

CDDH(2020)R93add2  
Appendix

04/12/2020

**STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)**

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**DRAFT EXPLANATORY MEMORANDUM**

**to the draft Recommendation CM/Rec(2020)...**  
**of the Committee of Ministers to member States**  
**on measures against trade of goods used for the death penalty,**  
**torture or other cruel, inhuman or degrading treatment or punishment**

[(Adopted by the CDDH at its 93<sup>rd</sup> meeting (14-16 December 2020)]

Note

[This [draft] Explanatory memorandum was adopted by the Steering Committee for Human Rights (CDDH) at its 93<sup>rd</sup> meeting(14-16 December 2020) in view of the publication, in 2021, of Recommendation CM/Rec(2021)... of the Committee of Ministers to member States on measures against trade of goods used for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment.<sup>1</sup>]

[When adopting the Recommendation at their ... meeting [... February 2021] the Ministers' deputies took note of this Explanatory memorandum.]

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<sup>1</sup> Based on the approved scheme by the CDDH Bureau and of the information provided by member States, a consultant expert, Dr Michael CROWLEY (Bradford University / *Omega Research Foundation*) together with the Secretariat, prepared a Feasibility Study which was discussed by the CDDH at its 91<sup>st</sup> meeting (18-21 June 2019) and adopted at its 92<sup>nd</sup> meeting (26-29 November 2019). The study highlighted the current situation concerning this type of trade and the existing national and international legal responses, and suggested measures to strengthen international regulations by a recommendation of the Council of Europe. On 12 February 2020 the Committee of Ministers gave a green light for the preparation of such a recommendation. Subsequently, the CDDH appointed two national Rapporteurs, namely Ms Nicola WENZEL (Germany) and Mr Chanaka WICKREMASINGHE (United Kingdom) to prepare the draft Recommendation and its Explanatory memorandum in cooperation with the Consultant and the Secretariat.

**DRAFT EXPLANATORY MEMORANDUM**

**to the draft Recommendation CM/Rec(2020)...  
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**PRELIMINARY REMARKS**

1. It is important to recall, first, *the scope of goods and services of concern* which are at the origin of the Recommendation CM/Rec(2021)... of the Committee of Ministers to member States on measures against trade of goods used for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment : Whilst almost any implement can be used to inflict torture and other cruel, inhuman and degrading treatment or punishment, United Nations, regional and national monitoring bodies<sup>2</sup>, as well as non-governmental human rights organisations<sup>3</sup>, have repeatedly highlighted the use of specialist law enforcement equipment and goods throughout the world for such practices.

2. Such violations have been reported in a variety of custodial settings including prisons, detention centres, including for immigration detainees, police stations and vehicles used for transport of detainees, as well as certain medical and social care institutions.

3. In addition, law enforcement equipment, particularly crowd control equipment such as tear gas, pepper spray and related delivery mechanisms, and weapon-launched kinetic impact devices, such as plastic and rubber bullets, has been inappropriately deployed against protests and other public assemblies. In some instances, such use has amounted to torture and other cruel, inhuman or degrading treatment or punishment, as highlighted by the current UN Special Rapporteur on Torture.<sup>4</sup>

4. Law enforcement equipment and related goods of concern can be divided into two distinct categories:

- (a) *Inherently abusive, cruel, inhuman and/or degrading law enforcement equipment and weapons* - this is a relatively narrow range of equipment and goods currently manufactured and/or promoted by a limited number of companies, albeit in all

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<sup>2</sup> See in particular, reports of the UN Subcommittee for the Prevention of Torture, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Committee Against Torture, Council of Europe's Committee for the Prevention of Torture, African Commission on Human and Peoples' Rights, and the Inter-American Commission on Human Rights,

<sup>3</sup> See reports of Amnesty International, Omega Research Foundation, Physicians for Human Rights, Stockholm International Peace Research Institute and Institute for Security Studies,

<sup>4</sup> UN, Report of the Special Rapporteur, Nils Meltzer, Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, A/72/178, 20 July 2017.

regions of the world. A list of the main types of such goods is provided in Annex 1 of this Recommendation;

- (b) Law enforcement equipment and weapons that can have a legitimate law enforcement function, when used in strict accordance with international and regional human rights standards for the use of force<sup>5</sup>, but which can, and are, misused by law enforcement officials to torture and otherwise ill-treat people. This encompasses a much broader range of goods than the previous category, as listed in Annex 3. They are produced and traded on a significant scale by a large number of companies throughout the world.

5. In addition, attention should also be given to the role played by both State and private commercial actors providing training and related transmission of skills in the use of law enforcement equipment. In his 2004 report to the UN Commission on Human Rights, the then UN Special Rapporteur on Torture warned that if such training to “military, security or police forces of foreign States” were not “stringently controlled and independently monitored, there is a danger that [it would] be used to facilitate torture and other ill-treatment.”<sup>6</sup>

6. Some explanations are needed on capital punishment and on the scope of goods and services of concern in this respect.

7. Although capital punishment remains a lawful punishment under international human rights law with some restrictions, by the end of 2019, 106 countries (a majority of the world’s states) had abolished the death penalty in law for all crimes, and 142 countries (more than two-thirds) had abolished the death penalty in law or practice.<sup>7</sup> There is a global trend towards its abolition.

8. Capital punishment is now unlawful in all Council of Europe member States. Protocol No. 6 to the European Convention on Human Rights, which abolishes the death penalty in peacetime, has been ratified by all member States except the Russian Federation, whose Constitutional Court has nevertheless instituted a moratorium on executions and death sentences.<sup>8</sup>

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<sup>5</sup> See in particular: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; UN Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 of 17 December 1979; European Prison Rules. For an application of these instruments to less lethal weapons and other law enforcement equipment, see United Nations, Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement, HR/PUB/20/1, 2020.

<sup>6</sup> Report of the UN Special Rapporteur on the question of torture, Theo van Boven, Commission on Human Rights (E/CN.4/2005/62), 15 December 2004, paragraph 31.

<sup>7</sup> Amnesty International, Death sentences and executions 2019, ACT 50/1847/2020, Annex II: Abolitionist and retentionist countries as of 31 December 2019, 21 April 2020.

<sup>8</sup> Council of Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983. For more information, PACE, Abolition of the death penalty in Council of Europe member and observer states, Belarus and countries whose parliaments have co-operation status – situation report, AS/Jur (2019) 50, 11 December 2019, para. 7, <http://www.assembly.Council of Europe.int/LifeRay/JUR/Pdf/DocsAndDecs/2019/AS-JUR-2019-50-EN.pdf>

9. In addition, Protocol No. 13 to the European Convention, which abolishes the death penalty in all circumstances, has been ratified by all member States except Armenia, Azerbaijan, and the Russian Federation.<sup>9</sup>

10. Recognising and building on this progress, the European Court of Human Rights ruled in 2010 that the death penalty amounted to inhuman or degrading treatment irrespective of the circumstances in which it was applied, and thus fell within the prohibition set out in Article 3 of the European Convention on Human Rights, which prohibits torture and other cruel, inhuman or degrading treatment or punishment.<sup>10</sup>

11. In the context of capital punishment, the scope of equipment and goods of concern should be considered. A limited range of devices specifically and solely intended for use in the execution of human beings have been developed including gallows, hanging ropes, gas chambers, electric chairs, or automatic lethal injection devices, as elaborated in Annex I of this Recommendation. Given the lack of transparency, the nature and scale of the trade, if any, in such goods, is unknown. In contrast, other goods that were not produced in the first instance to carry out executions have been deployed to this aim. For example, several States still implementing the death penalty have instituted so called “lethal injection” executions employing the intravenous administration of a lethal dose of certain pharmaceutical chemicals, as listed in Annex 2 of this Recommendation. Such dual-use chemicals, misused for such executions, are normally employed for a wide range of (often life-saving) medical, as well as veterinary and other legitimate purposes, and their trade is global in nature.

## SOURCES OF THE RECOMMENDATION

### ***a. THE INITIATIVE TAKEN BY THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE***

12. The Preamble of the Recommendation rightly mentions a crucial initiative taken by the Parliamentary Assembly of the Council of Europe on 26 January 2018, namely the adoption of its Recommendation 2123 (2018) “Strengthening international regulations against trade in goods used for torture and the death penalty”. This text, which called for technical guidance on how to establish and implement an effective regulatory regime, gave the main impetus for the present Recommendation of the Committee of Ministers. In its text, the Assembly considered that

“... Council of Europe member States are required to take effective measures to prevent activity within their jurisdictions that might contribute to or facilitate capital punishment, torture and inhuman or degrading treatment or punishment in other countries, including by effectively regulating the trade in goods that may be used for such purposes”.<sup>11</sup>

<sup>9</sup> Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius, 3 May 2002.

<sup>10</sup> European Court of Human Rights, *Al-Saadoon and Mufdhi v the United Kingdom* – 61498/08 [2010] ECHR, paras 115 – 125.

<sup>11</sup> PACE Recommendation 2123 (2018) (26 January 2018), paragraph 3.

13. The Parliamentary Assembly Recommendation further encouraged the Committee of Ministers to provide “technical support” to facilitate member State action in this area<sup>12</sup>, and to consider adopting a recommendation to member States setting out technical guidance on how to establish and implement an effective regulatory regime, whose effect would be to extend the scope of the approach taken by [the EU Anti-Torture Regulation] through harmonised national systems in non-European Union member States, and which should include a mechanism to monitor progress made in implementing the recommendation.<sup>13</sup>

14. In its reply of 12 September 2018<sup>14</sup> to the Assembly, the Committee of Ministers

“[a]gree[d] with the Assembly of the need to strengthen international regulations” and was convinced that, “in view of its pioneering role in these areas, the Council of Europe should contribute, for example by providing member States with a general framework and guidance for measures to take, with a view to establishing and implementing an effective regulatory system.”

15. With that in mind, the Committee of Ministers then tasked the Steering Committee for Human Rights (CDDH)

“to prepare a study to gauge the feasibility of a legal instrument in this area<sup>15</sup>, taking account of the existing international framework, as well as examples of good practices to be gathered via the new digital platform on human rights and business”.

#### ***b. THE WORK CONDUCTED BY THE UNITED NATIONS***

16. A substantial source of inspiration of the present Recommendation of the Committee of Ministers is the work conducted by the United Nations. The progressive action conducted by the United Nations reflects the long-standing recognition by the international community of the obligations upon all States to regulate and restrict the trade in certain law enforcement equipment and weapons, so as to ensure that they are not employed for torture, or other cruel, inhuman or degrading treatment or punishment. 8-23. In Resolution 2001/62, the UN Commission on Human Rights called upon

“all Governments to take appropriate effective legislative, administrative, judicial or other measures to prevent and prohibit the production, trade, export and use of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment.”<sup>16</sup>

17. The importance of all States introducing measures to prohibit the trade in such inherently abusive law enforcement equipment as part of a comprehensive anti-torture

<sup>12</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 12.2.

<sup>13</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 12.3.

<sup>14</sup> 1323<sup>rd</sup> meeting of the Ministers’ Deputies, document CM/AS(2018)Rec2123-final.

<sup>15</sup> Ibid, paragraph 9.

<sup>16</sup> UN Commission on Human Rights, Resolution 2001/62, Torture and other cruel, inhuman or degrading treatment or punishment, Article 8

action framework has repeatedly been recognised and enunciated – in language mirroring that of the UN Human Rights Commission - by the UN General Assembly (UNGA) in its (now) biennial Omnibus Torture Resolution, most recently, in December 2019.<sup>17</sup>

18. In his report to the 2005 Session of the Commission on Human Rights, the then UN Special Rapporteur on Torture, recommended broadening the scope of goods to be regulated, specifically calling on States to *inter alia*

“Designate and prohibit the manufacture, transfer and use of certain forms of equipment ‘specifically designed for’ or which ‘has no or virtually no, practical use other than for the purpose of’ torture, whose use is inherently cruel, inhuman or degrading;

Introduce strict controls on the export of other security and law enforcement equipment to help ensure that it is not used to inflict torture and other cruel, inhuman or degrading treatment or punishment;

Consider the development of an international regulatory mechanism”.<sup>18</sup>

19. The importance of addressing the trade in equipment used for torture, or other cruel, inhuman or degrading treatment or punishment has been recognised by international and regional human rights bodies and entities, including UN Special Rapporteurs on Torture, the UN Commission on Human Rights<sup>19</sup>, the UN Committee Against Torture<sup>20</sup>, the African Commission on Human and People’s Rights<sup>21</sup> the Council of Europe<sup>22</sup> as well as the current UN High Commissioner for Human Rights.<sup>23</sup>

20. Since 2017, there has been a growing momentum by the international governmental community to address this issue. A key organising forum for action has been

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<sup>17</sup> The 2019 UNGA Resolution specifically called on all States to: “take appropriate effective legislative, administrative, judicial and other measures to prevent and prohibit the production, trade, export, import and use of equipment that has no practical use other than for the purpose of torture or other cruel, inhuman or degrading treatment or punishment” [See: UN, General Assembly, Resolution adopted by the General Assembly on 18 December 2019, Torture and other cruel, inhuman or degrading treatment or punishment, Third Committee, Seventy-fourth session, A/RES/74/143, 22 January 2020, paragraph 20.

<sup>18</sup> UN Commission on Human Rights, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2005/62, 15 December 2004, Article 37.

<sup>19</sup> UN Commission on Human Rights, Resolution 2001/62, 25 April 2001.

<sup>20</sup> UN, Report of the Committee against Torture Thirty-ninth session (5-23 November 2007) Fortieth session (28 April-16 May 2008) General Assembly Official Records Sixty-third Session Supplement No. 44.

<sup>21</sup> African Commission on Human and People’s Rights, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture in Africa, ACHPR/ Res. 61(XXXII) 02 (2002), 23 October 2002, Appendix 1 [Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa], paragraph 14.

<sup>22</sup> Council of Europe, Business and Human Rights, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States, adopted on 2 March 2016, paragraph 24.

<sup>23</sup> Statement by Michelle Bachelet, UN High Commissioner for Human Rights, First Ministerial Meeting of the Alliance for Torture Free Trade, 24 September 2018.

the Alliance for Torture Free Trade, launched by Argentina, the EU and Mongolia in September 2017, which currently comprises over 60 States committed to “act together to further prevent, restrict and end trade...of goods used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment.”<sup>24</sup>

21. On 28 June 2019, Resolution A/73/304, Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards, was adopted by the UN General Assembly. The Resolution calls on the UN Secretary General to gather UN Member States’ views on the feasibility and scope of options to establish common international standards for the import, export, and transfer of goods used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment, and also to establish a group of governmental experts, commencing in 2020, to examine the feasibility, scope of goods to be included, and draft parameters, for a range of options to establish common international standards in this area.<sup>25</sup>

22. The UN Secretary General’s report analysing States views was published in July 2020, for consideration by the 74<sup>th</sup> UNGA Session.<sup>26</sup> As of November 2020, the Group of Governmental Experts is being established and is scheduled to present its findings for consideration by the 75<sup>th</sup> UNGA Session.

23. In the broader context of United Nations action, it is worth noting the 2011 Guiding Principles on Business and Human Rights (*the UN Guiding Principles*), which set out the responsibility of corporate actors to respect human rights.<sup>27</sup> According to the UN Guiding Principles:

- This responsibility applies “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”;
- The prevention of adverse impacts on human rights includes not just addressing abuses that a company has caused or contributed to, but those which are directly linked to a company’s products or services through a business relationship.

24. The Principles contain provisions – directed at both States and businesses – that are relevant to regulation of the trade in goods used for torture and other cruel, inhuman or degrading treatment or punishment and the death penalty.

- Principle 2 urges States to “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”;

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<sup>24</sup> Alliance for Torture-Free Trade, Political Declaration, 18 September 2017, available at <http://www.torturefreetrade.org> (accessed 5 August 2020).

<sup>25</sup> UN, General Assembly, Resolution Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards, 21 June 2019, Seventy-third session, A/73/304. The Resolution was adopted with 81 States voting in favor, to 20 against, with 44 abstentions.

<sup>26</sup> UN, General Assembly, *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*, Report of the Secretary General, A/74/969, 28 July 2020.

<sup>27</sup> UN, Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HR/PUB/11/04, 2011

- Principle 3 calls on States to “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;”
- Principle 11, directed at businesses themselves, affirms that such “enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”;
- Finally, Principle 13 (b) directs businesses to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.

25. On the basis of *the UN Guiding Principles*, the Council of Europe prepared a specific instrument which is also a source for the present Recommendation, namely, the Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business<sup>28</sup>. The aim of Recommendation CM/Rec(2016)3 is to contribute to the effective implementation of the UN Guiding Principles at a European level. Although presenting wide ranging guidance addressing broader questions of how to facilitate corporate respect for human rights, it does contain certain recommendations relevant to the trade in goods used for torture, other ill-treatment and the death penalty. Its paragraph 24 notably states that

“member States should ensure that business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for the purpose of capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment.”<sup>29</sup>

26. This was an important formal recognition by the Organisation of the obligation previously enunciated by both the UN Commission and UNGA, now broadened by the Committee of Ministers to encompass death penalty goods. It is an important - albeit limited- building block on which the Committee of Ministers can develop more comprehensive, detailed and operationally applicable guidance for member States, through this current Recommendation.

### ***c. THE WORK CONDUCTED BY THE EUROPEAN UNION***

27. By its Regulation No. 1236/2005 Concerning trade in goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (hereafter the EU Anti-Torture Regulation), agreed in July 2005 and which came into force in 2006<sup>30</sup>, the European Union instituted the first formal regional trade control regime in this area.

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<sup>28</sup> Adopted on 2 March 2016.

<sup>29</sup> Council of Europe, Recommendation CM/REC(2016)3 (2 March 2016) op.cit. paragraph 24.

28. This legally binding instrument, directly applicable in all 27 EU member States, establishes a harmonized system across the EU, and provides a shared minimum standard for regulating trade in a common list of goods, specifically:

- prohibiting the trade (import/export/transit) into, from, or through, all EU Member States of equipment and products from/to third countries (i.e., non-EU Member States) that have “no other practical use than capital punishment, torture or other cruel, inhuman or degrading treatment,” and further prohibiting provision of related technical assistance, brokering of trade deals between third countries, or promotion at trade fairs, on TV, radio or the Internet of such goods;
- regulating and licensing the export and transit to third countries in law enforcement equipment that could be misused for torture and other cruel, inhuman or degrading treatment or punishment, with States refusing export authorisation “when there are reasonable grounds to believe that the goods might be used for torture or other [ill-treatment] including judicial corporal punishment”, and States prohibiting transit when the person, entity or body executing the transit “knows that any part of a shipment of such goods is intended to be used for torture or other [ill-treatment]”;
- regulating and licensing the supply of technical assistance or brokering services related to law enforcement equipment that could be misused for torture and other ill-treatment, irrespective of the origin of such goods, with States refusing authorisation “when there are reasonable grounds to believe that the goods might be used for torture or other [ill-treatment] including judicial corporal punishment”
- regulating and licensing the export and transit in certain pharmaceutical chemicals to ensure they are not transferred for use in lethal injection executions in third countries retaining capital punishment, without limiting trade of such chemicals for medical, veterinary or other legitimate purposes.

29. The EU Anti-Torture Regulation requires EU member States to publish annual activity reports detailing relevant license applications and authorisations. It includes further measures to facilitate transparency and dissuade one EU Member State “undercutting” another.<sup>31</sup> It also contains provisions facilitating regular review and amendment of prohibited and controlled goods lists, and requires a comprehensive review of the implementation of the Regulation be undertaken every five years.

30. The EU Anti-Torture Regulation has been widely praised by the international human rights community: a previous UN Special Rapporteur on Torture welcomed it as a milestone in the fight against torture, and as a model that could be followed by countries

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<sup>30</sup> EC Regulation 1236/2005 of 27th June 2005 concerning trade in goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, published in Official Journal of the European Union, L200/1, 30th July 2005. The EU Anti-Torture Regulation has subsequently been revised and strengthened over time; the latest consolidated version, Regulation (EU) 2019/125, was published in January 2019 and came into force on 20 February 2019.

<sup>31</sup> In this case, undercutting is taken to mean the practice whereby one State allows the transfer of essentially identical law enforcement equipment or other relevant goods to an end user in a third country that another State had previously refused to authorize due to concerns that such goods would be used for torture and other cruel, inhuman or degrading treatment or punishment or the death penalty.

in other regions.<sup>32</sup> Similarly, the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe has recognised it to be the “gold standard” and the “state of the art” of State regulation in this area.<sup>33</sup>

## CONTENTS OF THE RECOMMENDATION

### *PREAMBLE*

31. After reiterating the unwavering commitment of the Committee of Ministers to the abolition of the death penalty in accordance with Protocol 6 and Protocol 13 to the European Convention on Human Rights, the Preamble of the Recommendation recalls the member States’ obligation to prohibit torture, inhuman or degrading treatment or punishment. This prohibition is absolute. The responsibility to eradicate torture and other cruel, inhuman or degrading treatment or punishment applies in all circumstances and, as part of international customary law, to all States.

32. The Preamble recalls that this prohibition is incorporated into a number of worldwide documents and treaties, including: the Universal Declaration of Human Rights<sup>34</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>35</sup>, and most notably, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.<sup>36</sup> Within the European region, this prohibition is also enunciated in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>37</sup> and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>38</sup>

33. The Preamble also mentions the jurisprudence of the European Court of Human Rights and standards developed by the European Committee for the Prevention of Torture

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<sup>32</sup> As quoted in European Council General Secretariat, Implementation of the EU Guidelines on torture and other cruel, inhuman or degrading treatment or punishment – stock taking and new implementation measures, 8407/1/08 REV 1 18 April 2008.

<sup>33</sup> Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe, strengthening international regulations against trade in goods used for torture and the death penalty, Doc. 14454, 15 December 2017, paragraphs 34 and 38.

<sup>34</sup> Article 5, UN, Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III), 10th December 1948

<sup>35</sup> Article 7, UN, International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976

<sup>36</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987.

<sup>37</sup> Article 3, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted by the Council of Europe on 4 November 1950, entered into force 3 September 1953

<sup>38</sup> Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126. Adopted by the Council of Europe on 26 November 1987, entered into force 1 February 1989.

and Inhuman or Degrading Treatment or Punishment on the use of certain law enforcement equipment and devices.

34. Furthermore, it underlines the great importance of initial and continued training of law enforcement officials in the appropriate use of security equipment, in line with international and regional human rights standards, and the consequent need to prevent the provision of training in abusive practices that contravene these standards.

35. The Preamble emphasizes the interest in establishing, based on a range of options, multilaterally agreed common international standards for the trade in inherently cruel, inhuman or degrading equipment as well as law enforcement equipment and weapons, and other relevant goods which can be misused for death penalty, torture and other cruel, inhuman or degrading treatment or punishment.

36. Finally, the Preamble expresses the Committee of Ministers' deep concern by the fact that certain equipment and goods whose only practical use is for torture and other cruel, inhuman and degrading treatment or punishment can be produced, promoted or marketed in Council of Europe member States including at European trade shows or on the websites of European and Europe-based companies.

### **OPERATIVE PART**

*Recommends that the governments of the member States:*

*1. Regularly review their national legislation and practice related to the trade of goods that are inherently abusive, as well of those which can be misused for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, in order to make sure that they comply with the measures set out in the Appendix to this Recommendation;*

37. The Recommendation is intended to provide guidance for all Council of Europe member States to establish and effectively implement the relevant national and international legislation and associated administrative measures to regulate, and as appropriate, restrict, trade of goods used for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment. These measures will be instrumental in promoting respect for fundamental human rights. For this reason, the operative part of the Recommendation suggests to governments of the member States that they should regularly review their national legislation and practice in order to make sure that they comply with the measures set out in the Appendix to the Recommendation.

38. The measures put forward by the Recommendation are intended to ensure that no national of, or company based in or operating from, a Council of Europe member State derives any benefits from trade which facilitates the implementation of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment; all practices incompatible with relevant Council of Europe instruments, and international conventions and treaties.

39. The Recommendation provides guidance for State regulation of the trade in law enforcement equipment and other relevant goods, specifically including promotion, import,

export, transit, and brokering of such goods, as well as associated provisions of technical assistance and training. It does not seek to provide guidance regarding the appropriate regulation of production and use of such equipment.

40. Nothing in this Recommendation is intended to weaken the implementation of existing legislation or other measures established by Council of Europe member States to restrict or otherwise regulate the trade in law enforcement equipment or other relevant goods that could be used for torture and other cruel, inhuman or degrading treatment or punishment or the death penalty.

*[Recommends that the governments of the member States:]*

*2. Ensure, by appropriate means and action, a wide dissemination of the principles set out in the Appendix to this Recommendation among competent authorities, notably those implementing and overseeing regulation of the trade in goods that can be used for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, specifically including national human rights institutions, national preventive mechanisms, Ombudsman institutions, trade unions concerned, civil society organisations, companies manufacturing, promoting and transferring law enforcement equipment and other relevant goods such as certain pharmaceutical chemicals and companies organising and operating trade fairs, as well as other relevant natural and legal persons, domiciled in member States;*

41. Member States are encouraged to ensure, by appropriate means and action, a wide and effective dissemination of this instrument among competent public authorities but also among an important number of sectors specifically mentioned in the Recommendation, notably (i) those implementing and overseeing regulation of the trade in goods that can be used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment; (ii) companies manufacturing, promoting and transferring law enforcement equipment and other relevant goods, and (iii) other relevant natural and legal persons, domiciled in member States.

42. For the purposes of such dissemination, member States, where necessary, should translate the Recommendation into their national languages.

43. It should be recalled in this context that, under its Recommendation CM/Rec(2016)3 on Business and Human Rights<sup>39</sup>, the Committee of Ministers encouraged member States to promulgate the principles of corporate responsibility in this area as part of their broader business and human rights awareness raising activities and to utilise the relevant national and international forums, mechanisms and measures established to this end, including the Council of Europe Platform on Business and Human Rights.

<sup>39</sup> Council of Europe, Business and Human Rights, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States, adopted on 2 March 2016.

*[Recommends that the governments of the member States:]*

*3. Examine, within the Committee of Ministers, the implementation of this recommendation no later than five years after its adoption.*

44. Member States are invited to examine implementation of this Recommendation at the Committee of Ministers level not later than five years after its adoption, with the participation of all relevant stakeholders. As part of this review, a comprehensive analysis should be undertaken collectively of the range of goods and equipment, the trade of which is prohibited (Annex 1), and controlled (Annexes 2 and 3) under this Recommendation, in order to ascertain whether such Annexes need to be amended in the light of changes in the development and in the nature of use of such equipment and goods, as well as changes in the international markets thereof.

45. While in principle the follow-up process is open and may take different forms, as appropriate, previous Recommendations were reassessed by sending questionnaires to member States on how and to what effect they had implemented those instruments. The replies were published on the Council of Europe website, together with a summary report and subsequently adopted by the CDDH, with a view to its being transmitted to the Committee of Ministers. In any event, the examination of the implementation of the present Recommendation should take place with the participation of all relevant stakeholders, including relevant business organisations and enterprises, national human rights institutions, national preventive mechanisms and ombudsperson institutions, and non-governmental organisations, which should have the possibility to make contributions throughout this process. It is also understood that the sharing of best practices is to be encouraged throughout this follow-up process.

46. A further relevant mechanism that could potentially inform the Committee of Ministers assessment of this Recommendation, is the comprehensive formal review of the implementation of the EU Anti-Torture Regulation which is conducted by the European Commission, Parliament and Council every five years<sup>40</sup>, and is next scheduled for 2025. As the EU Anti-Torture Regulation is directly applicable in a majority of Council of Europe Member States and has formed the inspiration for national control measures in a number of additional Council of Europe member States, an examination of the EU's formal review of this instrument, both with regard to its methodology and its findings, could provide useful insights for Council of Europe member States in their review of this Recommendation.

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<sup>40</sup> The first such formal Review initiated by the Commission in 2019 has been completed. See: Report from the Commission to the European Parliament and The Council on the review of Regulation (EU) 2019/125 of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, COM(2020) 343 final, 30 July 2020,.

## **PRINCIPLES PUT FORWARD BY THE RECOMMENDATION**

### **1. MEASURES REGARDING THE TRADE OF INHERENTLY ABUSIVE EQUIPMENT**

47. The Feasibility Study which preceded this Recommendation recorded that “at least a small number of companies based in certain Council of Europe member States have been involved in the manufacture, promotion, or trade of inherently abusive equipment or provision of possibly abusive training to law enforcement officials”.<sup>41</sup> Similar findings have been documented by the Legal Affairs and Human Rights Committee of PACE<sup>42</sup> and by certain NGOs<sup>43</sup>. As such studies were limited to publicly available information, and given the opacity of this trade, the true scope and scale of such activities may be greater than documented. Such activities need to be halted, through the measures described below.

*1.1. Member States should ensure that national legal frameworks and administrative measures are established and implemented to prohibit the import, export and transit of, and the supply of technical assistance and training relating to, equipment and goods, which have no practical use other than the infliction of the death penalty, torture and inhuman or degrading treatment or punishment.*

48. Principle 1.1. obliges all Council of Europe member States to ensure that their national legal frameworks and administrative measures effectively prohibit the import, export and transit of equipment and goods, having no practical use other than the infliction of the death penalty, torture or other forms of ill- treatment.

49. For the purpose of this Recommendation, “export” means any departure of a listed good from the customs territory of a Council of Europe member State; “import” means any entry of a listed good into the customs territory of a Council of Europe member State; and “transit” means any transport of external listed goods through the customs territory of a Council of Europe member State with a destination outside the customs territory of that Council of Europe member State.<sup>44</sup>

50. Principle 1.1. further requires that Council of Europe member States also prohibit the supply of technical assistance and training relating to such inherently abusive equipment and goods, as detailed in Principle 1.6.

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<sup>41</sup> CDDH, Feasibility Study, November 2019, paragraph 16.

<sup>42</sup> Council of Europe, Committee on Legal Affairs and Human Rights, PACE, Strengthening international regulations against trade in goods used for torture and the death penalty, Report Doc. 14454, 15 December 2017, see in particular pp.9-11.

<sup>43</sup> Omega Research Foundation, Manufacture, trade and use of ‘tools of torture’ in the Council of Europe, January 2018 (updated June 2018); see also: Omega Research Foundation, Review of EU Anti-Torture Regulation and its implementation, November 2020; Amnesty International and Omega Research Foundation, Europe’s Trade in Execution and Torture Technology, May 2015.

<sup>44</sup> With respect to Council of Europe member States that are also Member States of the European Union, the relevant customs territory is the customs territory of the Union as defined in Regulation (EU) 2019/125.

**1.2.** *Member States should prevent and prohibit the import, export or transit from, to or through their jurisdiction of equipment specified in section 1.3 which has no practical use other than the infliction of the death penalty, torture and inhuman or degrading treatment or punishment. In addition, the brokering of all such equipment by member State nationals or companies should be prohibited, irrespective of the origin of such goods. As an exception, member States could authorise import, export or transit of goods and equipment referenced in 1.3. if it is proved that such goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.*

51. In addition to reinforcing the obligation to actively prevent the activities described in Principle 1.1, Principle 1.2. also obliges member States to introduce national legislation or other measures to prohibit the brokering of such equipment and goods by member States' nationals and companies, irrespective of the origin of such equipment and goods. For the purposes of this Recommendation, brokering means (a) the negotiation or arrangement of transactions for the purchase, sale or supply of relevant goods from a third country to any other third country, or (b) the selling or buying of relevant goods that are located in a third country for their transfer to another third country. The only and very limited exception to the prohibitions under Principle 1.1 and 1.2 is where member States could authorise import, export or transit of such goods and equipment if it is proved that such goods will be used for the exclusive purpose of public display in a museum in view of their historic significance. The consequent numbers of such equipment and goods transferred should be correspondingly small.

52. To effectively implement Principles 1.1 and 1.2., and successive obligations of this Recommendation, all Council of Europe member States should undertake a comprehensive review of their existing relevant national trade control legislation, associated administrative measures and of their implementation, in the light of the guidance set out in this Recommendation, and with particular regard to the scope of goods and activities covered. Such a review would determine whether their existing legislation and measures are adequate, need to be strengthened or whether additional or new legislation and/or measures are required.

53. In order to guarantee legal certainty and ensure clarity in application by relevant stakeholders, notably State officials responsible for implementing, monitoring and enforcing national controls, and amongst companies manufacturing, promoting and trading in law enforcement equipment, a list of equipment and goods whose trade is prohibited is specified in Annex 1. This list is intended as a minimum common baseline of equipment specifically designed for or which has no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment or the death penalty. In addition, individual Council of Europe member States may consider it necessary to add additional items to their national prohibited lists as they deem appropriate.

**1.3.** *Member States should establish a list of prohibited equipment which should at least include the categories specified in Annex 1. The list should be regularly reviewed and updated, in order to consider changes in the development and in the nature of use of such equipment as well as changes in the international markets thereof.*

54. As stipulated by Principle 1.3., the list of prohibited goods should be established, regularly reviewed and, if necessary, updated. Given the rapidity of changes in the development and in the nature of use of such equipment as well as changes in relevant international markets, States should consider undertaking such reviews on an annual basis.

**1.4. Member States should destroy any stock of equipment and goods referenced in section 1.3. that remains within their jurisdiction unless used for the exclusive purpose of public display in a museum in view of their historic significance.**

55. This Recommendation is principally concerned with regulating trade in law enforcement equipment and other relevant goods and does not regulate manufacture of such goods. Principle 1.4., however, obliges member States to destroy any existing stocks of inherently abusive equipment and goods that has previously been manufactured or transferred into and now remains within their jurisdiction. Once again, the only and very limited exception should be made in case of public display of such equipment and goods in a museum-like facility. The consequent numbers of such equipment and goods held should be correspondingly small.

**1.5. Member States should ensure that advertising of equipment referenced in section 1.3. by any means, including information communication technologies and the Internet, TV, radio, in the print media and at trade fairs is prohibited.**

56. Given the inherently abusive nature of the equipment and goods listed in Annex 1, that can only be employed for torture and other cruel, inhuman or degrading treatment or punishment or the death penalty, member States should ensure that all advertising or other promotion of such equipment by any means should be prevented as detailed in Principle 1.5. This prohibition should specifically include any promotional activities conducted by manufacturers, sales or marketing companies or brokers including those utilising mass information communication technologies and the Internet, TV, radio, or print media.

57. In this context, attention should be given to preventing the promotion of such equipment and goods at arms and security equipment trade fairs held in Council of Europe member States. According to the Feasibility Study, during the 2014-2018 period, at least 94 arms and security equipment trade fairs and exhibitions were held in at least 15 Council of Europe member States.<sup>45</sup> The Feasibility Study, the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe and NGO reports have documented the promotion of inherently abusive equipment at such events, by both companies based in Council of Europe member States and also those based in non-Council of Europe states<sup>46</sup>. There is a consequent responsibility upon the organisers of such trade fairs (and the relevant member State entities co-organising, facilitating, participating or overseeing such events) to undertake adequate preventative measures

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<sup>45</sup> This figure comprised 32 distinct relevant trade fairs and exhibitions which were repeatedly held (on either an annual or biennial basis) during this period.

<sup>46</sup> CDDH, Feasibility Study, November 2019, Appendix 1 See also: Omega Research Foundation, Manufacture, trade and use of 'tools of torture' in the Council of Europe, January 2018 (updated June 2018); Omega Research Foundation, Review of EU Anti-Torture Regulation and its implementation, November 2020

(e.g. screening companies wishing to display products and promotional materials at their events) as well as reactive/remedial measures (e.g. the closure of company stalls found to be displaying prohibited goods and the removal of relevant company representatives from such events).

**1.6. Provision of technical assistance related to any of the prohibited equipment, including any technical support related to the repair, development, manufacture, testing, maintenance, assembly or any other technical service should be prohibited, except for museum procedures dedicated to conservation and preservation. Such assistance may take the form of instruction, advice, training activities, transmission of knowledge or skills. In addition, the training in the use of any prohibited equipment should be prohibited.**

58. Under Principle 1.6. the provision of technical assistance related to any of the prohibited equipment and goods (elaborated in Annex 1) is likewise prohibited. For the purpose of this Recommendation, “technical assistance” means any technical support related to repairs, development, manufacture, testing, maintenance, assembly or any other technical service, and may take forms such as instruction, advice, transmission of working knowledge or skills or consulting services. In addition, training (i.e. the transmission of knowledge, expertise or skills) in the use of such prohibited equipment and goods is likewise prohibited. Technical assistance and training include verbal forms of assistance/training and assistance/training provided by electronic means.

59. Once again, the only and very limited exception to the prohibitions on technical assistance relates to the provision of museum procedures dedicated to conservation and preservation of such prohibited equipment and goods.

**1.7. Member States should ensure that effective, proportionate and dissuasive sanctions exist for activities in breach of the prohibitions referred to in section 1.2., 1.5. and 1.6.**

60. Principle 1.7. requires that member States take legislative or other measures that are necessary to ensure that individuals and business enterprises are held accountable for any infringements of relevant national trade controls prohibiting import, export, transit, brokering, promotion of inherently abusive equipment and goods (elaborated in Annex I) or provision of associated technical assistance and training.

- Such measures should include the establishment of “effective, proportionate and dissuasive” penalties and other sanctions for such infringements.
- These could include meaningful financial penalties, and, if necessary, criminal prosecution for serious or repeated offenses. In developing appropriate sanctions, member States should be informed by the principles of the Committee of Ministers Recommendation (2016)<sup>3</sup> on Business and Human Rights, para 3 i and ii (civil and criminal liability for business-related human rights abuses), as well as those related to administrative remedies and non-judicial mechanisms (para iii.).

## **2. MEASURES REGARDING THE EXPORT AND TRANSIT OF CERTAIN PHARMACEUTICAL CHEMICALS**

61. Given the unwavering commitment by all Council of Europe member States to the abolition of the death penalty in accordance with Protocol 6 and Protocol 13 to the European Convention on Human Rights, this Recommendation incorporates provisions (detailed under Principle 1) to prohibit trade in law enforcement equipment and other relevant goods specifically designed for such purposes (elaborated in Annex 1).

62. In addition, Principle 2 provides guidance to Council of Europe member States on the introduction of appropriate measures to regulate the export and transit of certain pharmaceutical chemicals to prevent their transfer to, and subsequent misuse by, certain end-users, for lethal injection executions, in States still applying the death penalty.

63. In at least five countries - China, Guatemala, Thailand, Vietnam and the United States - the intravenous administration of a lethal dose of certain pharmaceutical chemicals ('lethal injection') is the legal method of execution.<sup>47</sup>

64. In all countries for which lethal injection protocols are known, a sedative or anaesthetic agent is administered either as the sole element of, or as a component of the lethal injection. In certain countries, however, acquisition of such anaesthetic agents from domestic sources for lethal injection has proven difficult. Over the past ten years, every manufacturer of listed execution drugs approved by the US Food and Drug Administration has implemented strict distribution controls to prevent Departments of Corrections from diverting their products for misuse in lethal injection executions.<sup>48</sup> Notably, in 2010 the sole US manufacturer of sodium thiopental suspended production of the drug and subsequently withdrew from the market altogether. As a result, a number of US States started attempting to source stocks held in other countries, including certain European countries.

65. Responding to such attempted acquisitions, in December 2011, the European Commission revised the EU Anti-Torture Regulation to include binding measures, to control the export from all EU member States of certain dual-use anaesthetic drugs which have legitimate medical uses, but that could also be employed for the execution of human beings, such as sodium thiopental and pentobarbital.<sup>49</sup>

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<sup>47</sup> Amnesty International, Execution by lethal injection: a quarter century of state poisoning, ACT 50/007/2007, 4 October 2007; Amnesty International, Maldives to resume executions after over 60 years ASA 29/6764/2017, 20 July 2017; Amnesty International, Further information: Papua New Guinea plans for executions, ASA 34/003/2013, 4 June 2013. Taiwan also lists lethal injection as a legal method of execution, though execution by gunshot is the default method and no lethal injection executions have been carried out in Taiwan to date. However, the regulations on executions as most recently amended in 2020 also foresee the administration of a sedative before an execution by shooting is carried out. See: Ministry of Justice of the Republic of China, Decree No. 10904514050, Amendments to the "Execution of Death Penalty Rules", 15 July 2020.

<sup>48</sup> Lincoln Caplan, The End of The Open Market For Lethal-Injection Drugs, 21 May 2016, at <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs>.

<sup>49</sup> EU, European Commission, Commission Implementing Regulation (EU) No: 1352/2011 of 20 December 2011, amending Council Regulation (EC) No 1236/2005, Official Journal of the European Union, 21 December 2011, L.338/31, Annex III, Article 4.

66. In 2016, the EU Anti-Torture Regulation was further revised to incorporate a differentiated licensing system which now included Union General Export Authorisations for the export of certain pharmaceutical chemicals only to States that have abolished the death penalty,<sup>50</sup> to ensure their effective regulation without unduly restricting or delaying the transfer of such chemicals for medical, veterinary or other legitimate purposes, and without creating a disproportionate burden on States or pharmaceutical chemical manufacturers.

67. In addition, the revised Regulation introduced a system of global export authorisations, which apply for a period of up to three years, with the possibility to extend for another two years. This system minimized the regulatory burden placed on companies when exporting life-saving medicines, as companies are not required to seek individual export authorisations for each shipment of medicines. To be granted a global export authorisation, companies are required to demonstrate that they have appropriate controls in place to prevent the sale of these medicines for use in executions.

68. The framework instituted under the EU Anti-Torture Regulation could serve as a model for member States when implementing this Recommendation.

**2.1.** *Member States should regulate and license the export and transit of certain pharmaceutical chemicals to ensure that they are not transferred for use in lethal injection executions in States still applying the death penalty. Member States' action should not limit the trade of such chemicals for medical, veterinary or other legitimate purposes.*

69. Consequently, under Principle 2.1. member States should regulate and license the export and transit of certain pharmaceutical chemicals to ensure that they are not transferred for use in lethal injection executions in those States still applying the death penalty. However, when introducing such national measures, member States should not limit the trade of such chemicals for legitimate medical, veterinary or other purposes.

70. The most appropriate national measures to be introduced to meet and balance these concerns are the responsibility of each Council of Europe member State.

71. A possible approach for Council of Europe member States to consider is the framework instituted under the EU Anti-Torture Regulation which, as described above, applies a differentiated licence authorisation process depending on whether the pharmaceutical chemical is to be exported to a State that retains or has abolished the death penalty.

**2.2.** *Regulation should include those pharmaceutical chemicals specified in Annex 2 and should be regularly reviewed, and, if appropriate, updated, in order to consider changes in the production, trade and use of such chemicals.*

72. Under Principle 2.2., member States should regulate the export and transit of all pharmaceutical chemicals specified in Annex 2 of the Recommendation. Although the specific list of pharmaceutical chemicals to be controlled by each Council of Europe

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<sup>50</sup> EU, Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) No 1236/2005, December 2016.

member State under Principle 2 is at the final discretion of that State, it is particularly desirable that a common approach and common list of chemicals be maintained, as elaborated in Annex 2. Such a common approach will firstly help mitigate the risk that one member State fails to regulate and thereby prevent the transfer of certain pharmaceutical chemicals employed in lethal injection thus undermining the activities of other Council of Europe member States who control and restrict trade of this drug; and secondly, a uniform control list will provide clarity for exporters and the pharmaceutical industry more generally, and limit delays and potential difficulties in acquisition of legitimate (and potentially life-saving) pharmaceutical chemicals.

73. It is important to note that the pharmaceutical chemicals which are sought for use in lethal injection are potentially life-saving medicines which were developed to save and improve the lives of patients rather than end the lives of convicted detainees. They have a unique status as vital products which protect, sustain and improve human life around the world. Restricting the sale of medicines has the potential to negatively impact legitimate trade and patient accesses and should therefore be considered in light of this.

74. The list detailed in Annex 2 is currently limited to certain specific short and intermediate acting barbiturate anaesthetic agents employed in, or approved for, lethal injection execution procedures. This list does not presently include all short and intermediate acting barbiturate anaesthetic agents employed in, or approved for, lethal injection execution procedures, or additional chemicals commonly employed together with such anaesthetic agents, as components in lethal injections. These additional medicines are not listed in Annex 2 on the basis that their manufacturers have put in place appropriate controls to prevent their sale for use in executions. In light of effective self-regulation by pharmaceutical companies, further regulation would pose an undue burden on legitimate trade and thereby impact patient access to medicines without adding any benefit.

75. The list of medicines listed in Annex 2 requiring export authorization so as to prevent their use for lethal injection execution includes only: (a) those specific pharmaceutical chemicals that have previously been used or are currently approved for lethal injection execution in a country that has not abolished capital punishment, and (b) for which the pharmaceutical industry does not have sufficient distribution controls in place to prevent the misuse of the specific pharmaceutical chemicals in executions.

76. Principle 2.2. also recommends that the list of Annex 2 pharmaceutical chemicals should be regularly reviewed and, if appropriate updated, in order to consider changes in the production, trade and use of such chemicals. This underlines the need for Council of Europe member States to remain particularly vigilant regarding developments in the pharmaceutical industry as well as changing patterns in the misuse of pharmaceutical chemicals for lethal injection executions arising as a result of adoption or extension (or indeed suspension or abolition) of the death penalty by certain States, or due to alterations in execution methodologies and the introduction of new drugs for this purpose in death penalty countries.

77. As discussed above, it is particularly desirable that a common approach and common list of chemicals be maintained, as elaborated in Annex 2. Consequently, Council of Europe member States should explore mechanisms for undertaking the review of Annex 2 chemicals in a coordinated manner, facilitated by the CDDH. Furthermore, when

conducting their review of Annex 2, States should consult with third party experts and representatives of the pharmaceutical industry to mitigate against the risk of inadvertently impacting the legitimate trade of medicines or otherwise making changes that could have unintended negative consequences.

**2.3.** *Member States should ensure that effective, proportionate and dissuasive sanctions exist for activities in breach of the regulations referred to in section 2.1.*

78. Principle 2.3. calls on member States to ensure (i.e. to introduce and effectively implement) sanctions that are “effective, proportionate and dissuasive” for breaches of the national control measures established in principle 2.1.

### **3. MEASURES REGARDING THE TRADE OF LAW ENFORCEMENT EQUIPMENT AND GOODS**

79. The Feasibility Study which preceded this Recommendation examined the promotion and trade in law enforcement equipment and goods which could be and have been misused for torture and other cruel, inhuman or degrading treatment or punishment, with the Study determining that such trade related-activities were “widespread in the Council of Europe region, in terms of both companies and States involved.”<sup>51</sup> Similar findings were documented by the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe<sup>52</sup> and by certain NGOs<sup>53</sup>. These activities need to be controlled, through the measures described below, to ensure that such equipment and goods, as well as related technical assistance and training, are not transferred to abusive end users. Although such end users are mainly law enforcement officials, as broadly defined<sup>54</sup>, the potential transfer to and misuse of these goods by other State officials (such as health professional applying certain means of restraint) or relevant non-State actors (such as private security company employees using batons, chemical irritants or electric shock devices) also needs to be addressed.

**3.1.** *Member States should establish effective national export and transit control measures with respect to law enforcement equipment and goods that can have a legitimate function when used in a manner consistent with international and regional human rights and other relevant standards on the use of force, but which may be misused*

<sup>51</sup> CDDH, Feasibility Study, Appendix 1, Paragraph 4.

<sup>52</sup> Council of Europe, Committee on Legal Affairs and Human Rights, PACE, Strengthening international regulations against trade in goods used for torture and the death penalty, Report Doc. 14454, 15 December 2017, see in particular pp.9-11.

<sup>53</sup> Omega Research Foundation, Manufacture, trade and use of ‘tools of torture’ in the Council of Europe, January 2018 (updated June 2018); See also: Omega Research Foundation, Review of EU Anti-Torture Regulation and its implementation, November 2020; Amnesty International and Omega Research Foundation, Europe’s Trade in Execution and Torture Technology, May 2015.

<sup>54</sup> See UN Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, Commentary to Article 1 which states “(a) The term ‘law enforcement officials’, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. (b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.”

*by law enforcement and other officials to inflict torture and other inhuman or degrading treatment or punishment such as:*

80. **Principle 3.1.** calls upon all Council of Europe member States to establish effective national export and transit control measures with respect to law enforcement equipment and goods that can have a legitimate function when used in conformity with international and regional human rights standards, but which may be misused by law enforcement officials to torture and otherwise ill-treat people.

**3.1.1.** *control the export, and transit of such equipment and goods through a licensing system as provided for in section 3.2;*

81. This Principle highlights five important components of such national export and transit control regimes with Principle 3.1.1. establishing the requirement for an effective licensing system which is subsequently elaborated under Principle 3.2.

**3.1.2.** *establish a list of controlled equipment and goods which should at least include the categories specified in Annex 3. The list should be regularly reviewed, in order to consider changes in the development and in the nature of the use of such equipment and goods as well changes in their international markets;*

82. Principle 3.1.2. recommends that all member States establish a national control list of law enforcement equipment and goods whose export and transit should be regulated, which should include at least the categories detailed in Annex 3. This list was developed with reference to the range of law enforcement equipment whose export is currently controlled by the majority of Council of Europe member States, and consequently should be considered as a common minimum baseline.

83. It should be acknowledged that Annex 3 does not incorporate a number of types of equipment – such as standard handcuffs, handheld striking weapons (such as batons and truncheons) and weapons-launched kinetic projectiles (such as rubber and plastic bullets) - frequently misused by law enforcement officials for torture and other cruel, inhuman or degrading treatment or punishment as documented by UN human rights bodies, regional bodies (such as the CPT) and NGOs.

84. Certain Council of Europe member States do currently control the export of some of these additional categories, and all Council of Europe member States should consider whether to include them in their national controls in addition to the goods listed in Annex 3. Further, Principle 3.1.2. encourages Council of Europe member States to regularly review their national control lists, in order to consider changes in the development and in the nature of the use of such equipment and goods as well as changes in their international markets.

85. Professional training of correctional and law enforcement officials in the appropriate use of legitimate security equipment and restraints can reinforce and operationalise human rights standards and good practice. However, international organisations and NGOs have reported instances where law enforcement officials have been trained in abusive methods. A number of Council of Europe member States' entities, and companies based in Council of Europe member States, have provided technical assistance and/or associated training to law enforcement officials of other member States

and to non-Council of Europe countries. In certain cases, however, this has included training in techniques such as hogtying and use of batons previously condemned by the CPT.<sup>55</sup>

86. Consequently, Paragraph 6 of the Preamble to this Recommendation underlines the “great importance” of initial and continued training of law enforcement officials in the appropriate use of law enforcement equipment, in line with international and regional human rights standards, and the consequent need to prevent the provision of training in abusive practices that contravene these standards.

***3.1.3. control the provision of technical assistance and training in the use of equipment and goods referred to in section 3.1.2.***

87. This is further underlined in Principle 3.1.3. which recommends that all Council of Europe member States control the provision of technical assistance and training in the use of law enforcement equipment and goods referred to in Principle 3.1.2.

***3.1.4. control the provision of brokering services related to goods listed in section 3.1.2.***

88. By the same token, member States should also control the provision of brokering services related to these goods, as enunciated in Principle 3.1.4.

***3.1.5. ensure that effective, proportionate and dissuasive sanctions exist for activities in breach of control measures referred to in section 3.1.1., 3.1.3 and 3.1.4.***

89. The wording of principle 3.1.5. repeats the Principle 1.7.

***3.2. Member States should establish effective national measures on licensing the equipment and goods referenced in section 3.1 such as to:***

90. Principle 3.2. establishes the requirement upon all member States to establish effective national measures for licensing the export and transit of law enforcement equipment and goods (and related technical assistance and training) that could be misused for torture and other cruel, inhuman or degrading treatment or punishment, and details four important components of such measures.

***3.2.1. license on a case-by-case basis the export of equipment and goods referenced in section 3.1.2. The relevant license authorisation should be issued only upon the provision of a detailed application from the prospective exporter that includes an end use certificate or other official written assurance from the intended recipient detailing the nature and volume of goods, end-user and nature of the intended use. A license is not required for exports to third countries, if the goods are used by military or civil personnel of that member State that is taking part in a***

<sup>55</sup> See for example Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe, Strengthening international regulations against trade in goods used for torture and the death penalty, Doc. 14454, 15 December 2017, paragraph 30; see also Omega Research Foundation, Manufacture, trade and use of ‘tools of torture’ in the Council of Europe, January 2018 (updated June 2018), pp.72-73.

*peace keeping or crisis management operation of the UN or a regional organisation in the third country concerned, or in an operation based on agreements between member States and third countries in the field of defense, for use by personnel of the member State concerned. Relevant authorities should verify whether this condition is met. Pending such verification, the export shall not take place;*

91. Principle 3.2.1. requires that States license on an individual case-by-case basis the export of equipment and goods referenced in Principle 3.1.2. The relevant license authorisation should be issued only upon the provision of a detailed application from the prospective exporting company or other exporting entity, that includes an end user certificate or other official written assurance from the intended recipient detailing the nature and volume of goods, end-user and nature of the intended use.

92. The measures established under Principle 3.2.1. are essential firstly to allow the authorizing State to undertake an effective assessment of the risk of such goods being misused for torture and other cruel, inhuman or degrading treatment or punishment by the intended end user as described in Principle 3.2.2. Secondly, such measures allow subsequent verification that all of the export has reached its intended end user and that no part has been diverted to another end user within the country or elsewhere. Thirdly, such measures allow the Council of Europe member State to undertake subsequent monitoring of the end use to which the goods are actually being employed. Where such information is not forthcoming, incomplete or raises concerns about the nature of the end user or end use, no authorization should be granted until these issues are fully and satisfactorily resolved.

93. Under Principle 3.2.1. such an export license is not required if the goods are to be transferred and subsequently used by personnel of that exporting Council of Europe member State in a peace-keeping operation under the auspices of the United Nations or a regional organization (such as European Union, OSCE or African Union), or under a military agreement between that member State and a non-Council of Europe member State, for use by personnel of the Council of Europe member State concerned.

94. However, for this limited exemption to be permissible, the relevant authorities in the Council of Europe member State should verify whether this condition is fully met, i.e. that the goods are actually to be used in such operations and only by military or civilian personnel of that Council of Europe member State, and that there are effective measures in place to ensure that they will not be used by or diverted to other end users within the country or elsewhere. Pending such verification (or indeed in cases where such verification is not forthcoming or fully met regarding end users and end use), the export shall not take place.

95. Although such transfers are exempted from the standard national trade licensing controls, the exporting member State is still obligated under international law to ensure that any such goods transferred are not employed in or facilitate torture and other cruel, inhuman or degrading treatment or punishment or the death penalty.

96. Consequently, all such transfers should be halted where there are reasonable grounds for believing that the equipment and goods being transferred, have been, are being or risk being used for death penalty, torture and other cruel, inhuman or degrading treatment or punishment; or where the diversion of such equipment and goods is likely.

**3.2.2.** *ensure that the evaluation of export license or transit applications incorporates an assessment of the risk that the equipment and goods referenced in section 3.1.2. will be diverted or used for torture and other cruel, inhuman or degrading treatment or punishment. The evaluation should take into account relevant judgments of international courts and information provided by competent authoritative international, regional and national bodies regarding the use and regulation of the equipment and goods by the proposed end users; other relevant information that may be taken into account includes national court judgments, reports or other information prepared by civil society organizations and information on exports of goods in Annex 1 and 3 applied by the country of destination;*

97. Principle 3.2.2. underlines the importance of member States ensuring that the evaluation of all export license or transit applications incorporates an assessment of the risk that the equipment and goods referenced in Principle 3.1.2. (Annex 3 goods) will be diverted or used for torture and other cruel, inhuman or degrading treatment or punishment by the intended end user or will be diverted to another end user within the destination country or elsewhere.

- As a minimum, for all such evaluations member States should take into account the relevant judgments of international courts, and information provided by competent authoritative international, regional and national bodies regarding the use and regulation of the equipment and goods by the proposed end users.
- Such information should include statements, general comments, recommendations, thematic commentaries and other guidance, provided by the relevant United Nations bodies and entities (such as the UN Committee against Torture, UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Special Rapporteur on Torture, the Human Rights Committee, Office of the High Commissioner for Human Rights), the Council of Europe (notably European Committee for the Prevention of Torture) and other regional organisations relating to the appropriate regulation of the use of law enforcement equipment.
- Further information to be taken into account from such bodies and also from relevant competent national bodies ((i.e. ombudsperson, national human rights institutions and national preventive mechanisms) should include reports, briefings, statements and other information relating to the specific regulation, use and misuse of such equipment in the recipient countries. This should include information concerning the potential recipient's track record of ratifying, promoting and adhering to key anti-torture instruments such as the ICCPR, CAT and OPCAT, as well as the potential recipient's record of investigating reported incidents of misuse and where necessary prosecuting perpetrators (i.e., accountability standards).
- Other relevant information that member States may take into account includes available national court judgements, reports or other information prepared by international and national non-governmental human rights organisations, other civil society organisations and the media, on the regulation, use and potential misuse of such equipment by law enforcement officials in the recipient country, as well as information obtained or compiled by relevant Embassy personnel. In addition,

information on restrictions on exports of goods in Annex 1 and 3 applied by the country of destination, may also be considered.

**3.2.3. ensure that the export license is withheld when there are reasonable grounds for believing that the equipment and goods applied for will be used for torture or other cruel, inhuman or degrading treatment or punishment;**

98. Principle 3.2.3. requires that member States ensure that the export license authorisation is withheld when there are reasonable grounds for believing that the equipment and goods applied for will be used for torture and other cruel, inhuman or degrading treatment or punishment by a law enforcement authority or any legal or natural person.. Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

**3.2.4. revoke the license of an ongoing export where there are reasonable grounds for believing that the equipment and goods being transferred, have been, are being or risk being used for torture or other cruel, inhuman or degrading treatment or punishment; or where the diversion of such equipment and goods is likely;**

99. Under Principle 3.2.4., if the circumstances change after the competent authorities have granted an export authorisation, so that there are reasonable grounds for believing that the equipment and goods being transferred, have been, are being or risk being used for torture and other cruel, inhuman or degrading treatment or punishment, or where the diversion of such equipment and goods is likely, then the competent authorities shall take swift and appropriate action to revoke the licenses and also to halt any transfers that are being or were going to be conducted. Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

**3.2.5. ensure that the transit of equipment and goods referenced in section 3.1.2. is prohibited when the person, entity or body executing the transit knows that any part of a shipment of such goods is intended to be used for torture or other cruel, inhuman or degrading treatment or punishment;**

100. Principle 3.2.5. requires that member States ensure that the transit of equipment and goods referenced in Principle 3.1.2. (Annex 3 goods) is prohibited when the person, entity or body executing the transit knows that any part of a shipment of such goods is intended to be used for torture or other cruel, inhuman or degrading treatment or punishment. Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

**3.2.6. maintain records of all export licenses, transit authorisations, authorisation of brokering services, related technical assistance and training;**

101. Principle 3.2.6. recommends that member States establish and maintain records of all export licenses, transit authorisations, and authorisation of brokering services, related technical assistance and training. Such national records should include details of relevant authorisations and also details of actual exports/transfers of equipment, related technical assistance and of training. States are encouraged to include in these records details of: the quantity, value, model/type of goods authorised and transferred, nature of related technical assistance and training, details of the exporting company, importing company, intended end use and end users, as appropriate. These records should be kept

for a minimum of ten years. Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

**3.2.7.** *publish a public annual national activity report providing information on the number of applications received, on the goods and countries concerned by those applications, and on the decisions taken on these applications;*

102. Under Principle 3.2.7., all member States should publish a public annual national activity report providing information on the number of export and transit licence applications received, on the goods and countries concerned by those applications, and on the decisions taken on these applications.

- Such information should be provided in a timely manner so as to allow appropriate oversight of member States policy and practice in this area by elected representatives, independent bodies and civil society organisations.
- Such public information requirements should be considered as a minimum common baseline, with member States encouraged to provide further meaningful information, including on the volume, value, nature of equipment, the proposed end use and end users.
- Member States are further encouraged to establish processes to notify their legislature in a timely manner of all decisions approving or rejecting a request for an export authorisation and of any decisions rescinding an export authorisation that has already been granted, along with the reasons for each decision.
- Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

**3.2.8.** *exchange information with the Council of Europe member States on licensing decisions (number of applications, goods and countries concerned) and, where available, actual exports.*

103. Principle 3.2.8. establishes a requirement for Council of Europe member States to exchange information on licensing decisions and, where available, actual exports.

- The information will be exchanged between States on a confidential basis and is intended to inform the risk assessments of all member States regarding potential end users of concern or risks of diversion.
- Such transparency measures are also important in providing assurance that all member States are meeting their obligations under the Recommendation.
- Proposals regarding the recommended information exchanged, frequency and mechanism of exchange will be prepared by the CDDH for consideration by member States.
- Similar appropriate provisions should be established with regard to pharmaceutical chemicals distinctly regulated under Principle 2.

#### **4. INFORMATION EXCHANGE, COOPERATION AND DISSEMINATION**

*Member States should use the Council of Europe Business and Human Rights Platform for information exchange and the sharing of best practices, specifically including the dissemination of relevant national legislation and associated administrative procedures, to facilitate both effective national implementation of the measures and cross-border cooperation. and to facilitate the promulgation to the business community and other key stakeholders, of their relevant obligations, mechanisms, and measures established to regulate trade in law enforcement equipment and relevant goods to prevent their use for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.*

104. Principle 4 recommends that member States fully utilise the newly-created Council of Europe Business and Human Rights Platform, to facilitate comprehensive information exchange and the sharing of best practices, specifically including the dissemination of relevant national legislation and associated administrative procedures, to facilitate both effective national implementation of the measures and cross-border cooperation, as envisaged under this Recommendation.

105. Principle 4 highlights the utility of the Platform as a mechanism to facilitate awareness raising and promulgation to the business community (including law enforcement equipment manufacturers and sellers, technical assistance providers, companies engaged in marketing of such goods and services, organising trade fairs, etc) and other key stakeholders, of their obligations under the national mechanisms and associated measures established to regulate trade in law enforcement equipment and relevant goods to prevent their use for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.

106. Of relevance will be information regarding sanctions to be imposed for activities in breach of national mechanisms.

107. The Platform could be used as a mechanism to promote transparency and information exchange between member States regarding licensing decisions and where appropriate actual exports, as outlined in Principle 3.2.8.

- It could also form an international archive for all public annual activity reports by Council of Europe member States, and also act as a repository for national legislation, associated trade control measures and sanctions.
- It could also be used as a clearing house for guidance materials facilitating development of good practice in areas such as risk assessment for export/transit license determinations, end use monitoring mechanisms and public annual reporting templates.

108. In addition, the Platform can be further employed as a confidential forum for States to share a range of publicly available open source material (including media articles, reports from international organisations and NGOs).

109. This Platform should be considered as part of the mechanism recommended by the Parliamentary Assembly of the Council of Europe and the Committee of Ministers to monitor progress made in implementing the recommendation, prior to the formal review of the Recommendation scheduled in five years' time.

## **5. SUPPORT FOR NON-MEMBER STATES**

110. Although there has been a growing recognition amongst the international community of the importance of regulating the trade in law enforcement equipment as part of measures to combat torture and other cruel, inhuman or degrading treatment or punishment, national implementation has been patchy.

111. In addition to the EU and the Council of Europe, certain international organisations (notably the African Union) have developed standards restricting trade in law enforcement equipment<sup>56</sup>, and others (such as the OSCE) have begun to discuss these issues<sup>57</sup>. However, despite these important advances, little attention has been given to this issue in other regional or multilateral organisations. Furthermore, and with certain notable exceptions, the majority of States beyond Europe have not introduced effective national measures in this area.

**5.1.** *Member States should encourage non-member States to implement measures such as those set out in this Recommendation and other relevant international standards to regulate the trade of law enforcement equipment and goods to prevent their use for the death penalty, torture and other ill-treatment, notably through developing partnerships with or offering other forms of support in implementing these standards.*

112. Consequently, Principle 5.1. calls on the Council of Europe member States to encourage non-member States to implement measures that are similar to, or in line with, the principles of this Recommendation and other relevant international standards, so as to regulate the trade of law enforcement equipment and other relevant goods to prevent their use for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.

113. The text suggests that this is done through partnerships or other forms of support, such as already carried out by certain Council of Europe member States and international organisations, including the European Union. Indeed, the importance of promoting "torture free trade" measures has been explicitly recognised by the European Union in its recently

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<sup>56</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa [Robben Island Guidelines], African Commission on Human and Peoples' Rights, October 2002, See in particular, Article 14 "States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends."

<sup>57</sup> Effective Multilateralism in the Fight Against Torture: Trends in the OSCE region and the way forward, Recommendations from conference participants, September 2019, Recommendation 11: "Give due consideration to the need for multilateral action, for instance in the form of new OSCE commitments, to control the trade in tools of torture which both prohibit inherently abusive goods (e.g. spiked batons) and control goods which are frequently misused (e.g. kinetic impact projectiles)."

revised Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>58</sup>

114. Indeed, as part of the EU Guidelines on Third Countries, EU States should: “raise awareness of third countries about the Global Alliance for Torture-Free Trade, whose ultimate aim is to end trade in goods used for torture and capital punishment, with a view to increasing the number of participating countries....and thereby global effort by countries which commit themselves to take effective measures to prevent, restrict and ban trade of goods intended or which may be used for capital punishment and torture”.<sup>59</sup>

115. An additional potentially fruitful forum for engagement with non-Council of Europe member States is through the ongoing international discourse concerning corporate responsibility and human rights. There is now a clear global consensus that companies have a responsibility to respect all human rights wherever they operate.

- This is expressly recognized in global standards on business and human rights such as the already mentioned UN Guiding Principles on Business and Human Rights, unanimously endorsed by the UN Human Rights Council in June 2011, and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>60</sup>.
- Furthermore, it is increasingly recognised that the prevention of adverse impacts on human rights includes not just addressing abuses that a company has caused or contributed to, but those which are directly linked to a company's products or services through a business relationship.
- There is a growing number of States considering, or in the process of developing national legislation to establish mandatory corporate due diligence processes, compelling companies to properly assess and address the human rights risks associated with their businesses.

**5.2.** *Member States should offer advice and support to non-member States wishing to strengthen their regulatory regime with respect to trade of law enforcement equipment and goods to prevent their use for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.*

116. Under Principle 5.2., member States should offer advice and support to non-member States wishing to strengthen their regulatory regime with respect to trade of law enforcement equipment and other relevant goods to prevent their use for the death

<sup>58</sup> Council of the European Union, Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines, 12107/19, 16 September 2019.

<sup>59</sup> Council of the European Union, Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines, 12107/19, 16 September 2019.

<sup>60</sup> Organization for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, OECD Publishing, 2011; see also OECD, OECD Due Diligence Guidance for Responsible Business Conduct, 31 May 2018.

penalty, torture and other cruel, inhuman or degrading treatment or punishment. An important potential forum for such action is the Alliance for Torture Free Trade addressed in Principle 6.2.

**5.3.** *Member States should provide information, through their diplomatic or consular missions in non-member States, on the human rights implications of trade in goods which can be used for torture or other cruel, inhuman or degrading treatment or punishment.*

117. Under Principle 5.3., member States should provide information, and offer advice to companies operating in non-member States, including through their diplomatic or consular missions in such countries, on the human rights implications of trade in goods which can be used for torture and other cruel, inhuman or degrading treatment or punishment. Member States should also provide appropriate training for their diplomatic and consular staff to raise awareness of these issues and enable them to monitor the use and potential misuse of such goods.

## **6. ACTION IN OTHER INTERNATIONAL ORGANISATIONS**

118. As discussed in the Preliminary Remarks and Sources of the Recommendation, in recent years, there has been a growing recognition by the international community, with increasing discussion within relevant international organisations, of the obligations upon all States to regulate and restrict the trade in certain law enforcement equipment and other relevant goods, so as to ensure that they are not employed for torture and other cruel, inhuman or degrading treatment or punishment.

**6.1.** *Member States should promote action in relevant international fora against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment. Particular attention should be given to the United Nations processes aimed at exploring the feasibility and scope of a range of options to establish common international standards in this area, notably a legally binding instrument.*

119. Consequently, being an international organisation working to prohibit and prevent torture and also to promote the abolition of the death penalty worldwide, Principle 6.1 recommends that Council of Europe member States promote action in relevant international fora against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment. Such actions can be taken collectively by the Council of Europe through its relevant structures, and also by individual member States engaging on a bilateral basis with non-Council of Europe member States, and also by interventions in relevant international organisations such as the OSCE or the Alliance for Torture Free Trade (see Principle 6.2) where these issues are being addressed.

120. Principle 6.1 specifically calls on Council of Europe member States to give “particular attention” to the United Nations processes aimed at exploring the feasibility and scope of a range of options to establish common international standards in this area, notably a legally binding instrument. In June 2019, over 50 States co-sponsored UNGA Resolution A/73/L.304, Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards. The Resolution was adopted by

the UN General Assembly on the 28 June 2019, with 81 States voting in favour, to 20 against, with 44 abstentions.<sup>61</sup>

121. In this Resolution, the General Assembly recognized that the absence of common international standards on the import, export and transfer of goods used for (a) capital punishment, (b) torture or other cruel, inhuman or degrading treatment or punishment contributes to the availability of these goods and enables such practices. It acknowledged the growing support across all regions for concluding an international instrument, negotiated on a non-discriminatory, transparent and multilateral basis, to establish such common international standards. The Assembly also acknowledged the importance of international trade and the need to ensure that the establishment of common international standards should not create barriers to international trade in other goods.

122. In this Resolution, the General Assembly requested the Secretary-General to seek the views of Member States on the feasibility and possible scope of a range of options to establish common international standards for the import, export and transfer of goods used for (a) capital punishment, (b) torture or other cruel, inhuman or degrading treatment or punishment, and to submit a report on the subject to the General Assembly at its 74<sup>th</sup> session.

123. The Office of the United Nations High Commissioner for Human Rights (OHCHR), on behalf of the Secretary General, addressed a *note verbale* to all Member States and a questionnaire inviting them to share information on relevant regional and national legal frameworks and to express views on the type, feasibility and scope of common international standards for trade in these goods. Submissions were received by 46 Member States (including 32 Council of Europe member States).<sup>62</sup> OHCHR also conducted an expert workshop/webinar to elicit the perspectives of relevant international organisations and certain expert technical NGOs, to which the Council of Europe CDDH participated.

124. In July 2020, the UN Secretary General's report analysing States views was published for consideration by the 74<sup>th</sup> UNGA Session. The report noted that most responding States "supported the proposal to establish common international standards", and that a majority were in favor of a "legally binding instrument establishing measures to control and restrict trade in goods used for capital punishment, torture or other forms of ill-treatment." They indicated that "only an international legally binding instrument could close the gap and put an end to the trade in those goods".<sup>63</sup> The majority of responding States suggested that such an instrument could draw on the rules, principles and mechanisms established in the EU Anti-Torture Regulation.<sup>64</sup>

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<sup>61</sup> UN, General Assembly, Resolution Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards, 21 June 2019, Seventy-third session, A/73/L.304.

<sup>62</sup> For further information about this process and copies of all Member State responses to the Questionnaire, see: UN, OCHR, Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards <https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Torture-Free-Trade.aspx> (accessed 24 July 2020).

<sup>63</sup> UN General Assembly, *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*, Report of the Secretary General, A/74/969, 28 July 2020, paragraph 36.

125. UNGA Resolution A/73/L.304 also requested that the UN Secretary General establish a Group of Governmental Experts (GGE), commencing in 2020 to examine the feasibility, scope of goods to be included, and draft parameters, for a range of options to establish common international standards in this area, and to submit a report to the 75th UNGA Session. As of November 2020, the Group of Governmental Experts is being established and will shortly commence its work; it is scheduled to present its findings to the UN General Assembly in the summer of 2021.

126. The UN process is clearly at an early stage where the scope and nature of potential international measures are still “open” for discussion. Consequently, it is important that the Council of Europe and its individual member States actively engage in relevant discussions and processes - notably through submissions to the GGE and during the 74<sup>th</sup>, 75<sup>th</sup> and subsequent UNGA Sessions - to support measures which will be in line with their long-term commitments to eradicate torture and other cruel, inhuman or degrading treatment or punishment and the death penalty, i.e. by calling for the development of effective international standards – and ideally a legally binding instrument – in this area.

127. In addition to the ongoing processes in the United Nations and other international organisations targeted specifically upon State regulation of the trade in law enforcement equipment misused for torture and other cruel, inhuman or degrading treatment or punishment and the death penalty, there are further opportunities for the Council of Europe and its member States to promote the Principles of this Recommendation in forums addressing business and human rights.

- Of particular importance are the obligations and associated measures established under the Organisation for Economic Co-operation and Development (OECD)<sup>65</sup>, and those under the UN, notably arising from the already mentioned 2011 UN Guiding Principles on Business and Human Rights, which set out the State’s duty to protect against human rights abuse by third parties, including business enterprises, and the responsibility of corporate actors to respect human rights<sup>66</sup>.
- An important consequent potential UN forum for Council of Europe member States’ intervention is the UN Working Group on the issue of human rights and transnational corporations and other business enterprises<sup>67</sup>.

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<sup>64</sup>UN General Assembly, A/74/969, 28 July 2020, paragraph 36.

<sup>65</sup> The Organization for Economic Co-operation and Development (OECD) adopted its Guidelines for multinational enterprises, which stipulate that “enterprises should...seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts” (Chapter IV, Human Rights).

Further, due regard should be had to their Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, as well as to the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Providers, having in mind in particular that a number of custodial duties are now conferred to the private enterprises.

<sup>66</sup> UN Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, HR/PUB/11/04, 2011.

<sup>67</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

**6.2.** *If not yet done so, join the Alliance for Torture-Free Trade, and make use of and contribute to the Alliance network of global Focal Points for sharing information and best practice and, where appropriate, technical assistance on design and implementation of relevant national legislation.*

128. Principle 6.2. singles out the Alliance for Torture Free Trade as a key international institution that all Council of Europe member States should join and actively engage with.<sup>68</sup> Launched in 2017, by the EU, Argentina and Mongolia, the Alliance currently comprises, over 60 States from all regions of the world (including 41 out of 47 member States of the Council of Europe)<sup>69</sup>.

- All Alliance members have signed its Political Declaration, acknowledging that: “the availability of goods used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment enables such practices”, and committing themselves to “act together to further prevent, restrict and end trade” of such goods, and specifically to “take effective measures, inter alia through legislation and effective enforcement where appropriate, for the restriction of the trade”.
- It is noteworthy that the Alliance, like the Council of Europe, focuses its attention on measures to combat capital punishment as well as torture and other cruel, inhuman or degrading treatment or punishment.

129. Alliance member States have also committed themselves to implementing a range of practical measures and mechanisms to facilitate the Alliance goals including the provision to member States of technical assistance on design and implementation of relevant national legislation, and a commitment to establish a network of global Focal Points for sharing information and best practice.

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<sup>68</sup> Under Article 1.2 of the EU Guidelines to Third Countries, EU Member States are requested “to raise awareness of third countries about the Global Alliance for Torture-Free Trade... with a view to increasing the number of participating countries.”

<sup>69</sup> As of 24 July 2020, the following Council of Europe States are members of the Alliance For Torture Free Trade: Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, and the European Union. In addition, two Council of Europe Observer States – Canada and Mexico – are also Alliance Members.

The other Alliance Members are: Argentina, Australia, Brazil, Cape Verde, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Madagascar, Mexico, Mongolia, New Zealand, Nicaragua, Palau, Panama, Paraguay, Seychelles, Uruguay and Vanuatu.

For further information see Alliance for Torture-Free Trade website: <http://www.torturefreetrade.org> (accessed 24 July 2020).

130. Principle 6.2 specifically enjoins Council of Europe member States to make use of and contribute to these measures and mechanisms.

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