisions of the treaties.²¹

Although all U.S. states have passed legislation that permits their participation in the program, when a foreign national is in a state prison, the state must first approve a prisoner’s request for an international transfer before they can request approval from the federal government and the government of the receiving state.²² This presents yet another hurdle for foreign prisoners seeking to obtain a transfer to their home country. Similar issues may also occur in other federalist countries. Considering

12. Just. Manual § 9-35.000, *supra* note 11; *see also* 8 U.S.C. § 4100(b).

13. Just. Manual § 9-35.000, *supra* note 11; *see also* 8 U.S.C. § 4100(c).

14. Just. Manual § 9-35.000, *supra* note 11; *see also* 8 U.S.C. § 4100(b).

15. Just. Manual § 9-35.000, *supra* note 11.

16. *Id.*; *see also* Transfer of Offenders To and From Foreign Countries Act, 18 U.S.C. § 4106 (1977); 18 U.S.C. § 4107.

17. 18 U.S.C. § 4102(2)(3).

18. Craig, *supra* note 8, at 65.

19. *See* David S. Finkelstein, “Ever Been In a [Foreign] Prison?”: *The Implementation of Transfer of Penal Sanction Treaties by U.S. States*, 66 *FORDHAM L. REV.* 125 (1997).

20. *Id.*

21. *Id.* at 143.

22. Paula A. Wolff, *The International Prisoner Transfer Program*, 55 *U.S. ATTY’S BULL.* 23, 24 (Jan. 2007).

that most of the prison population in the United States is housed in state penitentiaries,²³ this often adversely affects the likelihood of a foreign prisoner in a state penitentiary being granted transfer to their country of origin.

Although it does not directly affect how countries manage their prison populations, extradition serves as a mechanism for countries to ensure that prisoners in that country potentially become prisoners in another, thereby allowing for persons who would otherwise be imprisoned in one country to not be imprisoned in that country.²⁴ Extradition is a process in which the requesting country seeks the assistance of another country in detaining an individual who committed a crime in the requesting country to be sent back there for trial.²⁵

For extradition to occur, there must first be a judicial extradition hearing. In order to judicially extradite an individual, the court must find (1) a formal request by one jurisdiction (the receiving country) to another (the sending country), (2) the existence of an extradition treaty between both countries (which may be either a bilateral or multilateral treaty), and (3) dual criminality.²⁶ For the dual criminality element, there is no requirement that both countries share the same elements of the crime, but merely that both countries recognize the act as a crime and that they are substantially analogous.²⁷ If all three elements required for extradition are met, the judge or magistrate is required to judicially extradite the foreign national.²⁸

After judicial extradition, an executive authority of the government of the requested country will review whether extradition shall move

23. U.S. Dep't of Just., NJC 307-149, Prisoners in 2022 - Statistical Tables (Nov. 2023), <https://bjs.ojp.gov/library/publications/prisoners-2022-statistical-tables> at 10.

24. This would only apply in cases where the receiving country has the jurisdiction to prosecute the crime, yet sends the alleged criminal back to the jurisdiction where the alleged crime occurred. Otherwise, the country who extradites the alleged criminal has no means of prosecuting by itself, and thus does not preemptively manage its own prison population by sending the alleged to another country. In this sense, extradition provides a means of preventing would-be criminals to be prosecuted and sentenced within another country's territory.

25. U.S. Dep't of Just., *Frequently Asked Questions Regarding Extradition*, <https://www.justice.gov/criminal/criminal-oia/frequently-asked-questions-regarding-extradition> (last updated Aug. 11, 2023).

26. Fugitives from a Foreign Country to United States, 18 U.S.C. § 3184; *See also* Council on Foreign Relations, *What is Extradition?*, <https://www.cfr.org/background/what-extradition> (last updated Jan. 8, 2020).

27. *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008); *Shapiro v. Ferrandina*, 478 F.2d 894, 909-10 (2d Cir. 1973); *Arias Leiva v. Warden*, 928 F.3d 1281, 1293 (11th Cir. 2019).

28. 18 U.S.C. §§ 3181(b), 3184.

forward.²⁹ In doing so, the executive shall consider whether the requested person may pose a national security risk, or whether extradition would cause potential human rights violations, among other considerations.³⁰ If the executive authority of the requested country decides to go through with the extradition process, they shall submit a surrender order, after which the relevant authorities will coordinate the extradition process and send the suspect to the receiving country for trial.³¹

III. FOREIGN PRISON CELL RENTAL TREATIES AND THE AGREEMENTS CURRENTLY IN PLACE

Prior to 2009 (when Belgium and the Netherlands entered an unprecedented prison cell rental agreement), no country had ever implemented a prison cell rental treaty with another country.³² However, the idea that countries would choose to house their prisoners in foreign countries was not entirely novel. In 2006, Julie Stumpf's *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, predicted that countries, the United States in particular, would decide that it would be cheaper for countries to send prisoners to foreign military bases than to build new prisons domestically in order to deal with the increased demand for prisons.³³

Although this predicted a different arrangement from what countries have decided to do in actuality, the underlying concept is the same: countries faced with overcrowded prisons find the idea of removing prisoners, especially criminal aliens, to foreign detention centers more appealing than building new prisons domestically.³⁴ However, while all countries do not have military bases around the world to house prisoners, many have still decided that the best alternative would be to rent prison cells in foreign countries.³⁵

29. *Frequently Asked Questions Regarding Extradition*, *supra* note 25.

30. *Id.*

31. *Id.*

32. Linda Kjaer Minke, *Renting Cells Abroad: Understanding Contemporary Policy Responses to Prison Overcrowding*, 24 NORDIC J. CRIMINOLOGY 1 (2023).

33. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 373-4 (2006-7).

34. Days prior to the agreement with Bukele, the Trump Administration signaled plans to house particularly dangerous deported migrants to Guantánamo Bay. See Brett Samuels, *Trump Orders Preparation of Guantánamo Bay Facility to House Migrants*, THE HILL (Jan. 29, 2025), <https://thehill.com/homenews/administration/5113897-trump-guantanamo-bay-migrants/>.

35. Neither Belgium, Norway, nor Denmark hold any foreign military bases, unlike the United States. See World Population Review, *Overseas Military Bases by Country 2025* (2025), <https://worldpopulationreview.com/country-rankings/overseas-military-bases-by-country>.

A. Belgium-Netherlands and Norway-Netherlands Treaties

Three years after Stumpf's predictions of countries sending prisoners to foreign detention centers, Belgium and the Netherlands entered into an unprecedented agreement. The Netherlands was required to use prison space, staff, and resources at Tilburg prison to execute Belgian prison sentences in exchange for financial compensation.³⁶ For the first 500 prison spaces, Belgium was to pay an annual fixed amount of € 30million, after which it could pay additional monthly fees of €212,917 for each additional fifty prisoners up to 650 prisoners, and an additional €140 per day for each additional prisoner up to a hard cap of 681 total prisoners.³⁷ In the preamble of the treaty, both countries prefaced that it was essential to enforce prison sentences to further their common goal of having a functional rule of law.³⁸ The agreement was to temporarily solve Belgium's problem of prison overcrowding, so that it could ensure humane reception of detainees during the execution of their prison sentences, while simultaneously ensuring that prison sentences were executed humanely in Dutch prisons, whose excess capacity allowed Belgium to house some of its additional prisoners there.³⁹

As part of the agreement, the enforcement of sentences was to be governed by Belgian law, while the cooperation agreement (listed in Art. 3, describing the terms under which prison, staff, resources, and other obligations of the receiving state would be handled) and the provision of medical care to prisoners was to be decided by the Netherlands.⁴⁰ The question of which country's law controlled which issue did not arise solely in regard to issues of sentencing and enforcement. Complaints and actions by prisoners convicted in Belgium were governed exclusively by the Belgian law, and Belgian authorities were required to investigate such complaints and actions under Belgian law.⁴¹ Meanwhile, any criminal offense committed by a prisoners convicted in Belgium while housed in Dutch prison were subject to Dutch criminal law.⁴² These questions of law created legal uncertainty concerning what law applied in what situation.

For example, because the local public prosecutor can arrest and charge any person in the Tilburg penitentiary, they may then transfer that individual to another detention center in the Netherlands. This effectively

36. Belgium-Netherlands Treaty, *supra* note 5, at art. 3.

37. *Id.* at art. 26.

38. *Id.* at preamble.

39. *Id.*

40. *Id.* at art. 4.

41. *Id.* at art. 9.

42. *Id.* at art. 15.

meant that Belgium's execution of sentences was superseded by the Netherlands' execution of sentences in instances where a prisoner sentenced in Belgium was convicted of a crime under Dutch law.

Belgium was also legally obligated to only send prisoners who met certain criteria. First, the prisoners sentenced under Belgian law could not be either Dutch nationals or residents.⁴³ Second, they could not have been declared undesirable by the Dutch state, nor could they have been reported as an inadmissible alien.⁴⁴ Third, they could not have been wanted by the Netherlands for criminal offenses, nor could they have been the subject of an arrest warrant or further prosecution in Belgium.⁴⁵ Finally, any criminal sent to the Netherlands must have had a flight risk level and a social risk level that was appropriate for housing in the penal institution where the Netherlands chose to house them.⁴⁶

Throughout the time the prison cell rental scheme was in place, both prisoners and the public alike had mixed opinions on the matter. The prisoners generally found that the Dutch prison workers were more accessible (despite language barriers), friendly, helpful, and less authoritative than their Belgian counterparts.⁴⁷ While certain prisoners were satisfied with their transfers, others complained about the conditions of the prisons they were sent to.⁴⁸ Many prisoners who had previously been used to single-cell accommodation complained about the fact that they now shared a cell with several other inmates.⁴⁹ There were also complaints about the quality of food, as well as the limited opportunity for vocational training and recreation.⁵⁰ Much of these problems were attributable to the absence of a Flemish community, which was a major complaint from most of the prisoners.⁵¹ In 2016, after six years of detaining Belgian prisoners, Tilburg's Belgian sentenced prisoners were

43. *Id.* at 7(1)(a-b).

44. *Id.* at art. 7(1)(c).

45. *Id.* at art. 7(1)(d-e).

46. *Id.* at art. 7(1)(f).

47. Krystal Beyens & Miranda Boone, *Mixing Detention Cultures: The Belgian-Dutch Case*, in THE PALGRAVE HANDBOOK OF PRISON ETHNOGRAPHY, 479, 486-7 (Deborah H. Drake et al. eds., 2015). It is worth noting that a minority of prisoners viewed this as communication as a form of control, a view particularly common among non-Dutch speakers.

48. Prisoners arriving from Vorst and Sint-Gillis prisons were reportedly satisfied with their accommodations at Tilburg, although this was not the case as persons from other Belgian prisons. See Liga voor Mensenrechten, *Tilburg: Gevangenisregime en Levensomstandigheden* (June 30, 2011), https://mensenrechten.be/nieuwsberichten/verslag_van_het_bezoek_aan_tilburg?utm_source=chatgpt.com.

49. *Id.*

50. *Id.*

51. *Id.*

sent back to Belgium upon the expiration of the agreement between the two countries.⁵² At its peak in March of 2011, Belgium had rented 650 prison cells in Tilburg, all of which housed prisoners convicted in Belgium.⁵³

This was not the only instance in which the Netherlands leased its prison spaces in order to house prisoners from a foreign country. In 2015, the Netherlands entered into a similar agreement with Norway, where the Netherlands agreed to use space at Norgerhaven prison, as well as staff and resources to execute the sentences of Norwegian prisoners in exchange for a fee as determined by the treaty.⁵⁴ The terms of the treaty were generally analogous to the treaty with Belgium, with the only structural change regarding the execution of the treaty being the addition of Article 16, which stated that in the event of an emergency at the prison requiring evacuation, competent authorities could transfer prisoners sentenced in Norway to another facility with the goal of returning them to Norway in a timely manner.⁵⁵

There were also changes in certain important terms regarding payment and prison capacity. As part of the agreement, Norway was required to pay €25,500,000 per year paid in monthly fixed amounts to the Netherlands, and could send a maximum of 242 prisoners there.⁵⁶ However, unlike the Belgium agreements, there was no provision which allowed for an increase in the number of prisoners Norway could send for additional fees.⁵⁷ The preamble also contains similar language to the Belgium treaty; both Norway and the Netherlands agreed that the execution of prison sentences is an essential part of the functioning of the rule of law, and that both states would be bound by international human rights norms. Norway had a shortage of prison capacity, and therefore, renting prison space from the Netherlands to execute Norwegian sentences would alleviate overcrowding, at least temporarily.⁵⁸ This language mirrored similar statements in the Belgian-Dutch agreement made six years prior.⁵⁹ All issues of law also mirrored the prior Belgian-Dutch agreement, with Norwegian law applying in this treaty in all areas

52. Minke, *supra* note 32, at 5.

53. *Id.* at 2; Mensenrechten, *supra* note 48.

54. Norway-Netherlands Treaty, *supra* note 6, at art. 3.

55. *Id.* at art. 16.

56. *Id.* at art. 3.

57. Belgium-Netherlands Treaty, *supra* note 5, at art. 26.

58. *Id.* at preamble; Norway-Netherlands Treaty, *supra* note 6, at preamble.

59. Belgium-Netherlands Treaty, *supra* note 5, at preamble; Norway-Netherlands Treaty, *supra* note 6, at preamble.

where Belgian law applied in the earlier agreement,⁶⁰ as did all the requirements for prisoners to be sent to Dutch prison from Norway.⁶¹

Although there were mixed sentiments from Belgian inmates at Tilburg prison, and serious questions about the legitimacy of the project, the prisoners sentenced in Norway were generally very receptive to their transfer to Norgerhaven.⁶² Of the surveyed prisoners from Norway, many were appreciative of the respectful treatment they received from prison staff as well as the generally relaxed atmosphere of the prison.⁶³ This is significant in light of the fact that Norwegian prisons generally have a reputation of being more humane, liberal, and less punitive than other European prisons.⁶⁴

Although some prisoners were quite worried about how the increased distance would hinder their contact with their family,⁶⁵ the prisoners surveyed were generally pleased with the level of contact they maintained, in large part due to the increased availability of Skype to speak with loved ones.⁶⁶ There were also large open areas for recreation and sport on prison grounds that inmates could access for much of the day, providing a sense of freedom as well as physical fitness for inmates.⁶⁷ However, native Norwegian prisoners were slightly less receptive to being transferred to Norgerhaven when compared to their non-native counterparts, and involuntary transfers were significantly less receptive to the transfer when compared to voluntary transferees.⁶⁸

60. Belgium-Netherlands Treaty, *supra* note 5; Norway-Netherlands Treaty, *supra* note 6, at art. 4.

61. *Id.*

62. Alison Leibling et al., *Where Two 'Exceptional' Prison Cultures Meet: Negotiating Order in a Transnational Prison*, 61 BRIT. J. CRIMINOLOGY 41, 42 (2021).

63. *Id.* at 46.

64. *Id.* at 48.

65. Norway sends prisoners to jail because its own are too full. *See* Agence France-Presse, *Norway Sends Prisoners to Dutch Jail Because Its Own Are Too Full*, GUARDIAN (Sep. 1, 2015), <https://www.theguardian.com/world/2015/sep/01/norwegian-inmates-sent-to-dutch-prison-cells-too-full#:~:text=Due%20to%20lack%20of%20space,Norgerhaven%20prison%20from%20the%20Netherlands> (claiming there would be increased travel costs for loved-ones to visit inmates).

66. Leibling, *supra* note 62, at 47 & 49. For some prisoners, Norgerhaven was actually closer to their home and family than the prison they initially stayed at in Norway, also aiding family contact.

67. *Id.* at 49.

68. *Id.* at 47. (See quality of life score at the bottom of table 1. The scores on the table are measured on a scale between 1 and 5, where a score of 3 indicates that prisoners are neutral to the treatment received in a given area).

B. *Denmark-Kosovo Treaty*

More recently in 2021, Denmark and Kosovo struck an agreement in which Kosovo would receive up to 300 prisoners sentenced in Denmark at Gjilan prison in exchange for €15 million per year, paid quarterly.⁶⁹ During the period of the deal, if Gjilan's conditions do not meet Danish standards and legal requirements, Denmark is allowed to reduce the annual rate it pays.⁷⁰ The arrangement has a term length of five years that automatically extends to an additional five years if neither party notifies the other of its intention to discontinue the treaty at least twelve months in advance.⁷¹ Ancillary to the deal was a €60 million donation to Kosovo, paid out over ten years, to help Kosovo build renewable energy infrastructure, as well as an initial €5 million for the renovation of the prison, bringing the total compensation Kosovo received to €215 million.⁷²

At the time of the agreement, no date was announced for when the prison would be open to receiving inmates, but a subsequent agreement stated that the cooperation agreement would come into full effect by April 1, 2027.⁷³ This is due to the fact that Gjilan prison is undergoing renovation in anticipation of the arrival of Danish prisoners, in order to ensure that the prison is in a condition the Danish government deems adequate to house its prisoners.⁷⁴ Given the wealth disparity between Denmark and Kosovo,⁷⁵ and the resultant disparity in the quality of their respective prisons, the initial treaty agreement accounted for the need for Kosovo to make such improvements in order to house Danish prisoners. This is evidenced by the fact that Kosovo is using revenue earned from

69. Denmark-Kosovo Treaty, *supra* note 7.

70. *Id.* at art. 32(2).

71. *Id.* at art. 34.

72. Sylejman Klllokoqi and Llazar Semini, *Kosovo, Denmark Ironing Out Prison Rent Agreement*, A.P. (Dec. 17, 2021), <https://apnews.com/article/business-europe-prisons-denmark-kosovo-854c0e12cff4f46bca5d0096fb96d745>.

73. *Denmark and Kosovo Sign the Cooperation Agreement*, KOSOVO CORR. SERV., (Feb. 5, 2025), <https://shkk.rks-gov.net/en/2025/02/05/denmark-and-kosova-sign-the-cooperation-agreement/>.

74. *Id.* (“The parties have agreed on several aspects of prison’s operation to ensure that conditions fundamentally correspond to those in Danish prisons. This includes determining the number of prison officers, specifying requirements of prison’s infrastructure, regulations on transferring and transportation of inmates, as well as the inmates’ activities, rights and obligations.”)

75. World Bank estimates Denmark’s 2023 GDP per capita (PPP) to be \$73, 546, while Kosovo’s GDP per capita (PPP) is estimated to be only \$15, 141. *GDP per capita, PPP (current international \$)*, WORLD BANK GRP., <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP>. CD (last visited Mar. 21, 2025).

the treaty to help fund its justice system, as well as renewable energy projects.⁷⁶

When compared to the Belgium-Netherlands and Norway-Netherlands deals, the relative wealth disparity between Denmark and Kosovo is apparent when examining the terms of the treaty. The preamble states that one of the reasons for entering into the cooperation agreement was to acknowledge “positive developments in the correctional service system in the Republic of Kosovo and that the Republic of Kosovo by such intensified cooperation will strengthen its correctional service system.”⁷⁷ Article 4(2) states that Kosovo “shall make the necessary adjustments to the Prison Facilities to ensure that the Prison meets the requirements of the Sending State [Denmark]” and “ensure that the Prison continuously meets the requirements of the Sending State.”⁷⁸ Neither a preamble statement about improving the quality of Dutch prisons, nor an article stating an obligation to do so are found in either the Belgian-Dutch or Norwegian-Dutch agreements.⁷⁹

The disparities between Denmark and Kosovo are also reflected in the differences in the applicable law between the Denmark-Kosovo treaty and the previous treaties. Rules and regulations governing working conditions that apply to the prisoners during work activities are governed by Danish law.⁸⁰ While there was no corresponding clause in either the Belgian or Norwegian treaties, these duties were assumed under the execution of the cooperation agreement, which was governed by Dutch law.⁸¹ Although the law of the receiving state in the initial two agreements was applicable in the event of a medical emergency,⁸² in the Denmark-Kosovo agreement, there is an additional term in Article 4 that highlights that “treatment inside and outside the prison, including medical care, shall be conducted in accordance with the obligations under international law of the Sending State.”⁸³ Later clauses further outline this intent under Article 19, which outlines how medical care is provided both inside and outside the prison.⁸⁴

76. Klllokoqi, *supra* note 72.

77. Denmark-Kosovo Treaty, *supra* note 7, at preamble.

78. *Id.* at art. 4(2).

79. Belgium-Netherlands Treaty, *supra* note 5, at art. 3.; Norway-Netherlands Treaty, *supra* note 6 at art. 3.

80. Denmark-Kosovo Treaty, *supra* note 7, at art. 5(5).

81. Belgium-Netherlands Treaty, *supra* note 5, at art. 4.

82. *Id.*; Norway-Netherlands Treaty *supra* note 6, at art. 10 (2).

83. Denmark-Kosovo Treaty, *supra* note 7, at art. 4(5).

84. *Id.* at art. 19(4) (“Medical professionals, medical products and medicine inside the Prison shall be provided by the Sending State in accordance with the rules and regulations of the

Like the preceding prison-cell rental deals that came before it, the Denmark-Kosovo deal received criticism. In particular, as part of the deal, Denmark had intended Gjilan to serve as a prison for foreign nationals only, who would subsequently be deported from the country.⁸⁵ Criticisms of this aspect of the deal are much in line with Stumpf's 'crimmigration' critiques, as many view the treaty as a commodification of foreign prisoners, with fears that such arrangements undermine prisoners' rights.⁸⁶ Although the Tilburg and Norgerhagen agreements did disproportionately house foreign inmates,⁸⁷ the stated purpose of both agreements was to house prisoners generally, not to merely outsource the sentencing of foreigners.

This was not the only complaint observers had about the Gjilan agreement. Although the treaty does state that it is "based upon the respect for internationally fundamental human rights,"⁸⁸ and must be consistent with Denmark's obligations under international law,⁸⁹ the treaty highlights no specific mechanism for how human rights are to be monitored.⁹⁰ In particular, the agreement is ambiguous as to how Denmark will uphold its duty to protect prisoners from torture and other violations of the European Convention of Human Rights (ECHR).⁹¹ With the exception of Denmark being allowed to investigate crimes by or against staff members (with consultation from Kosovan authorities), Kosovo is primarily responsible for investigating crimes within Gjilan.⁹²

Although Kosovo has incorporated the terms of the ECHR into its constitution,⁹³ Kosovo is not a signatory of the ECHR, and thus cannot be

Sending State.); *Id.* at 19(5)(a) ("Medical professionals of the Sending State working in the Prison Health Unit shall not be required to undergo any procedures for foreigners working in the Receiving State"); *Id.* at 19(6) ("During a stay in the medical centre [sic.] outside the prison in the Receiving State, the Prisoner shall be treated in accordance with the rules and regulations of the Receiving State, in accordance with the international obligations of the Sending State.")

85. *Danish Justice Minister Visits Kosovo Prison Set to Receive 300 Inmates from Denmark*, EURONEWS (Sep. 26, 2024), <https://www.euronews.com/my-europe/2024/09/26/danish-justice-minister-visits-kosovo-prison-set-to-receive-300-inmates-from-denmark>.

86. Minke, *supra* note 32, at 1.

87. Two-thirds of the inmates at Tilburg were non-Belgian nationals, while around 80% of the inmates at Norgerhaven were non-Norwegian nationals. Beyens, *supra* note 47.; Liebling, *supra* note 62, at 46.

88. Denmark-Kosovo Treaty, *supra* note 7, at preamble.

89. *Id.* at art. 4(5).

90. DIGNITY International (@DIGNITY_INT), X (Apr. 26, 2022, 6:51 AM), https://x.com/DIGNITY_INT/status/1518920694515523584.

91. *Id.*

92. Denmark-Kosovo Treaty, *supra* note 7, at art. 24(1).

93. KUSHTETUTA REPUBLIKËS SË KOSOVËS [Constitution] June 15, 2008, Kapitulli Ii Të Drejtat Dhe Liritë Themelore [Fundamental Rights and Freedoms], (Kos.).

prosecuted by the European Court of Human Rights for violations at Gjilan.⁹⁴ With domestic enforcement of the equivalent crimes under the constitution not being held to the standards of the ECHR, and a backlog of cases in Kosovan courts,⁹⁵ there are serious questions as to whether human rights violations will be effectively prevented.

IV. PRISON-CELL RENTAL SCHEMES IN THE AMERICAN CONTEXT: UNITED STATES-EL SALVADOR

Recently, the United States came to an informal agreement to send prisoners to El Salvador in exchange for a fee. This agreement was first realized in March 2025, when the United States sent 238 members of the Venezuelan gang Tren de Aragua to El Salvador's Centro de Confinamiento del Terrorismo (CECOT) for one year in exchange for \$6 million.⁹⁶ This came after President Trump invoked the Alien Enemies Act in March 2025 to deport Venezuelan citizens, in order to address the alleged threat of the Tren de Aragua gang, which the state has designated as a terrorist organization.⁹⁷ The invocation stated it was aimed at protecting the American people from an alleged illegal invasion for the purposes of the Act.⁹⁸ As part of the declaration, the Trump Administration characterized Tren de Aragua as operating in conjunction with Cartel de los Soles and Venezuelan President Nicolás Maduro to commit narco-terrorism throughout the Americas, manifesting in murders, kidnappings, extortion, the trafficking of humans, drugs, weapons, and other crimes.⁹⁹

94. Council of Europe, *46 Member States of the Council of Europe*, <https://www.coe.int/en/web/portal/members-states> (last visited Sep. 15, 2025).

95. Antonia Obrvan, *Bringing the European Convention of Human Rights into the Kosovar Legal System*, BRIDGE (Mar. 25, 2021), <http://www.thebridgevienna.org/bringing-the-european-convention-of-human-rights-into-the-kosovar-legal-system/>.

96. Marcos Aleman & Regina Garcia Cano, *What to Know About the El Salvador Mega-Prison Where Trump Sent Hundreds of Immigrants*, PBS NEWS (Mar. 16, 2025), <https://www.pbs.org/newshour/world/what-to-know-about-the-el-salvador-mega-prison-where-trump-sent-hundreds-of-immigrants>; Luke Garrett, *U.S. Deports Hundreds of Venezuelans to El Salvador, Despite Court Order*, NPR (Mar. 16, 2025), <https://www.npr.org/2025/03/16/g-s1-54154/alien-enemies-el-salvador-trump>.

97. *Designation of International Cartels*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/designation-of-international-cartels/>.

98. *Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua*, THE WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/2025/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/> (hereinafter *Invocation of Alien Enemies Act*).

99. *Id.*

These acts, in conjunction with the gang's alleged illegal entry into the United States, are claimed to have been undertaken "to further [the gang's] objectives in harming United States citizens, undermining public safety, and supporting the Maduro regime's goal of destabilizing democratic nations in the Americas, including the United States."¹⁰⁰ This part analyzes whether the Trump Administration can legitimately invoke the Alien Enemies Act for the intended purpose of summarily removing Tren de Aragua members from the country, as well as whether doing so violates the Eighth Amendment's Cruel and Unusual Punishments clause.

A. *The Alien Enemies Act of 1798*

The Alien Enemies Act of 1798 states the following:

whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.¹⁰¹

Therefore, in order to legally invoke the Alien Enemies Act, the government must prove that: (1) a foreign nation or government (2) is perpetrating, attempting, or threatening an invasion or predatory incursion within the territory of the United States. Only when both of these conditions are met may a president make a public proclamation invoking the Act and remove enemy aliens without due process, as per the Executive's war powers.¹⁰²

In *Ludecke v. Watkins*, the Supreme Court, in a 5-4 decision, held that the president has the summary power under the Act to deport alien enemies deemed by the attorney general to be dangerous, with such decisions not subject to judicial review.¹⁰³ Given the fact that this was a highly-contested split decision (with Justice Black's and Douglas's dissents highlighting the due process violations that arise upon not providing a fair hearing to deportees,¹⁰⁴ and the context in which the

100. *Id.*

101. 50 U.S.C. § 21.

102. *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948).

103. *Id.* at 165-166.

104. *Id.* at 181, (Black, J., dissenting).

decision was made (in the immediate aftermath of World War II), questions remain as to whether or not courts would apply *Ludecke* to the current attempted removal of the alleged members of Tren de Aragua.¹⁰⁵

President Trump, in his invocation of the Act, claims that Venezuelan authorities have effectively ceded control of its territory to criminal organizations such as Tren de Aragua.¹⁰⁶ Although the Act does not apply to non-state actors,¹⁰⁷ in a number of Latin American countries, gangs have taken effective control over certain states, creating *de facto* regimes, which often fail to be recognized by the international community.¹⁰⁸ If the Trump Administration can prove that Tren de Aragua and similar international criminal organizations have effective control over the Venezuelan state to the extent that they stand in the place of the recognized government, the Trump Administration may successfully argue that it acts as a foreign nation or government, meeting the first requirement for invocation of the Act.

President Trump has also made the claim that Tren de Aragua, as a hybrid criminal state, “is perpetrating an invasion of and predatory incursion into the United States, . . . which poses a substantial danger to the United States.”¹⁰⁹ This statement comes just months after INTERPOL Washington declared that “Tren de Aragua has emerged as a significant threat to the United States as it infiltrates migration flows from Venezuela,”¹¹⁰ and weeks after the State Department declared that Tren de Aragua, and other international drug cartels, were now classified as foreign terrorist organizations.¹¹¹ When the Act was enacted into law, ‘invasion’ was defined as a “hostile entrance upon the rights or possessions of another; hostile encroachment.”¹¹² *Black’s Law Dictionary*

105. See *J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, 13 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring) (Claiming the district court’s grant of a TRO on the grounds that the government has not shown that it was likely to succeed on the merits should be sustained).

106. Proclamation No. 10903, 90 Fed. Reg. 53 (Mar. 14, 2025).

107. 50 U.S.C. § 21.

108. Villa et al., *Violent Nonstate Actors and the Emergence of Hybrid Governance in South America*, 56 LATIN AM. RSCH. REV. 36, 38 (2021).

109. Proclamation No. 10903, 90 Fed. Reg. 53 (Mar. 14, 2025).

110. Press Release, U.S. Dep’t of Justice, High Ranking Tren De Aragua Fugitive From Venezuela Arrested In Tennessee Thanks To Interpol Collaboration (Dec. 3, 2024), <https://www.justice.gov/interpol-washington/pr/high-ranking-tren-de-aragua-fugitive-venezuela-arrested-tennessee-thanks>.

111. Designation of International Cartels, *supra* note 97.

112. *Invasion*, SAMUEL JOHNSON’S DICTIONARY (4th ed. 1773). This definition, some contend, is meant to refer exclusively to war; Dave Benner, *The Founders’ Understanding of “Invasion”*, TENTH AMEND.T CTR. (Mar. 15, 2019), <https://tenthamendmentcenter.com/2019/03/15/the-founders-understanding-of-invasion/>.

also has definitions of ‘invasion’ that exclusively apply in the context of war.¹¹³ However, more recent Black’s Law definitions of ‘invasion’ are less specific to armed conflicts, and merely refer to the arrival of unwanted persons.¹¹⁴

This definition, when applied to the court’s finding in *Ludecke* that the president can summarily remove any persons that the attorney general deems to be dangerous,¹¹⁵ and thus unwanted, would mean that any unwanted persons subject to removal under the Act could be summarily removed, so long as the first requirement is met, as these unwanted persons would be classified as invaders. If the courts decide to adopt older definitions only applicable in the context of war, after first proving that Tren de Aragua effectively controls Venezuela, the Trump Administration would have to prove that Venezuela’s *de facto* government, which would include Tren de Aragua, is actively perpetrating, attempting, or threatening an invasion of the United States that poses a substantial danger to the country in order to legitimately invoke the Act.

B. *The Eighth Amendment’s Cruel and Unusual Punishment Clause*

Upon the invocation of the Act, hundreds of alleged Tren de Aragua members were transferred from United States custody to CECOT, despite a court order attempting to block the removal of said individuals.¹¹⁶ Many scholars and human rights activists have highlighted the inhumane conditions at both CECOT and other Salvadoran prisons, arguing that the deportation of alleged Tren de Aragua members to El Salvador would violate the Eighth Amendment rights of deportees.¹¹⁷ Under President Bukele, the Salvadoran prison system has been accused of prison overcrowding, subjecting inmates to severe heat, prolonged confinement and isolation, undernourishment, unsanitary conditions, and lack of

113. *Invasion*, sense 1, BLACK’S LAW DICTIONARY (12th ed. 2024) (Invasion n. (17c) 1. A military force’s hostile entry into a country or territory; the incursion or inroad of an enemy army for conquest or plunder (historical invasions by Danish marauders).

114. *Id.* at sense 3. (The arrival somewhere of people or things who are not wanted there (the invasion of warmer climes by northerners each winter.) This is the definition of invasion the Trump Administration adopts to justify its invocation of the Alien Enemies Act.; *See J.G.G. v. Trump*, No. 25-5067, 2025 WL 914682, 10 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring).

115. *Ludecke v. Watkins*, 335 U.S. 160, 165, 173 (1948).

116. Garrett, *supra* note 96.

117. *See, e.g., Juanita Goebertus, El Salvador’s Prisons are No Place for US Deportees*, THE HILL (Feb. 25, 2025), <https://thehill.com/opinion/international/5161360-el-salvador-prison-abuse/>.

access to medical care.¹¹⁸ These problems culminated in the mass sickness of inmates, with communicable diseases being widespread.¹¹⁹

There are also reports of abuse and mistreatment by prison guards, including regular beatings of inmates and the use of electric shocks, sufficient to amount to torture according to some human rights groups.¹²⁰ These conditions amount to violations of several human rights, including the right to enjoyment of the highest obtainable standard of physical and mental health,¹²¹ the right to be free from torture,¹²² and the right of a prisoner to be treated with humanity and with respect to his or her inherent dignity.¹²³

The Eighth Amendment prohibits cruel and unusual punishments from being inflicted on all persons convicted of crimes and imprisoned, regardless of their legal status.¹²⁴ Courts interpret Eighth Amendment questions as not being limited to the consideration of whether the Framers considered a particular punishment to be a cruel and unusual in 1789, but instead to a focus on societal standards for what is considered cruel and unusual today.¹²⁵ In *Brown v. Plata*, the Supreme Court stated that “a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”¹²⁶ In this case, the underlying factor that caused the inadequacies in inmates’ physical and mental health care was the overcrowding of California prisons, which studies cited by the Court linked to an increase in disease and a higher prisoner suicide rate.¹²⁷

118. U.S. Dep’t of State, Bureau of Democracy, Human Rights and Labor, El Salvador 2023 Human Rights Report, Country Reports on Human Rights Practices, 7-8 (2023). For information on the conditions of CECOT specifically, where similar conditions may also be found, See also Jim Wells, *Inside CECOT: El Salvador’s Controversial Prison*, PRINCETON POLITICAL REVIEW (Oct. 31, 2024), <https://www.princetonpoliticalreview.org/international-news/inside-cecot-el-salvadors-controversial-prison>.

119. *Id.*

120. *Id.* at 5-6.

121. International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

122. International Covenant on Civil and Political Rights, art.7, Dec. 16, 1966, 999 U.N.T.S. 171.

123. *Id.* at art. 12.

124. U.S. CONST. amend. VIII.

125. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”); See also *Weems v. U.S.*, 217 U.S. 349, 388 (1910).

126. *Brown v. Plata*, 563 U.S. 493, 511 (2011).

127. *Id.* at 504.

While prolonged periods of solitary confinement are not *per se* evidence of cruel and unusual punishment, this is a considerable factor in evidencing such.¹²⁸ In *Hutto v. Finney*, the Court found that isolation of individuals in dark, cramped cells with insufficient food, no furniture other than a toilet and no source of water for a period of up to thirty days violated the Eighth Amendment. With multiple binding Supreme Court decisions holding that conditions similar to those reported in El Salvadorian prisons, including CECOT, violate the Eighth Amendment, it would be difficult to imagine that deporting individuals to CECOT would be ruled constitutional without improved conditions.

Given the circumstances surrounding the United States' prison rental agreement with El Salvador, and recalling past prison cell rental agreements, it is worth considering how the United States could arrange such an agreement with El Salvador that would remain consistent with the Constitution and international law. The simplest way for the United States to attempt to argue that deportations of prisoners to CECOT and other Salvadoran prisons do not violate the Eighth Amendment would be to find that those prisoners are no longer subject to the protections of the Eighth Amendment once deported. This argument is flawed. Considering that El Salvador reportedly conditioned that it would only accept convicted criminals who would otherwise be serving sentences in American prisons,¹²⁹ these deportees would remain subject to the laws and protections of the United States, regardless of whether they remain there.

In *Rasul v. Bush*, the Supreme Court held that aliens detained in military custody outside the jurisdiction of the United States were entitled to seek a writ of *habeas corpus*.¹³⁰ The foreign nationals in question were held without trial in Guantánamo Bay, a U.S. military base in Cuba under U.S. jurisdiction and control.¹³¹ Although the facts surrounding the persons held in custody in this instance are different (pre-trial detainees held indefinitely as opposed to convicted criminals) and the agreement in effect lease different things (the United States leases the land on which Guantánamo Bay sits, while the United States merely leases prison space in CECOT),¹³² it can be reasoned that aliens in U.S. custody held abroad maintain some rights that would otherwise be afforded to them had they been held within U.S. territory.

128. *Hutto v. Finley*, 437 U.S. 678, 687 (1978).

129. Marcelo, *supra* note 1.

130. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

131. *Id.* at 471.

132. Treaty Concerning the Relations between the Two Countries, Cuba-U.S., May 29, 1934, 150 L.N.T.S. 95.

Contrary to the majority's holding in *Rasul*, Kennedy's concurrence and Scalia's dissent rely on the precedent set in *Johnson v. Eisentrager*.¹³³ In *Eisentrager*, the Court held that German nationals confined in an American military base in Germany after being convicted of engaging in military activity against the United States in China by a military tribunal had no right of *habeas corpus*.¹³⁴ Like the prisoners sent to CECOT, the petitioners in *Eisentrager* were convicted under U.S. law, were detained outside of the United States, and were considered to be enemies of the United States.¹³⁵

However, unlike the German combatants in *Eisentrager*, all persons sent to CECOT by the United States, as per the agreement with Bukele, are tried and convicted by United States criminal courts,¹³⁶ and all convicted and sentenced persons in the United States receive the protections of the Eighth Amendment.¹³⁷ Although no court has ruled on the issue of whether alien enemies convicted in U.S. criminal court but housed abroad will receive the protection of the Eighth Amendment, it is doubtful that a court would hold that the United States government can strip persons of their Eighth Amendment rights simply by relocating them to a foreign prison.

The finding that all persons that the United States sends to CECOT retain the protections of the Eighth Amendment are bolstered by the treaties of other prison cell rental agreements, which in effect could constitute customary international law. Looking at each of the preceding prison cell rental agreements in Europe analyzed in Part III, a commonality between each agreement is that the enforcement and execution of sentences was governed by the laws of the sending country.¹³⁸ The Denmark-Kosovo agreement specified that the enforcement and execution of Danish sentences in Kosovo included the subsequent rights and duties afforded to Danish prisoners, and may take the form of complaints and legal action of prisoners concerning the execution of their sentences.¹³⁹

Because there is a consistent international practice of applying the law of the sending state regarding the execution of sentences in prison cell

133. *Rasul*, 542 U.S. 466 at 485 (Kennedy, J., concurring); *Id.* at 488-489 (Scalia, J., dissenting).

134. *Johnson v. Eisentrager*, 339 U.S. 763, 785, 790 (1950).

135. *Id.* at 766.

136. Marcelo, *supra* note 1.

137. U.S. CONST. amend. VIII.

138. Belgium-Netherlands Treaty, *supra* note 5, at art. 4(1); Norway-Netherlands Treaty, *supra* note 6, at art. 4(1); Denmark-Kosovo Treaty, *supra* note 7, at art. 5(1).

139. Denmark-Kosovo Treaty, *supra* note 7, at art. 5(1).

rental agreements, and because there is no agreement between the United States and El Salvador stating that another law or rule will apply, the law of the United States, as the sending state, would customarily apply to the execution of United States criminal sentences being carried out in El Salvador, if the European agreements are held to be customary international law.

Because the law of the United States applies to the execution of these sentences, all persons the United States sends to El Salvador will thus retain their Eighth Amendment rights while being housed in El Salvador's prisons. Although it may be argued that the practice of prison cell rental agreements is itself not widespread enough to create any customary international law regarding the enforcement and execution of sentences in these types of agreements, when a practice has been consistently applied in all existing agreements of a certain type, many scholars agree that the consistent practice amounts to a binding obligation on all states to apply the law of the sending state in sentence execution.

Therefore, considering the Eighth Amendment issues within the deal between the United States and El Salvador, steps would need to be taken to improve the conditions of El Salvador's prisons such that they would become consistent with both the Constitution and international law. This can be done by making the arrangement similar to provisions in the Denmark-Kosovo treaty that both condition the deal on the receiving state meeting the requirements for a prison in the sending state and on providing adequate funding to improve the prison facilities in an attempt to provide more humanitarian conditions.¹⁴⁰

V. CONCLUSION

Although there are other agreements made between countries that impact the way in which they deal with their prison systems, prison cell rental agreements have become the preferred method of countries to temporarily address issues such as prison overcrowding. Ultimately, neither extradition nor prisoner transfer agreements properly address the specific problems that foreign prison cell rentals aim to accomplish, namely alleviating prison overcrowding and removing persons deemed undesirable, such as criminal aliens, from a country. This is because prison cell rental agreements are unilateral in its flows of prisoners from one country to another, whereas other agreements result in bilateral flows of prisoners.

140. *Id.* at art. 4(2).

While countries are willing to enter into foreign prison cell rental agreements as a viable short-term solution, these types of agreements may also prove to be financially unfeasible overall when compared to other solutions. The average annual cost per inmate the sending countries pay in each of the European deals amounts to €57,946 per inmate for Belgium (at 650 prisoners), €105,372 per inmate for Norway, and €70,000 per inmate for Denmark (at ten years given the entire financial package of the deal), more than what the average cost each country's penitentiary system costs per inmate.¹⁴¹ Although the United States pays only \$25,210 per prisoner sent to El Salvador, the relatively cheap price is offset by the human rights within Salvadoran prisons. This suggests that to provide prison accommodations that are both humane and cost effective, it is best for countries to build their own prisons rather than pay a premium to rent prison cells in another country.

141. Emma Altobelli, *Cost Analysis of Penitentiary Systems and Comparison Between the Countries of the Council of Europe*, ECONOMIES (Nov. 13, 2024), <https://www.mdpi.com/2227-7099/12/11/311>. It is worth noting that the annual rates stated in the article are for 2024, while the annual rates stated above were for the years in which those countries executed their prison cell rental agreements (2009, 2015, and 2021 for Belgium, Norway, and Denmark respectively). Adjusted for inflation to those years, all the annual rates for the agreements are greater than the average cost of housing inmates in the sending country. *See also supra* notes 37, 48, 56, 69, 96.