

## Denmark: Outsourcing the detention of foreigners to Kosovo sets a dangerous precedent

### Joint briefing paper

Geneva-Brussels-Copenhagen, 18 May 2022

**In the coming weeks, Denmark could ratify an agreement with Kosovo to transfer up to 300 third-country nationals to finish their prison sentence in a Kosovar prison, more than 2000 kilometres away. Leading anti-torture organisations are calling today for Denmark and Kosovo to pull back from this agreement which raises serious concerns when it comes to the rights of persons deprived of liberty in light of Denmark's obligations under international human rights law.**

The Kingdom of Denmark and the Republic of Kosovo signed, in March 2022, the “[Treaty](#) on the use of the Correctional Facility in Gjilan for the purpose of the execution of Danish sentences”.<sup>1</sup> Pursuant to this agreement, Denmark would forcibly transfer to Kosovo up to 300 third-country nationals, with an expulsion decision by court, serving Danish imprisonment sentences. According to plans, those transferred would serve their sentence not in Denmark but in Kosovo, despite their lack of any links to this country. After completing their sentence, these prisoners would return to Denmark for deportation to their countries of origin. Under the agreement, the prison administration and the prisoners will be subjected to Danish prison rules, but the Kosovar guards will be bound by Kosovar law. The agreement could enter into force upon its ratification by the Danish and Kosovar parliaments, at the end of May 2022. The first transfer of prisoners is scheduled for early 2023.

The World Organisation Against Torture (OMCT), the European Prison Observatory, the International Rehabilitation Council for Torture Victims (IRCT) and Antigone consider this agreement to be in clear breach of European and United Nations prison rules. If ratified, the agreement would fall short of international standards concerning the rights and treatment of persons deprived of their liberty, including the non-discrimination principle, the right to family life and the obligation to prevent torture and other ill-treatment. According to human rights law, Denmark retains full responsibility for prisoners serving sentences under its jurisdiction and remains responsible when delegating this task to a third country. As a Member State of the European Union and the Council of Europe, Denmark must adhere to and observe its core values, such as respect for human dignity and human rights, including the rights of persons deprived of liberty. This agreement sets a very dangerous precedent, in Europe and internationally, for prison externalisation and outsourcing of human rights obligations, undermining the global struggle against torture and ill-treatment.

### Human rights obligations cannot be outsourced

Following international human rights law,<sup>2</sup> Denmark is bound to respect, protect and fulfil the rights of all individuals in any territory under its jurisdiction. According to the United Nations Committee against Torture, “any territory” includes all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law.<sup>3</sup> The above would apply to prisoners under Danish jurisdiction, including in the territory of a third State, such as Kosovo. However, under the signed agreement, Denmark and Kosovo appear to share responsibilities, notably when it comes to the treatment of prisoners as well as in relation to the oversight, monitoring and complaint mechanisms.

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<sup>1</sup> See the agreement: <https://www.iustitsministeriet.dk/wp-content/uploads/2022/04/Final-treaty-Denmark-Kosovo.pdf>

<sup>2</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (art.2)

<sup>3</sup> See UNCAT General Comment No. 2 (UN Doc CAT/C/GC/2, 2008) and CAT/C/USA/CO/2 (2006). Also the scope of the notion of “jurisdiction” has been defined by the International Court of Justice as follows: “the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.” See ICJ Advisory opinion on the Legal Consequences of the Construction of a Wall in the OPT: <https://www.un.org/unispal/document/auto-insert-178825/>

According to the former United Nations Special Rapporteur on Torture, Juan Méndez, it is essential that any trans-national prison arrangement ensures that ‘... *there is no vacuum in the protection of human rights due to inappropriate and artificial restrictions on territory or jurisdiction*’.<sup>4</sup> However, this agreement would have the opposite effect: the prisoners and facilities would be under Danish jurisdiction, but prison officers would remain bound by Kosovo law. In practice, this means that Denmark would not be able to ensure an equivalent level of protection for the transferred prisoners given that Danish national authorities will be unable to investigate abuses committed by Kosovar staff, including allegations of torture and other forms of ill-treatment. Denmark is accountable for the human rights violations committed against its prisoners, even if they are committed by Kosovo officials, as the authority running the facility. The resulting legal void from these separate jurisdictions will create a perfect recipe for impunity.

Furthermore, the non-voluntary nature of the transfers is in itself problematic and discriminatory. As the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stated in a similar case, “*a prisoner who has been sentenced to imprisonment in one State should not, on the basis of an administrative decision, be forced to serve the sentence in another State*”.<sup>5</sup> Moreover, the very purpose of allowing in individual cases the serving of sentences in a third country is to allow prisoners to stay closer to home and to facilitate prisoners’ rights and re-socialisation. In contrast, in the Denmark-Kosovo agreement, the receiving State is more than 2000 kilometres away and those transferred have effectively no link whatsoever to Kosovo.

### **All prisoners are entitled to the same treatment and standards**

The Mandela Rules on the treatment of prisoners include the principle of non-discrimination among prisoners ‘...*on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status*’.<sup>6</sup> However, within the agreement, the forced relocation would exclusively target adult foreign prisoners, implying an attempt to discriminate against prisoners on the grounds of their nationality, violating *inter alia* article 14 of the European Convention on Human Rights (ECHR) and other key international standards. The agreement would also raise serious risks in relation to the right of prisoners to have meaningful and regular contact with the outside world, in particular the right to family life,<sup>7</sup> and to have access to a lawyer of their choice. Equally, it raises significant doubts concerning the rehabilitation and social reintegration of persons imprisoned in Kosovo. The practice of only sending foreign nationals to serve Danish prison sentences in Kosovo, in addition to the above concerns, could be considered itself as a degrading and inhuman treatment, given that the transferred prisoners would not have the same treatment and safeguards as prisoners serving sentences in Denmark.

In a 2021 visit to Kosovo, the CPT noted the prevalence of corruption among prison officers and “*received a number of credible allegations of physical ill-treatment of sentenced prisoners by custodial staff*”.<sup>8</sup> This, combined with the challenges facing the Kosovar judicial system,<sup>9</sup> means that if abuses occur, it will be difficult to hold those responsible accountable under national law. The lower human rights and rule of law standards of the Kosovar penitentiary and judicial systems will put prisoners at a higher risk of torture and ill-treatment and will severely restrict their right to an effective remedy.

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<sup>4</sup> [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/303&referer=/english/&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/70/303&referer=/english/&Lang=E)

<sup>5</sup> [Report](#) to the Governments of Belgium and the Netherlands on the visit to Tilburg Prison carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)(2011).

<sup>6</sup> See [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)

<sup>7</sup> For more details of the importance and standards surrounding the right to have frequent and meaningful contact with the outside world and, in particular, with family members, see: OMCT, “Breaking the walls of isolation: Restoring contact with the families in a world with Covid-19”, *Covid-19 and detention series: Impacts, lessons and urgent actions*, Guidance Note N°2, April 2022, available here: [https://www.omct.org/site-resources/legacy/Guidance-Note\\_2\\_English.pdf](https://www.omct.org/site-resources/legacy/Guidance-Note_2_English.pdf)

<sup>8</sup> CPT Ad-Hoc Visit to Kosovo: <https://rm.coe.int/1680a3eb75>

<sup>9</sup> 2020 World Justice Project Report on Kosovo:

[https://worldjusticeproject.org/sites/default/files/documents/WJP%20Graphical%20Report-Rule%20of%20Law%20in%20Kosovo\\_FINAL%20110320.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP%20Graphical%20Report-Rule%20of%20Law%20in%20Kosovo_FINAL%20110320.pdf)

## **Very limited international monitoring and protection mechanisms decrease protection from torture and other ill-treatment**

Due to its ambiguous legal status, Kosovo has not ratified the United Nations Convention against Torture and its Optional Protocol (OPCAT). Consequently, Kosovo is not regularly reviewed by the Committee against Torture nor the Subcommittee on Prevention of Torture, which constitute two paramount international monitoring and protection mechanisms. Even though Kosovo has an Ombudsperson and National Preventive Mechanism, the institutions are not reviewed by international mechanisms.<sup>10</sup> Furthermore, Kosovo is not part of the Council of Europe, nor a party to the ECHR and is not subject to the European Court of Human Rights (ECtHR). It can only receive visits by the European Committee for the Prevention of Torture (CPT) on an ad-hoc basis.<sup>11</sup>

## **Denmark must fulfil its human rights obligations**

For many years, Denmark has provided a leadership role at the United Nations strengthening universal anti-torture standards and commitment, a role recognized and respected internationally. The introduction of such an unprecedented and discriminatory detention framework risks considerably harming its leadership and damaging the global struggle against torture. At times like these, when Europe claims the moral high ground, it needs more than ever to remain steadfast on human rights at home.

## **Given the above, the World Organisation Against Torture (OMCT), the European Prison Observatory, the International Rehabilitation Council for Torture Victims (IRCT) and Antigone urge:**

- The Danish government to pull back from the agreement, stop the practice of prisoners' forced transfer and comply with its commitments under international human rights law, respecting and fulfilling, without discrimination, the human rights of persons deprived of their liberty.
- The Danish and Kosovar parliaments to refrain from ratifying the 'Treaty between the Kingdom of Denmark and the Republic of Kosovo on the use of the Correctional Facility in Gjilan for the purpose of the execution of Danish sentences'.
- The European Union, the Council of Europe and the United Nations to condemn this agreement.

*The World Organisation Against Torture (OMCT) is the largest global NGO group actively standing up to torture and protecting human rights defenders worldwide. It has more than 200 members in 90 countries. Its international Secretariat is based in Geneva, Switzerland.*

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<sup>10</sup> <https://ennhri.org/our-members/kosovo/>

<sup>11</sup> Following an agreement signed in 2004 between the Council of Europe and the United Nations Mission in Kosovo.