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## STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

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### Preliminary draft feasibility study of a legal instrument on the prohibition of the trade in goods used for torture and the death penalty

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#### Introduction

1. In its answer of 12 September 2018<sup>1</sup> to the Recommendation 2123 (2018) of the Parliamentary Assembly “Strengthening international regulations against trade in goods used for torture and the death penalty”, the Committee of Ministers indicated in particular that:

*“it would be expedient to have a study carried out by the Steering Committee for Human Rights enabling it to gauge the feasibility of a legal instrument in this sphere, taking account of the existing work within the framework of the Council of Europe and other international arenas, as well as examples of good practices to be gathered via the new digital platform on human rights and business”.*

2. On the basis of the approved scheme by the Bureau and of the information provided by member States<sup>2</sup>, a Consultant together with the Secretariat prepared the present preliminary draft.

3. The CDDH will examine this document **at its 92<sup>nd</sup> meeting (26-29 November 2019)**, in view of its possible adoption and transmission to the Committee of Ministers before the end of the year.

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<sup>1</sup> 1323<sup>rd</sup> meeting of the Ministers’ Deputies, document CM/AS(2018)Rec2123-final.

<sup>2</sup> The information request which was sent for this purpose appears in Appendix I hereafter.

**Preliminary draft feasibility study  
of a legal instrument to strengthen international regulations  
against trade in goods used for torture or other cruel, inhuman or degrading  
treatment or punishment and the death penalty**

Introduction

This report is divided into five sections.

Section 1

Overview of the trade in goods used for torture or cruel, inhuman or degrading treatment or punishment (ill-treatment) and the death penalty, by companies based in the Council of Europe member States.

Section 2

Existing legal framework: responsibility of Council of Europe member States to eradicate torture, ill-treatment, and the death penalty, and attendant obligations upon States to regulate the trade in law enforcement equipment and relevant goods.

Section 3

Existing measures taken by Council of Europe member States, Council of Europe structures and civil society to address this issue.

Section 4

Goals for additional action by the Council of Europe.

Section 5

Proposed legal instrument: feasibility, desirability and potential elements.

## **SECTION 1**

### **OVERVIEW OF THE TRADE IN GOODS USED FOR TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ILL-TREATMENT) AND THE DEATH PENALTY, BY COMPANIES BASED IN THE COUNCIL OF EUROPE MEMBER STATES**

#### **1.1 Scope of goods of concern**

1. Whilst almost any device or weapon can be used to inflict torture and other cruel, inhuman and degrading treatment or punishment (ill-treatment), reports over many years from United Nations (UN), regional and national monitoring bodies<sup>3</sup> as well as non-governmental human rights organisations<sup>4</sup> have repeatedly

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<sup>3</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, and the Inter-American Commission on Human Rights.

<sup>4</sup> See for example: Amnesty International and Omega Research Foundation, China's Trade in Tools of Torture and Repression, September 2014; Amnesty International and Omega Research

highlighted the use of specialist (often mass produced) law enforcement equipment in such practices ('tools of torture') throughout the world.

2. In his 2004 "report on the question of torture", to the UN Human Rights Commission, UN Special Rapporteur on Torture, Prof. Theo VAN BOVEN, stated that:

*"[T]he allegations of torture that [the Special Rapporteur] has received from all regions of the world have involved instruments such as restraints..., electro-shock weapons..., kinetic impact devices..., and chemical control substances... While some of the cases have involved the use of equipment which is inherently cruel, inhuman or degrading, and would per se breach the prohibition of torture, the vast majority have involved the misuse of those instruments, legitimate in appropriate circumstances, to inflict torture or other forms of ill-treatment."*<sup>5</sup>

3. Whilst evidence of the misuse of potentially legitimate law enforcement equipment and weapons amounting to torture and other ill-treatment has continued to be regularly documented by UN, regional and national monitoring bodies inspecting prisons and other places of detention, the misuse of such equipment is clearly not confined to custodial settings.
4. UN, regional and national monitors and NGOs have also reported the widespread and systematic misuse by police and security forces of a range of crowd control equipment including tear gas, pepper spray and related delivery mechanisms, and weapon-launched kinetic impact devices, such as plastic and rubber bullets.
5. The alleged misuse and abuse of such equipment has included their deployment against protestors, in some instances amounting to torture or ill-treatment, as the current UN Special Rapporteur on Torture, Prof. Nils MELTZER, has highlighted.<sup>6</sup>

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Foundation, The Human Rights Impact of Law Enforcement Equipment, April 2015; Amnesty International and Omega Research Foundation, Europe's Trade in Execution and Torture Technology, May 2015; Omega Research Foundation and Stockholm International Peace Research Institute, The Deployment of Law enforcement Equipment in Central Asia and the South Caucasus, September 2015; Omega Research Foundation and the Institute for Security Studies, Compliance through pain: Electric shock equipment in South African prisons, June 2016; Omega Research Foundation, Tools of Torture and Repression in South America: Use, manufacture and trade, July 2016; Omega Research Foundation, Briefing Paper: Use of Tools of Torture in OSCE participating States, 2017; Omega Research Foundation, Manufacture, trade and use of 'tools of torture' in the Council of Europe, January 2018 (updated June 2018).

<sup>5</sup> UN, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2005/62, 15 December 2004, paragraph 13.

<sup>6</sup> UN, Report of the Special Rapporteur, Nils Melzer, 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.

6. Publicly available information from companies, as well as studies such as that conducted by the Legal Affairs and Human Rights (LAHR) Committee of the Parliamentary Assembly of the Council of Europe (PACE), together with ongoing research by NGO human rights organisations, and investigations by the media, supports the previous UN Special Rapporteur's findings -regarding the manufacture, trade and use of "tools of torture" throughout the world- and underlines their continuing relevance today.<sup>7</sup>
7. Such information indicates that, as Prof. van Boven noted, these "tools of torture" can be divided into two distinct categories:
  - Inherently abusive or dangerous law enforcement equipment and weapons – encompassing a relatively narrow range of goods currently manufactured and/or promoted, by a limited number of companies albeit in all regions of the world,
  - Law enforcement equipment and weapons which can have a legitimate function, when used in accordance with international and regional human rights and use of force standards<sup>8</sup>, but which can and are readily misused by prison, police and other law enforcement agencies to torture and ill-treat people – encompassing a broader range of goods, produced and traded on a significant scale by a large number of companies throughout the world.
8. The determination of whether a certain piece of equipment should be considered as inherently abusive or instead categorised as having a legitimate law enforcement function but which could also be readily misused for torture, is sometimes difficult. Consequently the categorisation for certain goods has been contested, whilst for others such categorisation has changed over time as new evidence of use/misuse has been documented, judicial case law emerged, etc.
9. For clarity this Study has predominately utilised the categories employed in the current iteration of the EU Torture Regulation (and where a divergence occurs this is noted in the text).
10. The following sections provide an overview of the range of inherently abusive law enforcement equipment and also of law enforcement equipment that could be readily misused for torture and ill-treatment that is currently being manufactured and promoted by companies based in or operating in Council of Europe member States.

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<sup>7</sup> Amnesty International and the Omega Research Foundation, Combating Torture: The Need for Comprehensive Regulation of Law Enforcement Equipment, ACT 30/9039, September 2018; Amnesty International and the Omega Research Foundation, Tackling the Trade in Tools of Torture and Execution Technologies, ACT 30/6998, September 2017.

<sup>8</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.

11. Where possible an indication of the range of member States where such commercial activities occur is given, the information taken from the marketing materials of the companies themselves. It should be noted that such companies will normally be marketing their products to correctional and law enforcement communities in the Council of Europe region and also to those in third countries.
12. In addition to such activities, several member States regularly permit and/or facilitate arms and security equipment trade fairs to which both companies based in the Council of Europe and in third countries market their goods, and to which the correctional and law enforcement communities from both Council of Europe member States and third countries attend.
13. During the 2014-2018 period, at least 31 arms and security equipment trade fairs - where law enforcement equipment of potential concern has been marketed - were held in at least 16 member States; although only counted as one event many of these trade fairs have been held on an annual or biannual basis.<sup>9</sup>
14. As only certain Council of Europe member States provide public information on the licensed trade of relevant law enforcement equipment and this information provision is only partial and infrequent, no accurate or comprehensive figures on the scale and nature of this licensed trade into or from the Council of Europe region can be given.
15. This dearth of comprehensive quantitative information in the Council of Europe region is emblematic of a wider absence of official State data on this trade at the international level.
16. Certain commercial organisations have attempted to give an indication of the global scale and forecast market developments in the trade in so-called “non-lethal” weapons – a category which overlaps with and includes many of the categories of equipment of concern in this study.
17. For example, according to Allied Market Research the non-lethal weapons market is expected to garner \$9,656 million by 2022, registering a compound growth rate of 8% during the forecast period 2016-2022.<sup>10</sup>
18. From the following overview, which is based on publicly available information and will therefore certainly underestimate the true scope and scale of the trade, it is clear that whilst a small number of companies are involved in the manufacture, promotion and trade of inherently abusive or dangerous equipment or provision of abusive or dangerous training to law enforcement officials, such activities – which are potentially inconsistent with the prohibition against torture and other ill-

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<sup>9</sup> A list of illustrative examples of arms and security equipment trade fairs are held by the CDDH Secretariat.

<sup>10</sup> Allied Market Research, Non-Lethal Weapons Market- Global Opportunity Analysis And Industry Forecast, 2014 – 2022, <https://www.alliedmarketresearch.com/press-release/non-lethal-weapons-market.html>

treatment under Article 3 of the European Convention – are taking place in certain Council of Europe member States, and need to be halted.

19. In contrast, the promotion and trade in legitimate law enforcement equipment that could be readily misused for torture and ill-treatment is relatively widespread in the Council of Europe region, in terms of companies and States involved, and consequently such activities need to be controlled to ensure that such equipment, related technical assistance and training are not transferred to abusive end users in third countries – such actions being potentially inconsistent with Article 3 of the European Convention.

## 1.2 Inherently abusive or dangerous equipment

### 1.2.1 Body worn electric shock devices

20. A range of body-worn electric shock devices intended for attachment directly to prisoners are capable of delivering up to 50,000 volt shocks have been manufactured by companies in Asia, Africa, the Americas and Europe; they include stun belts, stun vests and stun cuffs, activated by remote control. From 2014-18 inclusive<sup>11</sup>, such devices have been manufactured and/or promoted by companies in at least 2 member States<sup>12</sup>.
21. For example the LAHR Committee study highlighted the a Council of Europe based company which promoted the PKI 9360 stun cuff for sale on its website. According to the company material: *“PKI 9360 stun-cuffs for hands find their application when taking a prisoner to the court or hospital. In case he attempts to escape the stun-cuffs are activated by remote control and transmit an electric shock of 60.000 Volt. Voltage can be adjusted according to demands of staff. You never saw an escaping person stop so quickly!”*<sup>13</sup>
22. In addition, certain companies based in third countries have marketed such devices at arms and security fairs held in Council of Europe member States. For example at an EU (French) arms and equipment trade fair on 21 November 2017 an Asian (Chinese) company physically displayed the *“Constraint”* body work electric shock device and distributed marketing materials for *“Electric Ankle Cuffs”* described as a *“behaviour controlling system forced to be worn on the prisoner’s ankles”* capable of delivering a *“high-voltage shock”* of 200 KV.<sup>14</sup>

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<sup>11</sup> Events documented as having occurred between 1 Jan 2014 and 31<sup>st</sup> Dec 2018.

<sup>12</sup> Copies of the relevant company marketing materials are held by the CDDH Secretariat. Both companies subsequently removed all promotional material from their websites.

<sup>13</sup> PKI Electronic Intelligence, *Stun-Cuffs for foot, Stun-Cuffs for hand*, available at: [www.pki-electronic.com/products/police-customs-and-military-equipment/stun-cuffs-for-foot-stun-cuffs-for-hand/](http://www.pki-electronic.com/products/police-customs-and-military-equipment/stun-cuffs-for-foot-stun-cuffs-for-hand/). Whilst the LAHR Committee Rapporteur “confirmed that this item still appeared on PKI’s website when accessed on 8 November 2017”, it has subsequently been removed. See 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, paragraph 24.

Because the promotion in such goods is now prohibited in EU Member States, the French Government and the trade fair organisers once apprised of this activity acted swiftly and closed down the company's stall and removed the company representatives from the trade fair.

23. Both the UN Committee against Torture<sup>15</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>16</sup> have condemned the use of electric shock stun belts and recommended such practices be halted.
24. Prior to the coming into force of the EU Torture Regulation, one Council of Europe EU member State imported electric shock stun belts for use in its prison service, and their presence was subsequently documented by the CPT.<sup>17</sup> Although the member State informed the CPT that *"such equipment had never been used"* the CPT stated that *"electric stun body belts, without batteries, were occasionally used ... when staff were short of ordinary body belts."*<sup>18</sup> Following the CPT intervention, all electric shock stun belts were subsequently removed from service in that member State.

### 1.2.2 Mechanical restraints

25. Rule 47 of the UN Minimum Standard Rules for the Treatment of Prisoners (Nelson Mandela Rules) states that *"the use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited."*<sup>19</sup>
25. Similarly, under Article 68.1 of the European Prison Rules, which were adopted by the Committee of Ministers of the Council of Europe, *"The use of chains and irons shall be prohibited."*<sup>20</sup>

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<sup>14</sup> Origin Dynamic electric shock products poster, on display 21 November on Origin Dynamic stall, Milipol 2017, Paris, France; Origin Dynamic product catalogue, distributed at Origin Dynamic stall, Milipol 2017, Paris, France (copy of relevant images held by the CDDH).

<sup>15</sup> UN, Committee against Torture, Report of the Committee against Torture, A/55/44, 2000, paragraph 180.

<sup>16</sup> CPT, 20<sup>th</sup> General Report, CPT/Inf(2010)28, 26 October 2010, paragraph 74.

<sup>17</sup> Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, 29 June 2006, paragraph 127.

<sup>18</sup> Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, 8 June 2010, paragraph 120.

<sup>19</sup> UN, Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), United General Assembly resolution 70/175, annex, adopted on 17 December 2015, Rule 48.

<sup>20</sup> Council of Europe, Recommendation of the Committee of Ministers to member States on the European Prison Rules, adopted by Committee of Ministers on 11th January 2006 at 952nd meeting of the Ministers' Deputies, Article 68.1.

26. However, despite these restrictions, the manufacture and/or promotion by companies based in member States, of a range of inherently abusive or dangerous restraints has been reported during 2014-18 period including:

27. Fixed restraints: Companies in at least 4<sup>21</sup> member States have manufactured and/or promoted hand or leg restraints designed to be attached to fixed objects, to the law enforcement community. For example, a company based in a member State has manufactured and continues to promote a restraint bracelet incorporating a single handcuff and a *“stationary mount in the form of a rock bolt”*.

According to the company information, this restraint device *“allows you to restrict freedom of movement”* of the prisoner who will be *“securely chained...to the wall.”*<sup>22</sup> The company has also manufactured *“Bouquet”* bracelets for restraining up to five prisoners together that allows the *“possibility of fixing [a] group ... to a fixed support.”*<sup>23</sup>

28. Weighted restraints: Companies in at least 1<sup>24</sup> member State have manufactured and/or previously promoted fixed restraints for use by law enforcement officials at equipment trade fairs and/or on their websites.

In addition a number of companies from third countries have promoted such products at arms and security trade fairs held in member States, including for example, three (Chinese) Asian companies which all promoted weighted leg irons attached by a chain to handcuffs, during a Council of Europe arms fair in November 2017.

29. Thumbcuffs: Companies in at least 3<sup>25</sup> member States have manufactured and/or promoted thumb cuffs for use by law enforcement officials at equipment trade fairs and/or on their websites. One such company has described its products as *“suitable for plainclothes policemen or in addition to handcuffs”*<sup>26</sup>

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<sup>21</sup> Copies of the relevant company marketing materials are held by the CDDH Secretariat.

<sup>22</sup> BCS-1 "Prikol" bracelet, NPO-Special Materials Corporation, [http://www.npo-sm.ru/specialnye\\_sredstva/naruchniki/bks-1\\_prikol/](http://www.npo-sm.ru/specialnye_sredstva/naruchniki/bks-1_prikol/) (accessed 24 May 2019).

<sup>23</sup> BCS-1 "Bouquet" Bracelets, NPO- Special Materials Corporation, [http://www.npo-sm.ru/specialnye\\_sredstva/naruchniki/bks-1\\_buket/](http://www.npo-sm.ru/specialnye_sredstva/naruchniki/bks-1_buket/) (accessed 24 May 2019)

<sup>24</sup> Copies of the relevant company marketing materials are held by the CDDH Secretariat.

<sup>25</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

<sup>26</sup> Nowar catalogue, available at [http://www.nowar.de/katalog/standard/001\\_pers\\_equipment\\_accessoires/114\\_hand\\_und\\_fussfes\\_seln/nowar\\_daumenfessel/dauemfessel\\_uk.htm](http://www.nowar.de/katalog/standard/001_pers_equipment_accessoires/114_hand_und_fussfes_seln/nowar_daumenfessel/dauemfessel_uk.htm) (accessed 18 January 2018).



Similarly, during this period Asian companies (from Taiwan and China) were documented promoting handcuffs at arms and security fairs in Council of Europe member States.<sup>27</sup>

30. *Cage and net beds*: The UN Human Rights Committee has repeatedly called for a cessation of the use of cage beds, and has stated that their use “*is considered an inhuman and degrading treatment of patients confined in psychiatric and related institutions*”.<sup>28</sup>

The CPT in its revised standard-setting document of 2017 concerning “*means of restraint in psychiatric establishments for adults*”, stated that “*the use of net (or cage) beds should be prohibited under all circumstances*”.<sup>29</sup>

Despite such concerns, the PACE LAHR Committee highlighted the promotion of such items until early 2015 by two companies in a member State<sup>30</sup>.

31. *Multipoint restraints*: Some full body restraints can have legitimate employment in restricted and carefully controlled medical contexts, for instance to prevent movement during emergency treatment, or to prevent suicide or self-harm.

However, a range of devices incorporating multiple restraints such as shackle boards, shackle beds and restraint chairs have been commercially promoted for penal and law enforcement use, although they are inappropriate for such use.

The UN Committee against Torture has recommended the abolition of “*restraint chairs as methods of restraining those in custody*”, as “[t]heir use almost invariably leads to breaches of Article 16 [the prohibition against cruel, inhuman or degrading treatment].” There do not appear to be any Council of Europe companies currently manufacturing restraint chairs, shackle boards or shackle beds.

However, there are indications that restraint chairs have previously been imported into the Council of Europe region. In addition a restraint chair manufactured by a company in the Americas (US), had been promoted for sale by a range of companies, previously including a Council of Europe

<sup>27</sup> See: Omega Research Foundation, *Manufacture, trade and use of ‘tools of torture’ in the Council of Europe*, January 2018, revised June 2018, p.45.

<sup>28</sup> UN, Human Rights Committee, *Concluding Observations of the Human Rights Committee, Slovakia*, 22 August 2003, UN Doc. CCPR/CO/78/SVK, paragraph 13; UN, Human Rights Committee, *Concluding Observations of the Human Rights Committee, Czech Republic*, 9 August 2007, UN Doc. CCPR/C/CZE/CO/2 paragraph 13.

<sup>29</sup> CPT, *Means of restraint in psychiatric establishments for adults* (Revised CPT standards), CPT/Inf(2017)6, 21 March 2017.

<sup>30</sup> Council of Europe, LAHR Committee (15 December 2017) op.cit, paragraph 25.

based company which has offices in four Council of Europe member States.<sup>31</sup>

On 29 April 2015, in response to an information request from human rights NGOs, the company stated: *“After reading your report we have decided to delete the mentioned chair out of our assortment and we have also removed it from our website. After taking everything in consideration we come to the conclusion that this product does not match our vision on safety for the prisoners when used wrongly.”*<sup>32</sup>

However in stark contrast to such welcome and responsible action by a Council of Europe based company, Chinese companies have continued to promote metal restraint chairs or “Inquest Chairs” in which the prisoner is fastened by metal shackles and handcuffs, at Council of Europe arms and security equipment trade fairs.

32. Blindfolds and hoods.<sup>33</sup> Although there is no evidence of the manufacture or promotion by Council of Europe companies of hoods or blind-folds specifically intended for law enforcement purposes, such devices have been promoted at Council of Europe arms and security exhibitions by non-Council of Europe companies. For example, at a Council of Europe arms trade fair in June 2016, an Asian (Chinese) company promoted the “WM-01 Mask – for arresting.”

This device consists of a cloth hood designed to completely block vision by covering the entire prisoner’s head (including nose and mouth); the hood being attached to metal handcuffs. The UN Committee against Torture has stated that blindfolding can constitute torture or other ill-treatment.<sup>34</sup>

The former UN Special Rapporteur on Torture has noted that *“the practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers.”* and recommended that *“blindfolding and hooding should be forbidden.”*<sup>35</sup>

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<sup>31</sup> De Ridder Products,

[http://www.deridderproducts.com/index.php?route=product/product&product\\_id=1336](http://www.deridderproducts.com/index.php?route=product/product&product_id=1336) (accessed 13 February 2015). As stated in its response to Amnesty International and the Omega Research Foundation, De Ridder subsequently removed all details of the safety restraint chair from its website. See: Amnesty International/Omega Research Foundation, Grasping the nettle: Ending Europe’s Trade in Execution and Torture Technology, EUR 01/1632/2015, May 2015.

<sup>32</sup> Email correspondence from representative of De Ridder Products to Amnesty International/Omega Research Foundation, 29 April 2015.

<sup>33</sup> Although UN and regional human rights organisations have highlighted the use of hoods and blindfolds in torture and ill-treatment, the EU Torture Regulation does not currently prohibit or control such items, the exception being the control of spit hoods.

<sup>34</sup> UN, Committee Against Torture, Concluding observations of the Committee against Torture: Israel, 5 September 1997, A/52/44; UN, Committee Against Torture, Report on Mexico produced by the Committee under article 20 of the convention, and reply from the government of Mexico, CAT/C/75 (2003), 26 May 2003.

The European Court of Human Rights has determined that blindfolding a prisoner constitutes cruel or inhuman treatment when used in combination with other interrogation or detention methods,<sup>36</sup> and can constitute torture when used with other techniques.<sup>37</sup>

### 1.2.3 Kinetic impact weapons

33. Commercial companies, notably in Asia, have developed a range of inherently abusive and dangerous kinetic impact weapons and devices designed to increase, not minimize, the amount of pain and injury inflicted on subjects. They include spiked batons, spiked shields and spiked arm armour, sjamboks and whips. Their use would lead to severe physical pain, mental suffering and serious injury and they therefore clearly cannot legitimately be used for law enforcement.

During the 2014-2018 period, one company in one<sup>38</sup> member State promoted spiked kinetic impact devices for use by law enforcement officials.

In addition, Asian (Chinese) companies have marketed a variety of spiked shields and batons at 2015 and 2017 security fairs in a Council of Europe member State, including the physical display of a spiked shield (with electric shock function) in 2015.<sup>39</sup>

## 1.3 Law enforcement equipment that could be readily misused for torture and ill-treatment

### 1.3.1. Direct contact electric shock weapons

34. During the 2014-2018 period, companies in at least 14<sup>40</sup> Council of Europe member States have manufactured and/or promoted direct contact electric shock devices and weapons – including electric shock batons, stun guns and shock shields - for use by correctional or law enforcement officials.

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<sup>35</sup> UN, Commission on Human Rights, Report of the special rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 2001/62, E/CN.4/2002/76, 27 December 2001.

<sup>36</sup> Ireland v. United Kingdom, 25 Eur. H.R. Rep. (ser. A) (1978); Ocalan v. Turkey, 37 Eur. Ct. H.R. 238, 222 (2003). [As cited in IRCT, Statement on hooding, International Forensic Group, *Torture*, volume 21, 3 November 2011].

<sup>37</sup> Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260 (1996); Aydin v. Turkey, 1997-VI Eur. H.R. Rep. 1866 (1997). [As cited in IRCT (2011) op.cit].

<sup>38</sup> A copy of the relevant company marketing materials are held by the CDDH Secretariat.

<sup>39</sup> See 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, paragraph 22.

<sup>40</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

35. Although based in member States these companies promote their products domestically, to other member States and to third countries throughout the world.

For example Council of Europe-based company produces a range of electric shock weapons which it promotes to the global law enforcement community on its website and at arms and security equipment trade fairs.

On its website, the company currently also lists dealers and representatives in three Council of Europe member States and as well as in three other European States, six Asian States (Bangladesh, Indonesia, Malaysia, Pakistan, Sri Lanka, Vietnam), the six Middle Eastern States (Egypt, Iran, Israel, Jordan, Saudi Arabia, Tunisia) and two African States (Nigeria and South Africa).<sup>41</sup>

36. In addition, companies from Asia and the Middle East have regularly promoted such devices in the Council of Europe region.

For example at an arms and security trade fair held in a Council of Europe member State from 29 April – 3 May 2019 an Asian (Chinese) company distributed marketing materials for three types of “*electrical baton*” whilst a second Asian (Chinese) company promoted an Electric Shield that can deliver shocks of at least 80,000 volts.<sup>42</sup>

37. Both the CPT and the European Court of Human Rights have expressed “*strong reservations*” about the use of electric shock equipment in direct contact mode, noting that “*properly trained law enforcement officials will have many other control techniques available to them when they are in touching distance of a person who has to be brought under control*”.<sup>43</sup> The CPT have raised concerns about the arming of custodial staff with electric shock weapons in certain Council of Europe member States and have recommended that “*immediate steps be taken to put a stop to custodial staff in police arrest houses routinely carrying electro-shock weapons*”.<sup>44</sup>

### 1.3.2 Projectile electric shock weapons

38. The UN Committee against Torture has recommended that projectile electric shock weapons (often called tasers) “*are used exclusively in extreme and limited*

<sup>41</sup> <https://russian-shockers.com/contacts/predstaviteli.html> (accessed 4 June 2019)

<sup>42</sup> Anti-riot and counter terrorism brochure, Norinco, undated, distributed at IDEF 2019 exhibition held from 30 April – 3 May 2019, pp.38-9; Personal Protection Equipment brochure, Electric Shield, Yuanfar International, undated, distributed at IDEF 2019 exhibition held from 30 April – 3 May 2019, p.16.

<sup>43</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards, “Substantive” sections of the CPT’s General Reports, CPT/Inf/E (2002) 1 - Rev. 2015, p. 111; European Court of Human Rights, Case of Anzhelo Georgiev and Others v. Bulgaria, judgment of 30 September 2014, paragraph 76.

<sup>44</sup> See for example: CPT, Report to the Lithuanian Government on the visit to Lithuania carried out by the CPT from 27 November to 4 December 2012, 4 June 2014.

*situations – where there is a real and immediate threat to life or risk of serious injury – as a substitute for lethal weapons and by trained law enforcement personnel only.”<sup>45</sup>*

39. Furthermore the Committee recommends *“establishing a high threshold for their use...expressly prohibiting their use on children and pregnant women...[and that such weapons]...should be inadmissible in the equipment of custodial staff in prisons or any other place of deprivation of liberty.”<sup>46</sup>*
40. Most projectile electric shock weapons also incorporate a drive-stun mode where the device can be used as a *de facto* direct contact electric shock weapon. This capability is prone to abuse, potentially including for torture and other ill-treatment. In a 2019 periodic review of a Council of Europe Member State the CAT recommended that *“use [of projectile electric shock weapons] in drive stun mode”* should be *“prohibited”<sup>47</sup>*
41. During the 2014-2018 period, companies in at least 3<sup>48</sup> Council of Europe Member States have manufactured and/or promoted projectile electric shock weapons for use by law enforcement officials. The international office for a large Americas (US)-based company producing projectile electric shock weapons is headquartered in another Council of Europe Member State.<sup>49</sup> This company's products are also promoted by companies in at least 6<sup>50</sup> Council of Europe Member States.

### **1.3.3 Mechanical restraints<sup>51</sup>**

42. If used appropriately, in conformity with international human rights law and standards, certain mechanical restraints such as ordinary handcuffs and leg cuffs can be legitimately used to ensure the safe detention and restraint of prisoners.

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<sup>45</sup> UN Committee against Torture, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN doc. CAT/C/GBR/CO/5, 24 June 2013, paragraph 26.

<sup>46</sup> Ibid.

<sup>47</sup> UN Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (CAT/C/GBR/6), 16 May 2019 (CAT/C/SR.1754), paragraph 29.

<sup>48</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat. Copy of relevant information is held by the CDDH Secretariat.

<sup>49</sup> Copy of relevant information is held by the CDDH Secretariat.

<sup>50</sup> [Citation needed].

<sup>51</sup> Although UN and regional human rights organisations (notably the CPT) have highlighted the misuse of ordinary handcuffs and standard leg cuffs in torture and ill-treatment, the EU Torture Regulation does not currently control such items.

43. The circumstances and limits within which these restraints are used should be consistent with international human rights standards (notably the Nelson Mandela Rules) and regional restrictions notably the European Prison Rules. Rule 43 of the Mandela Rules states that “*instruments of restraint shall never be applied as a sanction for disciplinary offences.*”<sup>52</sup>
44. During the 2014-2018 period, companies in at least 25<sup>53</sup> Council of Europe Member States have manufactured and/or promoted mechanical restraints for use by correctional and law enforcement officials.

### 1.3.4 Riot control agents

45. Riot control agents (RCAs) are a range of toxic chemicals, including pepper spray and tear gas, which are commonly used (for example in hand-thrown or weapon-launched RCA grenades and cartridges, or via water cannon) for controlling or dispersing crowds; and are also employed (in hand-held sprays) against individuals or a small number of people, for example to facilitate arrest.
46. RCAs can pose a risk of unnecessary harm if used without following the manufacturer's instructions or in contravention of human rights standards. Of particular concern is the use of RCAs in excessive quantities or in confined spaces where people cannot disperse and the toxic properties of the agents can lead to serious injury or death, particularly to vulnerable individuals.
47. The European Court of Human Rights has declared that “*the unwarranted use of tear gas by law enforcement officers is not compatible with the prohibition of ill-treatment*”.<sup>54</sup> With regard to places of detention, the CPT has repeatedly recommended that pepper spray and tear gas should not be used in confined spaces, nor on an individual already brought under control, as well as expressing “*serious reservations*” about its use in open space, stating that there should be clearly defined safeguards in place if it needs to be used exceptionally.<sup>55</sup>
48. The European Court of Human Rights has endorsed these concerns and recommendations.<sup>56</sup>
49. During the 2014-2018 period, companies in at least 24<sup>57</sup> Council of Europe Member States have manufactured and/or promoted riot control agents for use

<sup>52</sup> UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), United General Assembly resolution 70/175, annex, adopted on 17 December 2015, Rule 43.

<sup>53</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

<sup>54</sup> Case of *Izci v. Turkey*, judgment of 23 July 2013, paragraph 62.

<sup>55</sup> See for example, CPT, CPT, Report to the Government of Bosnia and Herzegovina on the visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 30 March 2007, paragraph 79.

<sup>56</sup> Case of *Ali Güneş v. Turkey*, judgment of 10 April 2012, paragraphs. 39-41.

by law enforcement officials. The products of certain Council of Europe based companies have been transferred to third countries where widespread and serious misuse of riot control agents has been documented, as highlighted by the UN<sup>58</sup> and in the PACE LAHR Committee report.<sup>59</sup>

### 1.3.5 Kinetic impact devices<sup>60</sup>

50. During the 2014-2018 period, companies in at least 17<sup>61</sup> member States have manufactured and/or promoted kinetic impact projectiles – such as plastic and rubber bullets – and associated launchers for use by law enforcement officials; whilst companies in at least 23<sup>62</sup> member States have manufactured and/or promoted hand-held kinetic impact weapons – such as batons or truncheons - for use by law enforcement officials. If employed in conformity with international human rights law and standards, in particular regarding the use of force, certain types of such weapons can have a legitimate role in law enforcement.

51. However, human rights organizations have regularly documented their widespread abuse - in both custodial and extra-custodial settings - to inflict unnecessary or excessive force, which has amounted in certain cases to torture or other ill-treatment, or has resulted in serious injury or death.

### 1.3.6 Training and technical assistance

52. In his 2004 report to the Commission on Human Rights, the UN Special Rapporteur on Torture warned that if 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>63</sup>

A number of entities of member States and commercial companies based in member States have provided technical assistance and/or associated

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<sup>57</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

<sup>58</sup> UN Group of Experts on Côte d'Ivoire, Final Report, prepared in accordance with paragraph 14 of Security Council resolution 1980 (2011), issued by the UNSC on 14 April 2012, UN doc. S/2012/196, paragraph 58.

<sup>59</sup> See 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, paragraph 27.

<sup>60</sup> Although UN and regional human rights organisations have highlighted the misuse of hand held kinetic impact weapons and launched kinetic impact weapons in torture and ill-treatment, the EU Torture Regulation does not currently control such items.

<sup>61</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

<sup>62</sup> Copies of illustrative relevant company marketing materials are held by the CDDH Secretariat.

<sup>63</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.

training to law enforcement officials from other member States and to third countries.

Whilst professional training of police and prison officers in the appropriate use of legitimate security equipment and restraints can reinforce and operationalize human rights standards and good practice, human rights NGOs and the PACE LAHR Committee have reported instances where law enforcement officials have been trained in abusive or dangerous methods.

For example a company based in a member State supplying security equipment trains police forces in their use. This training includes employment of restraints to place prisoners in hyper-extended positions (hog-tying) and also in the use of batons for neck holds.

Such techniques are similar to those the CPT recommended be halted. Images and videos on the company website continue to show training in such techniques to a range of police forces in the Europe, Asia, Africa and the Americas.<sup>64</sup>

### 1.3.7 Pharmaceutical chemicals

53. In China, Guatemala, the Maldives, Papua New Guinea, Taiwan, Thailand, Vietnam, and the United States, the intravenous administration of a lethal dose of certain pharmaceutical chemicals ("lethal injection") is provided for as a method of execution under the law.<sup>65</sup> Until 2010- 2011, the majority of US States that carried out lethal injection executions employed a 'three-drug' protocol comprising: sodium thiopental to induce general anaesthesia; pancuronium bromide to cause muscle paralysis, including of the diaphragm; and potassium chloride to stop the heart.

However, Hospira, the sole US manufacturer of sodium thiopental, suspended production of the drug in 2010, and in early 2011 withdrew from the market altogether. As a result, a number of US death penalty States started to source stocks held in other countries including European countries.

In December 2011, the European Commission revised the EU Torture Regulation to include binding measures, which were strengthened further in 2016, to control the export from all EU Member States of certain dual-use drugs which have legitimate medical uses but that could also be

<sup>64</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, paragraph 30; Omega Research Foundation, Manufacture, trade and use of 'tools of torture' in the Council of Europe, January 2018, revised June 2018, pp.72-73.

<sup>65</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.



employed for the execution of human beings, such as sodium thiopental and pentobarbital.<sup>6667</sup>

The PACE Legal Affairs and Human Rights Committee study reviewed this issue and concluded that the revised EU Torture Regulation “*has seriously hampered the ability of several States of the United States of America to execute the death penalty.*”<sup>68</sup>

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<sup>66</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.

<sup>67</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. In December 2016, the EU also introduced a system of Union General Export Authorizations for EU exports of certain pharmaceutical chemicals to States that abolished the death penalty; and individual or global export authorizations to non-abolitionist States.

<sup>68</sup> Parliamentary Assembly of the Council of Europe (PACE), Recommendation 2123 (2018), Strengthening international regulations against trade in goods used for torture and the death penalty, 26 January 2018, paragraph 4.

## **SECTION 2**

### **STATE RESPONSIBILITY TO ERADICATE TORTURE, ILL-TREATMENT, AND THE DEATH PENALTY, AND ATTENDANT OBLIGATIONS UPON STATES TO REGULATE THE TRADE IN LAW ENFORCEMENT EQUIPMENT AND RELEVANT GOODS**

54. The prohibition on torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) is absolute. It applies in all circumstances and, as part of international customary law, to all States. It is incorporated into numerous treaties including the Universal Declaration of Human Rights<sup>69</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>70</sup> and notably the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>71</sup> It is also enunciated in a number of regional instruments including the African Charter on Human and Peoples' Rights<sup>72</sup>, American Convention on Human Rights<sup>73</sup>, and in Europe under the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>74</sup> and Charter of Fundamental Rights of the European Union.<sup>75</sup>

55. Although there is no global consensus to abolish capital punishment and currently 55 out of the 195 UN Member States still retain it, the death penalty is now unlawful in all Council of Europe member States. Protocol number 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;<sup>76</sup> in addition Protocol number 13 to the European Convention, which

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<sup>69</sup> UN, Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III), 10th December 1948, Article 5.

<sup>70</sup> 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, Article 7.

<sup>71</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 in to force 26 June 1987.

<sup>72</sup> African Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of State and Government, June 1981, Nairobi, Kenya, Article 5.

<sup>73</sup> American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, Article 2.

<sup>74</sup> Council of Europe (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, Article 3.

<sup>75</sup> European Union (EU), Charter of Fundamental Rights of the European Union, C 364/1, Official Journal of the European Communities, 18 December 2000, Article 4.

abolishes the death penalty in all circumstances, has been ratified by all member States except Armenia, Azerbaijan and the Russian Federation.<sup>77</sup>

56. Recognising and building on this progress, in 2010, the European Court of Human Rights ruled that the death penalty amounted to inhuman or degrading treatment and thus fell within the prohibition set out in Article 3 of the European Convention on Human Rights.<sup>78</sup>
57. International law imposes specific obligations on States to prevent torture and other ill-treatment, to investigate its occurrences, criminalise complicity in such activities, to bring to justice the perpetrators and to provide reparations to the victims.<sup>79</sup>
58. As highlighted by the PACE LAHR Committee study, the prohibition against torture is so strict as to require States to take into account consequences of their actions that may occur in other countries, notably by preventing the removal of a person to a country in which they are at real risk of exposure to sufficiently serious ill-treatment.<sup>80</sup>
59. Despite such obligations, torture and other ill-treatment is perpetrated in all regions of the world. International and regional torture prevention monitoring bodies, as well as non-governmental human rights organisations, have documented the use of a range of law enforcement and security equipment and weapons ('tools of torture') in the facilitation and/or commission of torture or other ill-treatment.
60. 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*" and requested the UN Special Rapporteur on torture "*to study the situation of trade and production in such equipment, its origin, destination and forms, with a view to finding the best ways to prohibit such trade*

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<sup>76</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.

<sup>77</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>78</sup> European Court of Human Rights, *Al-Saadoon and Mufdhi v the United Kingdom* – 61498/08 [2010] ECHR 282.

<sup>79</sup> UN, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 39/46 of 10 December 1984 (entry into force 26 June 1987), Articles 2, 4 and 16.

<sup>80</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, paragraph 4.

*and production and combat its proliferation, and to report thereon to the Commission”.*<sup>81</sup>

61. In response, in 2003, the then UN Special Rapporteur on torture Prof. van Boven submitted a: *“Study on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms”* to the UN Commission on Human Rights.<sup>82</sup>
62. Whilst the study noted that *“international human rights law has up to now mainly addressed the question of the circumstances in which such equipment can be used...”*, the Special Rapporteur argued that controlling the trade of such equipment also formed part of every State’s obligations under the UN Convention against Torture:

*“[T]he Special Rapporteur reminds States parties to the [UN] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of its article 2 which provides that ‘each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’. He believes that the enactment of legal and other measures to stop the production and trade of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment is part of this obligation of a general nature to prevent acts of torture.”*<sup>83</sup>

63. Consequently, in his subsequent report to the 2005 Session of the Commission on Human Rights, the UN Special Rapporteur on Torture recommended, *inter alia*, that States:
- 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 or ill-treatment;
  - Consider the development of an international regulatory mechanism.<sup>84</sup>

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<sup>81</sup> UN Commission on Human Rights, Resolution 2001/62, 25 April 2001.

<sup>82</sup> UN Commission on Human Rights, E/CN.4/2003/69, 13 January 2003, Article 14

<sup>83</sup> UN Commission on Human Rights, E/CN.4/2003/69, 13 January 2003, Article 35

<sup>84</sup> UN Commission on Human Rights, Report of the Special Rapporteur, Theo van Boven, E/CN.4/2005/62, 15 December 2004, Article 37.

64. The importance of all States introducing measures to tackle the trade in ‘tools of torture’ as part of a comprehensive anti-torture strategy has repeatedly been recognised by the UN General Assembly (UNGA) in its (now) biannual Omnibus Torture Resolution which has consistently urged States to introduce effective controls in this area.

65. The latest Torture Resolution of November 2017 called upon 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”<sup>85</sup>*

66. Likewise the importance of this approach has been recognised by a growing number of individual Member States<sup>86</sup>, regional and international human rights bodies including UN Special Rapporteurs on Torture, UN Commission on Human Rights<sup>87</sup>, UN Committee Against Torture<sup>88</sup>, African Commission on Human and People’s Rights<sup>89</sup> and the Council of Europe<sup>90</sup>.

67. In September 2018, Michelle Bachelet, the current UN High Commissioner for Human Rights declared that:

*“Freedom from torture is an absolute right. In all circumstances, in all countries. It is shocking that in spite of this universal ban, the “tools of torture” continue to be freely traded across the globe. It is time to match the global consensus on the need to eliminate torture with concrete action to end this trade... Under the Convention Against Torture, States must prohibit and refrain from torture and they must also take effective steps to prevent it. To allow these products to be made because the eventual victims live in another country is not an option.”<sup>91</sup>*

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<sup>85</sup> UN, General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, 6 November 2017, Third Committee, Seventy-second session, A/C.3/72/L.20/Rev.1, paragraph 19.

<sup>86</sup> Notably over 60 States of the Alliance for Torture Free Trade, see Section 3.5 of this Study..

<sup>87</sup> UN Commission on Human Rights, Resolution 2001/62, 25 April 2001.

<sup>88</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>89</sup> Commission on Human and People’s Rights, Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, paragraph 14.

<sup>90</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>91</sup> Statement by Michelle Bachelet UN High Commissioner for Human Rights, First Ministerial Meeting of the Alliance for Torture Free Trade, 24 September 2018

## **SECTION 3**

### **EXISTING MEASURES UNDERTAKEN BY COUNCIL OF EUROPE MEMBER STATES, COUNCIL OF EUROPE STRUCTURES AND CIVIL SOCIETY TO ADDRESS THIS ISSUE**

#### **3.1. European Union**

##### **3.1.1 EU Torture Regulation**

68. European Council (EC) 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* (the EU Torture Regulation) was agreed in July 2005.<sup>92</sup> The EU Torture Regulation came into force on 30 July 2006; it is directly applicable in all (currently 28) EU Member States.

69. The EU Torture Regulation is intended as a “living instrument”, with mechanisms allowing EU Member States, the European Parliament and the Commission to collectively respond to developments in the international security market place. Consequently, the European Commission has twice, in 2011 and 2014, updated and extended the Annexes to the Regulation listing prohibited and controlled goods. In 2016, the European Council and Parliament, with assistance from the Commission, amended the Regulation’s operative provisions extensively. In January 2019, a consolidated EU Torture Regulation, Regulation (EU) 2019/125, was published.<sup>93</sup>

70. The EU Torture Regulation distinguishes between three distinct categories of items whose trade should be regulated.

71. Annex II lists equipment and products with *no other practical use than capital punishment, torture or other cruel, inhuman or degrading treatment*; this category of goods is banned from all trade (import/export/transit) into, from or through all EU Member States and the brokering of trade deals between third countries is also prohibited. The provision of any technical assistance related to such goods specifically including training in their use is also prohibited. In addition, advertising of such goods on the internet, TV, radio or at trade fairs is prohibited.

72. Annex II includes detailed lists of items under the following headings:

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<http://webtv.un.org/assets/rss/video3804186128001/watch/first-ministerial-meeting-of-the-alliance-for-torture-free-trade/5839498628001/?term=&sort=popular&page=11> (accessed 21 May 2019).

<sup>92</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

<sup>93</sup> European Union, 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 (‘Anti-Torture Regulation’).

- Goods designed for the execution of human beings, and certain of their components;
- Goods which are not suitable for use by law enforcement authorities to restrain human beings;
- Portable devices which are not suitable for use by law enforcement authorities for the purpose of riot control or self-protection;
- Certain types of whips.

73. Annex III lists goods that have been designed for other purposes (specifically law enforcement), but could be misused for torture or ill-treatment; this category is subject to export controls, requiring authorisation, on a case by case basis, by national authorities. No authorisation should be granted *“when there are reasonable grounds to believe that [Annex III goods] might be used for torture or other [ill-treatment] including judicial corporal punishment”* in the third country.

74. Annex III currently includes detailed lists of items under the following headings:

- Goods designed for restraining human beings;
- Weapons and devices designed for the purpose of riot control or self-protection;
- Weapons and equipment disseminating incapacitating or irritating chemical substances for the purpose of riot control or self-protection and certain related substances.

75. Finally, Annex IV lists certain anaesthetic chemicals which could be misused for the execution of human beings by means of “lethal injection”. A distinct license authorisation process has been established to control the export of such anaesthetic chemicals to prevent their transfer for use in lethal injection executions without limiting or delaying the supply of such chemicals for medical, veterinary or other legitimate purposes.

76. The Regulation incorporates an “urgency procedure” that enables the EU to quickly prohibit transfers of new types of equipment judged to be inherently abusive; and control exports of new equipment that could be readily misused for torture, or new pharmaceutical chemicals that could be misused for lethal injection executions.

77. In order to facilitate transparency and dissuade one EU Member State “undercutting”<sup>94</sup> another, the EU Torture Regulation requires the competent authorities of EU Member States to notify all other Member States’ authorities and the European Commission when they refuse to issue an authorisation or

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<sup>94</sup> In this case, undercutting is taken to mean the practice whereby one State allows the transfer of essentially identical law enforcement equipment or 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 in torture or ill-treatment.

annul an existing authorisation; subsequently any EU Member State considering authorising *“an essentially identical transaction”* in the next three years must consult the original denying State.

78. Although the power to take the final decision remains with individual EU Member States, if a licence is granted in these circumstances, the licensing Member State will have to provide a detailed explanation of its reasoning to the European Commission and all Member States.
79. All EU Member States are required to publish and send the European Commission a copy of an annual activity report concerning the number of applications received, the goods and countries concerned, and the decisions taken on these applications. The European Commission is required to prepare its own annual report comprised of the national reports, to be made publicly available.
80. Although certain States have released public reports or information, according to the LAHR Committee study *“few of these have done so fully or systematically”*.<sup>95</sup> However, there appear to be improvements in this area; recent correspondence with the European Commission indicates that at least 22 of the 28 EU Member States have already submitted their annual activity reports for 2018 and the remainder are expected shortly.<sup>96</sup>
81. The EU Torture Regulation also requires EU Member States to put in place *“effective, proportionate and dissuasive”* penalties for breaches of the Regulation. For examples of national legislation incorporating such penalties see responses to the CDDH questionnaire provided by Austria, Croatia, Czech Republic, Ireland, Netherlands, and the UK.
82. An ‘*Anti-Torture Coordination Group*’ – chaired by the Commission and comprised of representatives of all EU Member States - has been established to *“examine any questions concerning the application of this Regulation”*; the European Commission is required to submit an annual report in writing to the European Parliament on the Group’s activities.
83. The European Commission is also required to review the implementation of the Regulation by 31 July 2020, and every five years thereafter, and present a *“comprehensive implementation and impact assessment report to the European Parliament and to the Council, which may include proposals for its amendment”*. The European Commission is currently engaged in the first such review process.<sup>97</sup>

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<sup>95</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, paragraph 30.

<sup>96</sup> Email exchange between CDDH consultant and European Commission 23-25 May 2019.

<sup>97</sup> Email exchange between CDDH consultant and European Commission 23-25 May 2019.



84. The EU Torture Regulation has been widely praised by the international human rights community, with the UN Special Rapporteur on Torture welcoming it as a milestone in the fight against torture, and as a model that could be followed by countries in other regions.<sup>98</sup>
85. Similarly the LAHR Committee of PACE have recognised it to be the “*gold standard*” and the “*state of the art*” of State regulation in this area.<sup>99</sup> The LAHR Committee noted, however that the nature and level of implementation by certain EU Member States should be improved.<sup>100</sup>
86. Furthermore certain human rights NGOs have called on the EU Member States and the Commission to amend and expand the Annexes of goods controlled and prohibited under the Regulation.<sup>101</sup>
87. The forthcoming comprehensive review of the Regulation to be undertaken by the Commission and its submission of a “*comprehensive implementation and impact assessment report*” provide an important opportunity for these issues to be addressed by the European Commission, European Parliament and EU Member States.

## 3.2 National Controls

### 3.2.1 EU Member States

88. The provisions of the EU Torture Regulation are directly applicable to all (currently 28) EU Member States, and therefore provide a shared minimum standard for regulating trade in a common list of goods. In addition, at least two EU Member States – Spain and the United Kingdom – currently implement further national measures that regulate the trade in certain goods not presently covered by the EU Torture Regulation.
89. **Spain:** Royal Decree 679/2014 of 1 August 2014 “*establishing the control Regulation on external trade in defence material, other material and dual-use items and technologies*”, incorporates controls on the export of standard handcuffs requiring prospective exporters to obtain a licence to export these restraint devices.<sup>102</sup>

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<sup>98</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>99</sup> LAHR Committee Study, paragraphs 34 and 38.

<sup>100</sup> LAHR Committee Study, paragraphs 34 and 38.

<sup>101</sup> Grasping the nettle: Ending Europe’s Trade in Execution and Torture Technology, Index: EUR 01/1632/2015 Amnesty International/Omega Research Foundation, May 2015

<sup>102</sup> Spain, Annex II.2 of Royal Decree 679/2014 of 1 August 2014 establishing the control Regulation on external trade in defence material, other material and dual-use items and technologies.

In March 2014, the Spanish Government suspended 15 licenses for the export of certain types of law enforcement equipment including “*chrome handcuffs with ratchet closure*” to Venezuela due to the “*situation of internal instability and risk of deviation of use*”.<sup>103</sup>

90. **United Kingdom:** Under Article 9 of the UK’s Export Control Order 2008 - provisions supplementing “the torture Regulation”, the export of: “*[g]angchains and leg-irons specially designed for restraining human beings*” and “*portable shock devices*” are prohibited to any destination within “*the customs territory*”, which includes European Member States and the Channel Islands, and their transit through the UK is prohibited irrespective of destination.<sup>104</sup>

Should the UK leave the EU (Brexit), the UK Government is making provision to retain certain critical elements of the existing EU Torture Regulation as part of UK national legislation which will take effect on Brexit day.

The changes being made ensure that certain existing EU rules operate as UK rules after withdrawal and specifically include changes to ensure current powers on the part of the European Commission to make EU tertiary legislation to amend relevant annexes to bring additional goods within the scope of the EU Torture Regulation become powers to amend these annexes by UK domestic secondary legislation.<sup>105</sup>

[...]

### 3.2.2 Non-EU Council of Europe Member States

91. Publicly available information with regard to relevant national control regimes of Council of Europe Member States beyond the EU is currently very limited. In response to the questionnaire sent by the CDDH to all Council of Europe Member States in May 2019, to date three non-EU Council of Europe Member States provided information on their national controls in this area.

<sup>103</sup> Spanish Secretary of State for Trade, *Spanish Statistics on the Export of Defence Material, Other Material and Dual Use Items and Technologies, 2014*, Annex II, p. 74; Correspondence to the Omega Research Foundation from an official from the Directorate General for International Trade and Investments, Secretariat of State for Trade, Ministry of Economy and Competitiveness, 9 February 2016.

<sup>104</sup> UK, Department for International Trade, UK Strategic Export Control Lists, The consolidated list of strategic military and dual-use items that require export authorisation, December 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766972/UK\\_Strategic\\_Export\\_Control\\_Lists\\_20181219.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766972/UK_Strategic_Export_Control_Lists_20181219.pdf) (accessed 21 May 2019).

<sup>105</sup> UK, Draft Statutory Instruments, Draft Regulations laid before Parliament under paragraph 1(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament, The Trade etc. in Dual-Use Items, Firearms and Torture etc. Goods (Amendment) (EU Exit) Regulations 2019, <https://www.legislation.gov.uk/ukdsi/2019/9780111180624> (accessed 21 May 2019).

92. **Montenegro:** National legislation - namely *“The Law on Foreign Trade in Goods and Services that can be used for the application of the death penalty, the torture or other brutal, inhuman or degrading treatment or punishment”* - was adopted by Montenegro in January 2018.<sup>106</sup> This legislation *“prohibits the trade in goods that are designed for torture and other ill-treatment or for the application of the death penalty.”* This legal framework also *“covers brokering and promotion of regulated goods”,* and *“transit of such goods across national territory.”*<sup>107</sup>
93. **Republic of North Macedonia:** The export of riot control agents is currently regulated at the national level and such export regulations *“are in line with the EU Standards”*. Furthermore, the Ministry of Economy of the Republic of North Macedonia has prepared *“the Law prohibiting trade in goods designed for torture and other ill-treatment”* which is *“in line with the EU Standards.”* The draft Law *“will soon enter the Government procedure”*.<sup>108</sup>
94. **Switzerland:** There are currently no national laws or other measures in Switzerland dealing in a general way with the prohibition of trade in goods used for torture and other ill-treatment or for the application of the death penalty. However, there are some sectoral laws that contain relevant provisions notably including:
- \* Weapons legislation (i.e. The Arms Act<sup>109</sup> and The Ordinance on Weapons<sup>110</sup>) includes certain objects which could be misused for torture and ill-treatment such as batons and taser. Furthermore depending on the circumstances, other objects could also fall under the definition of *“dangerous object”* within the meaning of this legislation.
  - \* Legislation relating to military equipment (Federal Act on War Material<sup>111</sup>)
  - \* Federal Law on the Control of Usable Goods for civilian and military purposes, specific military goods and strategic goods.
  - \* Therapeutic Products Act<sup>112</sup> which came into force on 1 January 2019, regulates the export and trade abroad from Switzerland of drugs that may

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<sup>106</sup> See: *Official Gazette of Montenegro no. 2/18 of 10 January 2018*  
<http://www.mek.gov.me/vijesti/180519/Zakon-o-spoljnoj-trgovini-robom-i-uslugama-koje-mogu-da-se-koriste-za-izvršenje-smrtne-kazne-mu-enje-ili-drugo-okrutno-neljudsko.html>

<sup>107</sup> Response from Montenegro to CDDH questionnaire.

<sup>108</sup> Response from Republic of North Macedonia to CDDH questionnaire.

<sup>109</sup> Arms Act, Routine Proceedings [RS] 514.54

<sup>110</sup> Ordinance on Weapons, RS 514.541

<sup>111</sup> Federal Act on War Material [SMF], RS 514.51

be intended for the execution of human beings. The range of drugs included is based upon the law in force in the European Union.

95. Switzerland generally implements international sanctions in its territory that expressly prohibit the supply of goods for internal repression and / or torture and executions. At present, these are sanctions taken from the European Union and targeting Myanmar, Zimbabwe, Iran, Libya, Syria and Venezuela.<sup>113</sup>

[...]

96. In addition to the responses to the CDDH questionnaire, further information was obtained from analysis of the responses to a questionnaire on this issue sent to the parliaments of Council of Europe member States by the PACE LAHR Committee in 2018 – with both the Azerbaijan and Norway respondents indicating that no national legislation was currently in place that specifically regulated the trade in goods used for the death penalty or torture.<sup>114</sup>

### 3.3 Council of Europe

97. As elaborated in Section 1, the CPT has on several occasions highlighted and opposed the use of certain law enforcement devices or equipment (e.g. electric stun body belts; cage or net beds) or has urged the national authorities of certain Council of Europe Member States to put an end to unacceptable practices such as the use of devices on detained persons to block their vision or blindfolding them during transportation or police interviews.

98. The CPT has also made a series of recommendations in order to mitigate the risks of misuse of other law enforcement devices or equipment.

99. During 2017 the PACE LAHR Committee undertook a study to *‘investigate and report on trade in security equipment in the member States of the Council of Europe, and subsequently develop appropriate rules to prevent the trade or brokering of equipment which could facilitate torture and the application of the death penalty’*, its findings published in December 2017 for consideration by the PACE<sup>115</sup>.

100. In January 2018 the PACE, following a review of the LAHR Committee report, unanimously adopted Recommendation 2123 (2018): *‘Strengthening international*

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<sup>112</sup> Therapeutic Products Act [THPA], SR 812.21 See also: Drug Authorization Ordinance [OAMéd], SR 821.12.1, Federal Act on Narcotic Drugs and Psychotropic Substances [LStup], RS 812.121)

<sup>113</sup> Response from Switzerland to CDDH questionnaire.

<sup>114</sup> PACE LAHR Committee questionnaire

<sup>115</sup> 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

<http://assembly.councilofeurope.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24292&lang=en> (accessed 12 April 2019).

*regulations against trade in goods used for torture and the death penalty’.*<sup>116</sup>  
Under Paragraph 3 of this Recommendation:

*“The Parliamentary Assembly considers that on the basis of these existing legal obligations, 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>117</sup>

101. The PACE Recommendation consequently invited the Committee of Ministers to call on Council of Europe Member States *inter alia* to:

*\* Introduce [national] legislation ... prohibiting trade in [inherently abusive and dangerous] goods ... and requiring authorisation for trade in the goods [that could be misused for torture, ill-treatment and the death penalty], such authorisation to be withheld when there are reasonable grounds for believing that these goods might be used for capital punishment or torture or [ill-treatment]*<sup>118</sup>;

*\* Join the Alliance [for Torture Free Trade], make full use of and contribute to the global network of Focal Points for sharing information, including on decisions on requests for authorisation of trade in specific goods, and best practice, and, where necessary, seek the technical assistance of other members of the ... Alliance for the design and implementation of relevant legislation;*<sup>119</sup>

102. The PACE Recommendation further encouraged the Committee of Ministers to:

*\* Provide technical support to facilitate member State action in this area;*<sup>120</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 Torture Regulation] through harmonised national systems in non-European Union member States, and which should*

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<sup>116</sup> Parliamentary Assembly of the Council of Europe (PACE), Recommendation 2123 (2018), Strengthening international regulations against trade in goods used for torture and the death penalty, 26 January 2018.

<sup>117</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 3

<sup>118</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 10.1

<sup>119</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 10.5

<sup>120</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 12.2

*include a mechanism to monitor progress made in implementing the recommendation.*<sup>121</sup>

103. On 14 September 2018, in its formal response to the PACE Recommendation, the Committee of Ministers of the Council of Europe reiterated its *“unwavering commitment to the absolute prohibition of torture and inhuman or degrading treatment or punishment and to the abolition of the death penalty...”* and emphasised that *“member States’ compliance with their commitments involves them taking effective measures to prevent activities that might facilitate or contribute to application of the death penalty, torture and inhuman or degrading treatment or punishment in other countries.”*<sup>122</sup>
104. Furthermore it stated that *“Where regulating the trade in goods used for torture and the death penalty is concerned, the Committee of Ministers is fully aware of this issue, as demonstrated in its ...Recommendation ...on human rights and business, which set out specific provisions aimed at prohibiting enterprises domiciled within the jurisdiction of member States to trade in such goods and informing those enterprises of the potential impact of their operations on human rights.”*<sup>123</sup>
105. However it recognised that: *“The fact that certain goods used to carry out torture and the death penalty can be produced or marketed in Council of Europe member States and exhibited at trade shows or accessible on the websites of European companies is undeniably a source of concern.”*<sup>124</sup>
106. Consequently the Committee of Ministers stated that *“strengthening international regulations against trade in goods used for torture and the death penalty would be a useful addition to efforts at European and global levels to prohibit torture and inhuman or degrading treatment or punishment and abolish the death penalty”* and tasked the Steering Committee for Human Rights (CDDH) to prepare a study to gauge the feasibility of a legal instrument in this area<sup>125</sup>.

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<sup>121</sup> PACE Recommendation 2123 (2018) (26 January 2018) op.cit, Paragraph 12.3

<sup>122</sup> Council of Europe, Committee of Ministers, Reply to Recommendation: Recommendation 2123 (2018), Adopted at the 1323rd meeting of the Ministers’ Deputies (12 September 2018) 2018 - Fourth part-session.  
<https://assembly.CouncilofEurope.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25042&lang=en>  
 (accessed 21 May 2019), paragraph 2.

<sup>123</sup> Committee of Ministers, (12 September 2018) op.cit. paragraph 5.

<sup>124</sup> Committee of Ministers, (12 September 2018) op.cit. paragraph 6.

<sup>125</sup> Council of Europe, Committee of Ministers, (12 September 2018) op.cit. paragraph 9.

### 3.4 Organisation for Security and Cooperation in Europe

107. There are indications that this issue is also beginning to receive attention in other European regional organisations notably the Organisation for Security and Cooperation in Europe (OSCE). On 12 September 2018, during the OSCE Human Dimension Implementation Meeting, the Office for Democratic Institutions and Human Rights (ODIHR) together with an NGO (the Omega Research Foundation) organised an event with speakers from PACE and the EU to explore existing regional processes to control the trade of equipment that was designed or can be used for torture or other ill-treatment.

108. Stephanie SELG, the ODIHR Adviser on Torture Prevention welcomed the *“start [of] a constructive dialogue with OSCE participating States and civil society organizations in our region on the issue of trade in tools of torture and existing processes to regulate the trade of such tools on the regional and international level. This discussion is important to further assist participating States in fulfilling their commitment to preventing and eradicating torture.”*<sup>126</sup> The issue was subsequently addressed during the OSCE international conference “Effective multilateralism in the fight against torture: Trends in the OSCE region and the way forward” held in Vienna on 5 June 2019, with the participation of all OSCE Member States.<sup>127</sup>

### 3.5 Alliance for Torture Free Trade and the potential development of international measures

109. On 18 September 2017, the EU, Argentina and Mongolia launched the Alliance for Torture Free Trade in the margins of the United Nations General Assembly in New York. To date, 61 States from all regions of the world (including 41 from the Council of Europe)<sup>128</sup> have signed the Alliance’s 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,*

<sup>126</sup> OSCE ODIHR, Measures to end trade in torture tools in OSCE region focus of expert discussion in Warsaw 13 September 2018, <https://www.osce.org/odihr/394460>

<sup>127</sup> See: Draft Agenda, “Effective multilateralism in the fight against torture: Trends in the OSCE region and the way forward” 5 June 2019, Vienna.

<sup>128</sup> As of 12 April 2019 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, Vanuatu. For further information see Alliance for Torture-Free Trade website : <http://www.torturefreetrade.org> (accessed 12 April 2019).



*restrict and end trade” of such goods. The States specifically commit themselves to “take effective measures, inter alia through legislation and effective enforcement where appropriate, for the restriction of the trade”.*

110. In order to facilitate such “*effective measures*” the States of the Alliance have committed themselves to “*strengthen cooperation in this area and to form a global network of Focal Points for the sharing of information and best practices*” for example on how to establish efficient control and enforcement systems and also to set up a platform for monitoring and exchanging information, so customs authorities can see trade flows and identify new products.<sup>129</sup>
111. They have also committed themselves to making “*available technical assistance for the design and implementation of relevant legislation*”.<sup>130</sup> The Alliance held its first Technical Meeting in Brussels in June 2018; at which 70 diplomats from 38 countries and the European Union gathered to discuss the practical steps needed to restrict trade in goods used for torture, other ill-treatment and capital punishment.<sup>131</sup>
112. The launch of the Alliance has been noted in the most recent UN General Assembly (UNGA) Torture Resolution<sup>132</sup>, and this initiative has been supported by leading UN anti-torture bodies including the UN Special Rapporteur on Torture<sup>133</sup>, the UN Sub-Committee on the Prevention of Torture<sup>134</sup> and the UN High Commissioner for Human Rights<sup>135</sup>, who speaking at the First Ministerial Meeting of the Alliance, highlighted the obligation upon States to tackle the trade in “tools of torture”:

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<sup>129</sup> Alliance for Torture-Free Trade, website

<sup>130</sup> Alliance for Torture-Free Trade, Political Declaration, New York, 18 September 2017

<sup>131</sup> For more information see: <http://www.torturefreetrade.org/en/news.html?entry=2> (accessed 15 April 2019)

<sup>132</sup> United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, Resolution adopted by the General Assembly on 19 December 2017, A/RES/72/163, 19 January 2018, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/72/163](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/163) (accessed 21 May 2019).

<sup>133</sup> Ibid.

<sup>134</sup> Statement by Sir Malcolm Evans, Chairperson, Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 73rd session General Assembly Third Committee, 15 October 2018, <https://www.ohchr.org/Documents/HRBodies/OPCAT/StatementGA73.pdf> (accessed 21 May 2019)

<sup>135</sup> Statement by Michelle Bachelet UN High Commissioner for Human Rights, First Ministerial Meeting of the Alliance for Torture Free Trade, 24 September 2018, <http://webtv.un.org/assets/rss/video3804186128001/watch/first-ministerial-meeting-of-the-alliance-for-torture-free-trade/5839498628001/?term=&sort=popular&page=11> (accessed 21 May 2019).



*This is particularly clear for items which are inherently harmful...batons with metal spikes...electric shock belts...that are designed purely for torture and have no legitimate use... We need preventative measures to be adopted, country by country, reflecting international standards. International cooperation is vital. The [Alliance's] work in tackling pain and death is vitally important.*<sup>136</sup>

113. Within the Council of Europe, support for the Alliance has been forcefully enunciated by the LAHR Committee<sup>137</sup> and PACE in its unanimously adopted resolution<sup>138</sup>.
114. Subsequently, in its 12 September 2018 formal response to PACE, the Council of Europe Committee of Ministers stated that it was *"pleased to see that 41 Council of Europe member States have adopted the Alliance's political declaration and invite[d] the other member States to join them."*<sup>139</sup>
115. Furthermore, on 9 October 2019, in their Joint Declaration to mark European and World Day against the Death Penalty, the Secretary General of the Council of Europe and the EU High Representative for Foreign Affairs and Security Policy stated:

*"Member states should continue taking effective measures to prevent their involvement, however indirect, in the use of the death penalty by third countries, such as by adopting measures that prevent the trade in goods that could subsequently be used to carry out executions. In this context, the Council of Europe and the EU will continue promoting the "Global Alliance to end trade in goods used for capital punishment and torture".*<sup>140</sup>

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<sup>136</sup> UN, General Assembly, Third Committee Summary record of the 18th meeting, A/C.3/72/SR.18, 9 November 2017, paragraph 77, <https://undocs.org/pdf?symbol=en/A/C.3/72/SR.18> (accessed 21 May 2019).

<sup>137</sup> The LAHR committee *"strongly encourage[d] all other Council of Europe member States, observer States and States whose parliaments enjoy Partner for Democracy status with the Parliamentary Assembly, to sign up to the declaration of the Global Alliance and, along with the current signatories, to apply fully its provisions."* Committee on Legal Affairs and Human Rights, PACE, (15 December 2017) op.cit. paragraph 36

<sup>138</sup> PACE, Recommendation 2123 (2018) (26 January 2018) op.cit., paragraphs 7 & 10.5.

<sup>139</sup> Committee of Ministers, (12 September 2018) op.cit. paragraph 8.

<sup>140</sup> Joint Declaration by the European Union High Representative for Foreign Affairs and Security Policy, and the Secretary General of the Council of Europe on the European and World Day against the Death Penalty, 9 October 2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/10/09/joint-declaration-by-the-eu-high-representative-for-foreign-affairs-and-security-policy-and-the-secretary-general-of-the-council-of-europe-on-the-european-and-world-day-against-the-death-penalty/> (accessed 21 May 2019).

116. On 24 September 2018, the first Ministerial meeting of the Alliance, Member States agreed to initiate concerted Alliance activities through the United Nations to promote development of international measures to tackle the trade in ‘tools of torture’. In its Joint Communiqué, the Alliance agreed to put forward a draft resolution, to be adopted by the United Nations General Assembly during its seventy-third session, in order to:

*“request the Secretary-General to seek the views of Member States on the feasibility and possible scope of a range of options, **including a legally binding instrument**, to establish common international standards for the import, export and transfer of goods used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, and to submit a report on the subject to the General Assembly at its seventy-fourth session”.*<sup>141</sup> [Highlighted for emphasis].

117. As of 3 June 2019, a proposed draft UNGA Resolution text has been developed, discussed and agreed by Alliance Member States. Alliance Member States are currently seeking to gain the support of a majority of UN Member States (i.e. at least 97 Member States) so that the UNGA Resolution can be adopted and the UN process initiated. It should be noted that the proposed process, as laid out in the draft UNGA resolution, facilitates development of common international standards on the transfer of goods used for capital punishment, torture and other ill-treatment, but does not delineate the nature and scope of such measures.

### 3.6 Business and human rights

118. The 2011 UN Guiding Principles on Business and Human Rights (the UN Guiding Principles) set out the responsibility of corporate actors to respect human rights. The UN Guiding Principles<sup>142</sup>, although not legally binding, have significant moral force deriving from their unanimous endorsement by the UN Human Rights Council.
119. Furthermore, they are based on existing international legal instruments and principles, and in abiding by them, business enterprises can reduce the risk of facing legal action as a consequence of their activities.
120. The UN Guiding Principles contain provisions – directed at both States and business – that are directly relevant to regulation of the trade in goods used for torture, ill-treatment and the death penalty. In particular, 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”, and Principle 3 calls on States to “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect*

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<sup>141</sup> Alliance for Torture-Free Trade Joint Communiqué, New York, 24 September 2018.

<sup>142</sup> United Nations, UN Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, HR/PUB/11/04, 2011.

*human rights, and periodically to assess the adequacy of such laws and address any gaps.”*

121. Principle 11, directed at businesses themselves, states 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.” The attendant Commentary states:

*“The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”*

122. All those companies based in the Council of Europe or operating in the Council of Europe that manufacture, promote or trade in inherently abusive or dangerous law enforcement equipment and weapons are in breach of Principle 11 and should cease such activities immediately.

123. Principle 17, which is also directed at businesses, recommends that they conduct ‘human rights due diligence’ which ‘should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’<sup>143</sup> and should cover “adverse human rights impacts which may be linked directly to its operations, products or services by its business relationships”<sup>144</sup>.

124. The attendant commentary on this provision notes that:

*“Questions of complicity may arise when a business enterprise contributes to [...] adverse human rights impacts caused by other parties... [M]ost national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases... The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.”<sup>145</sup>*

125. Principle 17 is potentially applicable to those Council of Europe companies manufacturing, promoting and trading in law enforcement equipment, weapons and other goods that have a legitimate use but could be readily misused to ensure their products are not transferred to abusive end users.

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<sup>143</sup> UN Guiding Principles on Business and human Rights (2011) op.cit., Principle 17.

<sup>144</sup> UN Guiding Principles on Business and human Rights (2011) op.cit., Principle 17.a

<sup>145</sup> UN Guiding Principles on Business and human Rights (2011) op.cit., Commentary, Principle 17

126. Within the Council of Europe, the 2016 Committee of Ministers' Recommendation to member States on human rights and business<sup>146</sup>, intended to contribute to the effective implementation of the UN Guiding Principles at European level, contains detailed recommendations in Appendix 3 relevant to the trade in goods used for torture and the death penalty. Paragraph 24 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>147</sup>

127. Other provisions of relevance include paragraph 27, which states that:

*"member States should be in a position to inform business enterprises...on the potential human rights consequences of carrying out operations in...sectors or areas that involve a high risk of negative impact on human rights [and] should facilitate business enterprises' adherence to sector-specific standards, such as...the International Code of conduct for Private Security Providers ...Member States should consider performing a sector-risk analysis in order to identify the sectors in which activities are most at risk of having a negative impact on human rights."*<sup>148</sup>

128. There are also provisions addressing the role of competent authorities in Council of Europe member States in ensuring human rights "due diligence" by businesses. Paragraph 22 states that:

*"member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States: own or control business enterprises; grant substantial support and deliver services through agencies, such as export credit agencies and official investment insurance or guarantee agencies, to business enterprises; grant export licenses to business enterprises..."*<sup>149</sup>

129. An online Platform on Human Rights and Business is currently being put in place by the CDDH Secretariat and relevant the departments of the Organisation in charge of cooperation in the human rights field (HELP Programme). This Platform is intended to raise awareness, promote information exchange and best

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<sup>146</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

<sup>147</sup> Council of Europe, Recommendation CM/REC(2016)3 (2 March 2016) op.cit. paragraph 24.

<sup>148</sup> Council of Europe, Recommendation CM/REC(2016)3 (2 March 2016) op.cit. paragraph 27.

<sup>149</sup> Council of Europe, Recommendation CM/REC(2016)3 (2 March 2016) op.cit. paragraph 22; see also paragraphs 20 and 28.

practice on this issue between Council of Europe member States, business and concerned civil society.

## **SECTION 4**

### **GOALS FOR ADDITIONAL ACTION BY THE COUNCIL OF EUROPE**

130. The following goals for additional action by the Council of Europe could be considered:

- (i) Raising awareness of member States' authorities, public opinion, media, industrial and commercial sectors relevant to the problem of the trade in goods used for torture and other ill-treatment and the death penalty
- (ii) Reiterating, including to stakeholders beyond the Council of Europe, the Council of Europe's unwavering commitment to the absolute prohibition of torture and other ill-treatment and the abolition of the death penalty
- (iii) Reminding member States of their commitment to take effective measures to prevent activities which might facilitate or contribute to the application of the death penalty, torture and other ill-treatment in other countries (both within and outside the Council of Europe region). In this context and in the light of existing good practices, encouraging and, where possible, helping the member States to :
  - (a) establish or strengthen their legal frameworks and adopt measures to regulate and prohibit, as appropriate, the trade in equipment, related technical assistance and training used for the death penalty, torture or other ill-treatment. Such measures should:
    - prohibit transfer of equipment, technical assistance and training which have no practical use other than the death penalty, torture or other ill-treatment
    - require prior State authorisation for the transfer of equipment, technical assistance and training designed for legitimate law enforcement use but which are prone to misuse for torture or other ill-treatment; with such authorisation being withheld when there are reasonable grounds for believing that goods might be employed for capital punishment, torture or other ill-treatment by the end-user
  - b) exchange information to strengthen and harmonise the relevant national legal framework, facilitate effective national implementation of the measures and cross-border cooperation
  - (c) establish effective national measures to regulate, monitor and provide effective training in the appropriate use of security equipment to law enforcement personnel

- (d) if not yet done, ratify Protocol No. 6 and 13 of the European Convention on Human Rights and join initiatives, such as the Alliance for Torture Free Trade , to regulate and prohibit international trade in goods used for capital punishment and torture or other ill-treatment
- (e) promote similar actions in the relevant international arenas to strengthen international regulations against the trade in goods used for torture and other ill treatment and the death penalty.
- (f) provide technical assistance to facilitate the adoption of national control mechanisms on the trade of tools of torture that include the prohibition of inherently abusive equipment and that require prior State authorisation for the transfer of equipment which is prone to misuse or abuse.

## **SECTION 5**

### **PROPOSED LEGAL INSTRUMENT**

#### **5.1. Desirability and feasibility**

131. It is clear from Section 1 of this Feasibility Study that whilst a small number of Council of Europe companies have been or are involved in the manufacture, promotion and trade of inherently abusive or dangerous equipment or have apparently provided abusive or dangerous training to law enforcement officials, such activities –which are potentially in breach of Article 3 of the European Convention – have taken place or are taking place in certain member States, and need to be halted. In contrast, the promotion and trade in legitimate law enforcement equipment that could be readily misused for torture and ill-treatment is relatively widespread in the Council of Europe region, in terms of companies and States involved, and consequently such activities need to be controlled to ensure that such equipment, related technical assistance and training are not transferred to abusive end users in third countries – potentially in breach of Article 3 of the European Convention.
132. Consequently given the wide ranging involvement by companies and States throughout the Council of Europe region in the promotion and trade of goods which could be used in torture, ill-treatment and the death penalty, this Study concludes that it would be desirable for the Committee of Ministers to provide guidance through a Recommendation applicable to all Council of Europe Member States to ensure that their activities in this area were in accordance with existing international and regional obligations. Such a Recommendation would build upon the previous Recommendation of the Committee of Ministers on Business and Human Rights.

133. The Committee of Ministers Recommendation CM/REC (2016) sought to address a wide range of issues concerning Business and Human Rights. Consequently, whilst it raised the issue of the trade in goods used for the death penalty, torture and ill-treatment, and included some limited provisions, it did not address this issue in a comprehensive manner.
134. In this regard, it was an important starting point for concerted action by Council of Europe member States in this area, but its provisions now need to be built on, substantially expanded and operationalized.
135. Although CM/REC (2016) declared that States should ensure that “*business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for ...capital punishment, torture and ill-treatment*”, there was no attempt within the Recommendation, or thereafter, to define the nature and scope of such goods, the criteria by which States should determine whether goods fall into this prohibited category, nor to establish an indicative list of the types of goods so covered. Without such guidance it will prove very difficult for Council of Europe member States to implement the COM Recommendation in a consistent, comprehensive and effective manner.
136. Whilst CM/REC (2016) did announce a partial norm of prohibition with regard to the trade in certain inherently abusive equipment it did not explicitly address the more extensive ongoing trade in the wider range of law enforcement equipment and related goods that can have a legitimate function, when used in accordance with international and regional human rights standards, but which can and have been readily misused by correctional and law enforcement personnel for torture and ill-treatment in many States.
137. Publicly available information, including the PACE LAHR Committee study and the previous study by UN Special Rapporteur on Torture, Prof. van Boven, indicates that the global trade in such law enforcement equipment is significant in terms of the number of companies involved in their manufacture, promotion and supply; the presumed quantities of goods transferred; and the numbers of law enforcement and correctional bodies that will consequently use (and potentially misuse) such goods.
138. Consequently, it is important that a clear normative statement be made announcing the obligation upon Council of Europe member States in fulfilment of Article 3 of the European Convention to control the trade in such law enforcement equipment to prevent its use in torture and other ill-treatment; and a new instrument of the Committee of Ministers would be best suited to fulfilling this current gap.
139. To be effective such an Instrument should, as above, incorporate a definition of the nature of such goods, the criteria by which States shall determine whether goods fall into this category, and establish an indicative list of the types of goods so covered.
140. Similarly, whilst CM/REC (2016) covered the trade in goods that have no practical use other than capital punishment, it did not explicitly address the trade

in certain pharmaceutical chemicals that, whilst having important roles in medicine, veterinary science and other entirely legitimate purposes, could be misused for lethal injection executions.

141. The effect of the EU Torture Regulation upon such transfers in regard to US executions, as highlighted by the PACE LAHR Committee, illustrates the potential impact of such mechanisms.
142. The inclusion of such trade controls in the proposed instrument of the Committee of Ministers would help member States to meet their obligations in fulfilment of Article 3 of the European Convention and the Council of Europe commitment to combat the application of the death penalty in third countries.
143. Whilst CM/REC (2016) called on member States to prohibit the trade in inherently abusive goods, it did not define the scope of this trade nor specify the activities that needed to be prevented. From an analysis of publicly available information, including the PACE LAHR Committee study and the previous study by UN Special Rapporteur on Torture, Prof van Boven, it is clear that the trade in both inherently abusive goods and goods that can have a legitimate purpose but can be readily misused, can potentially encompass import, export, and transit of such goods into, from and through Council of Europe member States.
144. In addition, related activities conducted by companies such as brokering of deals between third countries, promoting goods at arms and security equipment trade fairs or in the print media and the internet, and the provision of related technical assistance and training fall within the auspices of relevant trade of potential concern and should be explicitly recognised as needing to be addressed in a subsequent Recommendation of the Committee of Ministers.
145. Consequently, the proposed Instrument should provide guidance as to the essential elements of a national regulatory regime that would effectively address all relevant aspects of trade in this area.
146. Similarly, CM/REC (2010) did not provide any guidance as to how member States should introduce and implement relevant regulatory measures in a co-ordinated manner. Without such dialogue and cooperation between all member States, there is a danger that States will adopt divergent policy and practice in this area, with certain States potentially failing to fulfil their obligations under Article 3 of the European Convention fully and effectively in this area, or in certain cases potentially undermining the positive actions of other States to do so, notably through undercutting.
147. It is, therefore, considered appropriate for the Committee of Ministers to develop an Instrument establishing guidance for all member States in this area: promoting and facilitating the introduction of standardised national measures to prohibit the trade of inherently abusive, and regulate the trade in readily misused law enforcement and other relevant goods and services; and also introduce mechanisms to facilitate cooperation, information exchange and consultation between all member States as well measures to prevent undercutting.



148. As part of this Feasibility Study, a review of the relevant existing national and regional measures introduced by member States to regulate the trade in goods used in torture, ill-treatment and death penalty was undertaken.
149. From this review, it is clear that the most important and widely implemented existing control regime is that established through the EU Torture Regulation, which is legally binding and directly applicable in all (currently 28) EU member States.
150. Furthermore the three non-EU Council of Europe member States that responded to the questionnaire (Montenegro, North Macedonia and Switzerland) have all introduced or are introducing controls compatible with or informed by those established in the EU Torture Regulation for at least some of the goods under consideration.
151. The EU Torture Regulation has established a harmonised system across the EU for prohibiting the trade in a range of inherently abusive and dangerous goods, regulating the trade in law enforcement equipment that could be misused for torture and ill-treatment, and regulating the trade in certain pharmaceutical chemicals to ensure they are not transferred for use in lethal injection executions without curtailing or delaying trade of such chemicals for legitimate purposes.
152. This system has been praised by the international human rights community and recommended as a model for other regions and States to follow. Given the scarcity of public information available, it is not possible to determine the effect of the EU Torture Regulation on the licensed trade of controlled goods (i.e. law enforcement equipment that could be readily misused for torture and ill-treatment and pharmaceutical equipment that could be misused for lethal injection executions).
153. However, a review, based on publicly available information, of the marketing to the law enforcement community of a range of inherently abusive or dangerous products by EU companies at arms fairs and on the internet, etc shows an apparent reduction in such activities; similarly, the promotion of such goods by non-EU companies in EU arms fairs has also apparently declined.
154. Whilst apparently restricting aspects of the trade in inherently abusive equipment, the EU Torture Regulation and its implementation by EU Member States does not appear to have been unduly onerous upon these States; furthermore there does not appear to be any evidence of concerns raised by companies trading in legitimate law enforcement goods as to the operation of the Regulation.
155. It therefore appears that the EU Torture Regulation would prove to be an effective and workable model on which to base Council of Europe standards in this area. Such a strategy would have the further benefit of employing a regulatory framework already in place in the majority of Council of Europe member States and that has been implemented by these Council of Europe member States for nearly 15 years, with the consequent technical experience gained, which could be shared, as appropriate with the wider Council of Europe member States.

156. Furthermore, since the existing system is overseen and facilitated by the European Commission, this institution has developed technical and policy expertise and experience of potential utility to the Council of Europe and would potentially be able to provide technical support to individual Council of Europe member States, if appropriate.
157. Consequently, this Study concludes that a legal instrument - drawing inspiration from the standards and mechanisms established in the EU Torture Trade Regulation - providing technical advice on the introduction or strengthening of national measures to regulate the trade in goods used for torture, ill-treatment and the death penalty would be both desirable and feasible.
158. The Study also recommends that Council of Europe member States and the relevant Council of Europe institutions explore either: the establishment of a Council of Europe-wide information-exchange network or possible coordination with the existing information exchange network established under the EU Torture Regulation.
159. Finally, the Study recommends certain additional measures for the consideration of the CDDH to facilitate international action in this area.

**5.2 Potential elements for an Instrument to encourage and facilitate the introduction and strengthening of measures by Council of Europe Member States to regulate the trade goods used in torture, other ill-treatment and the death penalty**

160. This instrument is intended to encourage and help facilitate the fulfilment by all Council of Europe member States of their obligations under Article 3 of the European Convention and consequent commitments to take effective measures to prevent activities which might facilitate or contribute to the application of the death penalty, torture and other ill-treatment in other countries.
161. Its proposed provisions provide technical advice, drawn from region-wide best practice, notably as established in the EU Torture Regulation, to facilitate the introduction and strengthening of measures by Council of Europe Member States to regulate the trade in law enforcement equipment, technical assistance and training.

**5.2.1. National measures to regulate trade in equipment, technical assistance and training**

162. In this context and in the light of existing good practices, notably the EU Torture Regulation, the Council of Europe Council of Ministers encourages all Council of Europe member States to establish or strengthen their national legal frameworks and adopt measures to regulate and prohibit, as appropriate, the trade in equipment, related technical assistance and training used for the death penalty, torture or other ill-treatment.
163. Such measures should incorporate the following essential elements:

### **5.2.1.1 Prohibition on the transfer of inherently abusive or dangerous equipment, technical assistance and training**

164. Such a prohibition should be comprehensive with regard to the range of commercial transfer activities covered, notably including import, export, or transit from/to or through any Council of Europe member State or third country. In addition the prohibition should extend to related promotional (i.e. the display or offering for sale such goods at trade fairs, or the purchase of advertising time or space on television, radio, print media or internet in relation to such goods) and brokering activities.
165. The prohibition should cover all equipment, related technical assistance and training that has no practical use in law enforcement other than for torture and ill-treatment and capital punishment, as listed in this Instrument.
154. ***List of prohibited equipment, technical assistance and training*** - A list of prohibited goods and services, should be established, which should be regularly reviewed and updated to take account of developments in technology, the international law enforcement equipment market and the nature of use of such goods.
155. This list should, as a minimum, incorporate the following categories of equipment, technical assistance and training:
  - Equipment specifically designed for capital punishment including gallows, guillotines, gas chambers and automatic lethal injection systems;
  - Mechanical restraint devices unsuitable for law enforcement including thumb-cuffs, finger-cuffs, thumbscrews; bar fetters; fixed restraints; weighted restraints; restraint chairs, shackle boards/beds with metal restraints; cage and net beds;
  - Kinetic impact devices/weapons unsuitable for law enforcement including spiked batons and shields, and certain whips;
  - Electric shock devices/weapons unsuitable for law enforcement including body worn electric shock devices such as belts, sleeves and cuffs;
  - Unique components and specifically designed parts for all prohibited equipment;
  - 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. Such assistance may take the form of instruction, advice, training activities, transmission of working knowledge or skills;
  - Training in the use of prohibited goods for torture or other ill-treatment, or capital punishment.
156. In addition, the EU Torture Regulation specifically allows individual States, if they deem it appropriate, to prohibit export and import (and brokering) of "*leg irons, gang chains and portable electric shock devices* (e.g direct contact shock weapons)".

157. A similar provision for individual Council of Europe member States to prohibit certain additional goods if they deem it appropriate should be provided for in this Instrument. Such a provision should as a minimum include “*leg irons, gang chains and portable electric shock devices*” but could also extend to items such as blindfolds and hoods that are not currently prohibited under the EU Torture Regulation even though their use is widely condemned by UN and regional human rights bodies (including the CPT).

#### **5.2.1.2 Restrictions on the export of controlled law enforcement equipment**

158. National measures should strictly regulate the export (and transit) to correctional or law enforcement agencies of equipment that can be used legitimately in a manner consistent with international human rights standards for law enforcement, but nevertheless could also be misused for torture or other ill-treatment. Such measures will also apply to relevant brokering activities.
159. **List of controlled equipment** - A list of controlled goods, should be established, which should be regularly reviewed and updated to take account of developments in technology, the international law enforcement equipment market and the use/misuse of such goods.
160. At a minimum this list should incorporate the following categories of equipment:
- Goods for restraining human beings such as shackles, gang chains, neck restraints and spit hoods;
  - Projectile electric shock weapons suitable for law enforcement
  - Direct contact electric shock weapons such as shock batons, shields and stun guns
  - Certain riot control agents (RCAs) notably pepper spray and OC
  - RCA dispersal equipment targeting one individual or disseminating a dose over a small area
  - Fixed RCA dispersal equipment intended for RCA dispersal inside a building
  - RCA dispersal equipment intended for disseminating RCAs over a wide area, including water cannons
  - Unique components and specifically designed parts for the goods listed above;
  - Technical assistance related to any of the controlled equipment, including any technical support related to the repair, development, manufacture, testing, maintenance, assembly or any other technical service,. Such assistance may take the form of instruction, advice, training activities, transmission of working knowledge or skills.
161. In addition, the EU Torture Regulation specifically allows individual States, if they deem it appropriate, to regulate export of oversized handcuffs (so that traders cannot avoid export regulation of such items which are then used as *de facto* leg cuffs).
162. A similar provision for individual Council of Europe member States to regulate certain additional goods if they deem it appropriate should be provided for in this Instrument. Such a provision should as a minimum include oversized handcuffs,

but could also extend to items such as ordinary handcuffs, certain leg restraints, launched kinetic impact weapons (e.g. rubber and plastic bullets) and hand-held (striking) weapons (e.g. batons) that are not currently controlled under the EU Torture Regulation even though their misuse is widely reported by UN and regional human rights bodies (including the CPT).

163. ***Pharmaceutical chemicals that could be employed in lethal injection executions*** - A parallel authorisation process should be established to regulate the export of a specific list of anaesthetic chemical agents that have medical, veterinary and other legitimate uses but that can be misused for the practice of capital punishment through “lethal injection” executions.

### **5.2.1.3 National trade control system**

164. A national trade control system should be established, under which the designated competent authority of the Council of Europe member State determines whether to grant authorisations for exports of controlled law enforcement equipment, technical assistance and training on a case by case basis, following detailed application from the prospective exporter that includes an end use certificate or other official written assurance detailing the end user and the nature of the intended use.
165. No exports should be granted if there are reasonable grounds that the equipment, technical assistance or training might be used for torture, ill-treatment or capital punishment by the recipient law enforcement authority or be diverted to another unauthorised end user.
166. To evaluate licence applications the competent national authority shall take into account international court judgements, information from competent UN bodies including the UN Special Rapporteur on Torture, the UN Committee against Torture, the UN Subcommittee on the Prevention of Torture and associated National Preventative Mechanisms; competent regional bodies such as the CPT regarding the use, misuse and regulation of the equipment by the proposed end users. National authority could also take into account national court judgements and information from civil society organisations.
167. Any Council of Europe member State which denies a transfer authorisation or annuls an existing authorisation shall notify all other Council of Europe member States. Any Council of Europe member State considering granting an *essentially identical transaction* should consult the original denying State. If after such consultations the State still decides to grant authorisation it shall immediately inform all Council of Europe member States and explain the reasons for its decision.
168. Rules on penalties applicable to infringements of these national laws and regulations shall be established and the Council of Europe member State shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

169. Each Council of Europe member State shall maintain detailed national records keeping of all export authorisations and its actual exports of controlled equipment, related technical assistance and training.
170. Council of Europe member States should publish a public annual 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. This report shall not include information the disclosure of which a Council of Europe member State considers to be contrary to the essential interests of its security.

**5.2.1.4 Associated measures for coordinating and facilitating technical assistance, information exchange and review amongst Council of Europe member States**

171. An appropriate Council of Europe body should explore options for establishing a platform and associated measures (potentially in cooperation or coordination with the EU) for information exchange and sharing of best practice between Council of Europe member States to strengthen and harmonise the relevant national legal framework, facilitate effective national implementation of the measures and cross-border cooperation. The platform would facilitate monitoring and information exchange between Council of Europe member States to enable customs and other competent authorities to observe relevant transfer flows and identify new equipment, technical assistance and training of concern.
172. An appropriate Council of Europe body should explore options for facilitating a denial notification/prior consultation process and the circulation of annual activity reports by Council of Europe member States (- potentially in cooperation or coordination with the EU).
173. An appropriate Council of Europe body should explore options for coordinating an annual review by relevant experts of the lists of prohibited and controlled equipment, technical assistance and training, and in the light of technological advances, market developments or changes in the nature of their use/misuse make recommendations for their revision, for consideration by Council of Europe member States (-potentially in cooperation or coordination with the EU).
174. An appropriate Council of Europe body should act as a clearing house to facilitate the provision of technical assistance - from Council of Europe member States and relevant entities such as the EU and the Alliance for Torture Free Trade – to Council of Europe member States requesting such assistance in the adoption and implementation of national control mechanisms on the trade in law enforcement equipment, technical assistance and training.

**5.2.2. Other measures by Council of Europe Member States to regulate the trade in goods used in torture, ill-treatment and the death penalty**

### **5.2.2.1 EU**

175. All Council of Europe member States who are members of the EU should fulfil their obligations under the EU Torture Regulation in full, including by publishing their annual activity reports, and by actively participating in the work of the '*Anti-Torture Coordination Group*'. They should actively cooperate and participate in the current European Commission-led review of the implementation of the EU Torture Regulation due to be completed by 31 July 2020, and should engage fully in the subsequent deliberations of its findings.

### **5.2.2.2 Alliance for Torture Free Trade**

176. All Council of Europe member States are encouraged to join the Alliance for Torture Free Trade, make full use of and contribute to the global network of Focal Points for sharing information, including on decisions on requests for authorisation of trade in specific goods, and best practice, and, where necessary, seek the technical assistance of other members of the Alliance for the design and implementation of relevant national legislation.
177. All Council of Europe member States are encouraged to actively support and participate in the UN process, advocated by the Alliance, to explore 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 capital punishment, torture or other ill-treatment, and to respond positively to the Secretary-General's survey of Member States views on these matters.

## **5.2.3. Other measures**

### **5.2.3.1 Training in responsible use of law enforcement equipment**

178. Council of Europe member States should establish effective national measures to regulate, monitor and provide effective training in the appropriate use of security equipment to law enforcement personnel. This should include the establishment of a training plan and provision of technical support for law enforcement and prison staff to assure the proper use of law enforcement equipment compatible with the respect of human rights in the light of good practice in this field.

### **5.2.3.2 Abolition of the death penalty**

179. Council of Europe member States that have not already done so should ratify Protocols number 6 and 13 to the European Convention on Human Rights.

## Appendix

### **Draft CDDH feasibility study of a legal instrument on the prohibition of the trade in goods used for torture and the death penalty**

#### **INFORMATION REQUEST**

##### **Question 1**

Has your country introduced national legislation (or alternative measures) which prohibits the trade in goods that are designed for torture and other ill-treatment, or for the application of the death penalty; and regulates the trade in goods that have a legitimate law enforcement purpose but which may be readily abused for torture and ill-treatment? <sup>150</sup> Does the relevant legal framework (or alternative measures) also cover brokering and promotion of regulated goods, transit of such goods across national territory and provision of training in their use? Is the legal framework (or alternative measures) based on existing international (including EU) standards, whether binding or non-binding?

##### **Question 2**

[Question for non-EU Member States] How are prohibited and regulated goods defined and categorised under national legislation (or alternative measures)? Is there a mechanism for updating these definitions? How often are they updated, and when was this last done? Is there any Governmental reporting of exports of regulated goods and related training? Are these reports publicly available? If so please provide copies from the last three years.

##### **Question 3**

Have there been in your country any investigations, prosecutions and/ or convictions for breaches of domestic regulations on the trade in such goods? If so please provide details.

##### **Question 4**

Are there in your country any manufacturers or suppliers of:

- Goods that are designed for the execution of human beings (such as hanging ropes and gallows; gas chambers; electric chairs) ; or components of such goods;
- Goods that are promoted for use by law enforcement authorities but which are either inherently inhumane or have no practical law enforcement use which cannot be achieved with less harmful means, including:
- Weighted leg irons, fetters, finger cuffs, thumb cuffs; restraints fixed to walls or other objects; multi-point restraints such as shackle beds, restraint chairs and cage beds
- Body worn electric shock devices such as electric shock belts
- Direct contact electric shock devices such as stun batons, stun guns or stun shields
- Spiked batons or spiked shields

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<sup>150</sup> I.e. goods and services that may fall within the descriptions set out in questions 4, 5, 6 and 7.



If so, please provide details.

**Question 5**

Are there in your country any manufacturers or suppliers of law enforcement equipment that if used responsibly could have legitimate law enforcement purposes but which can be misused for torture and other ill-treatment, including:

- Riot control agents and associated delivery mechanisms
- Hand-cuffs and leg-cuffs and associated restraints
- Batons, truncheons, rubber bullets and plastic bullets
- Electric shock projectile devices such as Taser.

If so, please provide details.

**Question 6**

Are there in your country any manufacturers of dual use pharmaceutical chemicals that have legitimate medical uses but which have been misused for lethal injection executions, such as sodium thiopental or pentobarbital? If so, please provide details.

**Question 7**

Are there in your country any companies engaged in training other countries' military, security or police personnel in techniques that may be readily used for purposes amounting to ill-treatment and torture? If so, please provide details.