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## Seventy sixth session

Agenda item 74 (b)\*

**Human rights questions, including alternative approaches for  
improving the effective enjoyment of human rights and  
fundamental freedoms**

### **Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards**

#### **Report of the Group of Governmental experts**

#### **Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Group of Governmental experts on torture-free trade, in accordance with Assembly resolution [73/304](#).

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\* A/76/251.

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## **Report of the Group of Governmental experts on torture-free trade**

### **Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards**

#### *Summary*

In its resolution 73/304, the General Assembly requested the Secretary-General to seek the views of Member States on the feasibility and possible scope of a range of options to establish common international standards for the import, export and transfer of goods used for (a) capital punishment, (b) torture or other cruel, inhuman or degrading treatment or punishment, and to submit a report on the subject to the General Assembly. The Secretary-General's report 74/969 was submitted to the General Assembly at its seventy-fourth session. Resolution 73/304 also requested the Secretary General to establish a group of governmental experts, to be chosen on the basis of equitable geographical distribution and guided by the need to appoint individuals reflecting the highest standards of efficiency, competence in the fields of human rights and/or international trade, and integrity, to examine, commencing in 2020, the feasibility, scope of the goods to be included and draft parameters for a range of options to establish common international standards on the matter and to transmit the report of the group of experts to the Assembly for consideration at its seventy-fifth session. The present report is submitted pursuant to that request. Taking into account the delays in the process of establishing the group of governmental experts, the report of the group of governmental experts is submitted to the General Assembly at its seventy-sixth session.<sup>1</sup>

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<sup>1</sup> See, Note by the Secretariat A/75/908.

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## I. Introduction

1. Paragraph 2 of General Assembly Resolution 73/304 requested the Secretary-General, on the basis of his report to be submitted to the General Assembly at its seventy-fourth session (74/969), to establish a group of governmental experts, to be chosen on the basis of equitable geographical distribution and guided by the need to appoint individuals reflecting the highest standards of efficiency, competence in the fields of human rights and/or international trade, and integrity, to examine, commencing in 2020, the feasibility, scope of the goods to be included and draft parameters for a range of options to establish common international standards on the matter and to transmit the report of the group of experts to the Assembly for consideration at its seventy-fifth session.<sup>2</sup>
2. In accordance with the terms of the resolution, Governmental experts from the following 10 States were appointed by the Secretary General in July 2021: Cameroon, Côte d'Ivoire, Cyprus, Denmark, Ecuador, Estonia, Germany, Russian Federation, Singapore and Uruguay<sup>3</sup>.
3. On the first day of the first meeting, the Group nominated, by acclamation, Mr. Asger Kjaerum (Denmark) as Chairperson; Ms. Mari Amos (Estonia) as Vice-Chair; and Ms. Alejandra Costa (Uruguay) as Rapporteur.
4. The Group met on three occasions<sup>4</sup> in 2021 and 2022. As the Group's work was undertaken during the COVID-19 pandemic, its meetings were held remotely (on webex and zoom platforms).
5. On 1 December 2021, the Group issued a call for inputs to all stakeholders (States, regional organisations, international, non-governmental organisations), and received submissions from the Council of Europe, the European Union, Germany, Italy, Mexico, Mauritius, Saudi Arabia, Singapore, the International Maritime Organisation, Amnesty International and the Omega Research Foundation, and Reprive.<sup>5</sup>
6. The Group also engaged in stakeholder consultations on 17 January 2022 (see section below "Stakeholder consultations").

## II. Methodology

7. The present report reflects the outcome of discussions carried out by the Group of Governmental Experts pursuant to General Assembly resolution 73/304. Where relevant, it also takes into account the position of stakeholders, including States and civil society, who provided inputs further to a call for submissions, issued by the Group on 1 November 2021 and views expressed during the stakeholder consultations held on 17 January 2022.
8. The Secretary General, in his report, further noted that most responding States (i.e. 36 out of a total of 46 States which provided inputs) supported the proposal to establish "common international standards" in this area, and that 24 of the responding States were in favour of a "legally binding instrument establishing measures to control and restrict trade in goods used for capital punishment, torture or other forms of ill-treatment."<sup>6</sup>

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<sup>2</sup> Taking into account the delays in the process of establishing the group of governmental experts, the report of the group of governmental experts is submitted to the General Assembly at its seventy-sixth session. See, Note by the Secretariat A/75/908.

<sup>3</sup> Ms. Mari Amos (Estonia); Ms. Iris Bodendorf (Germany); Ms. Alejandra Costa (Uruguay); Mr. Alejandro Dávalos (Ecuador); Mr. Constant Zirignon Delbe (Côte d'Ivoire); Ms. Athena Demetriou (Cyprus); Mr. Asger Kjaerum (Denmark); Ms. Natalie Y. Morris-Sharma (Singapore); Mr. Germain Ntono Tsimi (Cameroon); and Mr. Bakhtiyar Tuzmukhamedov (Russian Federation)

<sup>4</sup> 12-13 October 2021, 3, 6 and 7 December 2021, 24 and 26 January 2022, as well as stakeholder consultations on 17 January 2022.

<sup>5</sup> Submissions available at <https://www.ohchr.org/en/calls-for-input/calls-input/call-input-united-nations-general-assembly-resolution-73304-towards>

<sup>6</sup> Para. 36.

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9. Throughout its tenure, the Group has sought to research existing regional regulations and practices. In addition to the European Union Regulation (EU) 2019/125 of January 2019 and Recommendation CM/Rec(2021)2 of the Committee of Ministers of the Council of Europe, the Group was attentive to developments under the African Commission on Human and Peoples' Rights.

10. The present report builds upon the General Assembly's assessment, that the absence of common international standards on the import, export and transfer of goods used for (a) capital punishment, and (b) torture or other cruel, inhuman or degrading treatment or punishment is a contributory factor to facilitate the availability of these goods and enables such practices, and its acknowledgement of the growing support across all regions for concluding an international instrument, negotiated on a non-discriminatory, transparent and multilateral basis, to establish such common international standards.

11. This report further builds upon and complements the assessments and recommendations of the Secretary General, including the observation that information received from Member States revealed an uneven situation at both the regional and the national levels regarding the regulation of the import, export and transfer of goods used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

12. In fulfilling its mandate, the Group has strived to work on the basis of consensus.<sup>7</sup>

### **III. International legal framework on human rights**

#### **A. The prohibition of torture**

13. The prohibition on torture and other ill-treatment, a *jus cogens* norm, is absolute, applies in all circumstances and, as part of international customary law, to all States, regardless of their status vis-à-vis the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

14. The prohibition of torture and other forms of ill-treatment does not permit any restriction or derogation, i.e. it applies even in times of war, internal strife or emergency, and no exceptional circumstances can ever justify torture. States are prohibited from using torture and other forms of ill-treatment in accordance with the Universal Declaration of Human Rights (UDHR)<sup>8</sup>; and their obligations under the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup>.

15. Several regional treaties reaffirm the prohibition against torture: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>10</sup>; the American Convention on Human Rights (ACHR)<sup>11</sup>; the African Charter on Human and Peoples' Rights (ACHPR)<sup>12</sup>; the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment; and the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration<sup>13</sup>.

16. There are currently 173 States parties to the CAT and three States that signed, but have not ratified the Convention<sup>14</sup> which imposes an obligation on States parties to take all necessary legislative, administrative, judicial and other appropriate measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment (Article 2), as well as to ensure accountability, and proper reparation and rehabilitation of victims.<sup>15</sup>

17. Article 7 of the ICCPR expressly prohibits torture and cruel, inhuman or degrading treatment or punishment. Article 4(2) further provides that no derogation from article 7 is permitted in any

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<sup>7</sup> See Rule 13 of the Group's Methods of work: "The Group shall endeavour to reach all of its decisions by consensus. If a consensus cannot be reached, decisions of the Group shall be put to a vote and adopted on the basis of a simple majority of votes from the experts present and voting. Dissenting opinions may be reflected in reports, if the dissenting expert so wishes"

<sup>8</sup> Article 5

<sup>9</sup> Article 7

<sup>10</sup> Article 3

<sup>11</sup> Article 5

<sup>12</sup> Article 5

<sup>13</sup> Paragraph 14.

<sup>14</sup> [UNTC](#)

<sup>15</sup> See, inter alia, articles 2, 4, 12, 13, 14 and 16 of the Convention.

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circumstances, not even in situations of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.

18. Since 2002, General Assembly resolutions have been calling upon 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 is specifically designed to inflict torture or has no practical use other than for the purpose of torture or other cruel, inhuman or degrading treatment or punishment.<sup>16</sup> Successive Special Rapporteurs on torture have made similar calls.<sup>17</sup>

## **B. Question of the death penalty**

19. Article 6 of the ICCPR acknowledges the death penalty in a restrictive way: Paragraph 2 strictly limits the application of the death penalty, first, to States parties that have not abolished the death penalty, and secondly, to the most serious crimes.

20. The ICCPR expressly prohibits States parties' imposition of the death penalty to certain groups, considered as especially vulnerable, such as persons below 18<sup>18</sup> and pregnant women.<sup>19</sup> According to the Special Rapporteur on torture, such prohibitions are due to the fact that the imposition of the death penalty in such cases would be considered particularly cruel, inhuman and degrading from the standpoint of article 7 of the ICCPR, and articles 1 and 16 of the CAT.<sup>20</sup>

21. States parties that have not abolished the death penalty must respect article 7 of the ICCPR, the failure of which would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Convention on the Rights of the Child (CRC) specifically prohibits capital punishment "for offences committed by persons below eighteen years of age".

22. In a series of resolutions adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018,<sup>21</sup> the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty and to progressively restrict its use and reduce the number of offences which are punishable by death. The latest resolution 75/183, adopted on 16 December 2020, obtained 123 votes in favour. The resolution recognizes the sovereign right of countries to determine their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations.

## **IV. Existing and new national, regional, and international measures**

23. A number of states in Europe and Africa have adopted laws, guidelines, and other measures on the issue of trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.

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<sup>16</sup> See General Assembly resolutions 56/143, 57/200, 58/164, 59/182, 60/148, 61/153, 62/148, 63/166, 64/153, 65/205, 66/150 (in which the Assembly addressed import for the first time), 67/161, 68/156, 70/146, 72/163 and 74/143.

<sup>17</sup> See A/72/178, para 65 (b). See also E/CN.4/2003/69, 13 January 2003

<sup>18</sup> ICCPR, art. 6(5)

<sup>19</sup> Ibid

<sup>20</sup> A/67/279, (9 August 2012), at para. 58.

<sup>21</sup> 2008: **106** countries voted in favour, 46 against and 34 abstained. In 2010: **109** votes in favour, 41 votes against and 35 abstentions. 2012: **111** votes in favour, 41 voting against and 34 abstaining. In 2014: **117** votes in favour, 37 against, 34 abstentions and five absent. In 2016: **117** votes in favour, 40 against, 31 abstentions and five absent. In 2018: **121** votes in favour, 35 against, 32 abstentions and five absent. In 2020, the resolution was adopted with **123** votes in favour, 38 against, 24 abstentions and eight absent.

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## A. European system

### European Union Regulation (EU) 2019/125 of January 2019

24. European Union Regulation (EU) 2019/125 of January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (the EU Anti-Torture Regulation) consolidated various amendments to Council Regulation (EC) No. 1236/2005 (27 June 2005). The regulation is a legally binding instrument within the European Union, and is directly applicable in all its 27 Member States.

25. The Anti-Torture Coordination Group,<sup>22</sup> composed of Member State experts and the European Commission, is mandated by the Regulation to examine questions concerning the application of the Anti-Torture Regulation. The Coordination group serves as a platform for Member State experts and the Commission to exchange information on administrative practices and discuss issues of interpretation of the Regulation, technical issues with the goods listed, developments relating to the Regulation, and any other matters that may arise.

26. The Commission has also recently established an informal group of experts,<sup>23</sup> tasked to provide support to the Commission in exploring avenues to strengthen compliance and make the Regulation and its implementation more effective.

27. In July 2020, the Commission adopted a review report<sup>24</sup> of the Regulation assessing its impact, influence at global level, challenges and opportunities, and outlining further action. As the report highlights, the Regulation has had a positive impact on limiting the trade in goods that can be used for torture and death penalty.

### Council of Europe Recommendation CM/Rec (2021)2

28. Recommendation CM/Rec (2021)2 on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment inspired by the EU regulation, and drafted in close co-operation with representatives of the civil society, calls upon, and provides guidance to its 47 Member States to adopt national measures aiming to control the trade in goods used for the death penalty, torture and other ill-treatment.

29. The Recommendation further underlines the importance of multilateral cooperation, for example, through information-exchange and dissemination of best practices among Member States, support to non-Member States and action in other international organisations, to secure torture-free trade within Europe, and beyond.

30. The Recommendation includes a ban on inherently abusive equipment, and strict trade controls on law enforcement equipment, which could be misused to inflict torture or other ill-treatment. It further provides guidance for the trade regulation of pharmaceuticals, which can be misused for lethal injection executions.

31. It includes a non-exhaustive list of goods and equipment, which has no practical use other than the infliction of the death penalty, torture and other cruel, inhuman or degrading treatment or punishment. Member States should prevent and prohibit the import, export or transit, from, to or through their jurisdictions, of such goods and equipment. They should also prohibit the brokering and advertising of as well as the provision of technical support and assistance regarding any of the prohibited goods and equipment.

32. The Recommendation further contemplates the regulation and a licensing regime with respect to the export and transit of certain pharmaceutical chemicals. A relevant list is annexed to the

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<sup>22</sup> [Register of Commission expert groups and other similar entities \(europa.eu\)](https://ec.europa.eu/fpi/call-experts-implementation-eus-anti-torture-regulation-2021-03-01_de)

<sup>23</sup> [https://ec.europa.eu/fpi/call-experts-implementation-eus-anti-torture-regulation-2021-03-01\\_de](https://ec.europa.eu/fpi/system/files/2020-07/com_2020_343_fl_report_from_commission_en_v2_p1_1089601_2.pdf)

<sup>24</sup> [https://ec.europa.eu/fpi/system/files/2020-07/com\\_2020\\_343\\_fl\\_report\\_from\\_commission\\_en\\_v2\\_p1\\_1089601\\_2.pdf](https://ec.europa.eu/fpi/system/files/2020-07/com_2020_343_fl_report_from_commission_en_v2_p1_1089601_2.pdf)

Available at [Result details \(coe.int\)](https://www.coe.int)

See para. 5.1, “Support for non-member States”

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Recommendation, with the goal to prevent their transfer for possible use in lethal injection executions in States applying the death penalty.

33. The Recommendation also envisages a license and transit-control regime for the export of law-enforcement goods and equipment, which can have a legitimate function when used in a manner consistent with international and regional human rights standards and relevant standards on the use of force, but which may be misused by law enforcement and other officials to inflict torture and other inhuman or degrading treatment or punishment. A non-exhaustive list of such controlled goods and equipment is annexed.

## **B. The African Commission on Human and Peoples' Rights**

34. The Committee for the Prevention of Torture in Africa (CPTA) is mandated to facilitate the dissemination and implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines).

35. Resolution 472 on the prohibition of the use, production, export and trade of tools used for torture, adopted by the African Commission on Human and Peoples' Rights (2020)<sup>25</sup> calls upon its 55 Member States to uphold their commitments established under the 2002 Robben Island Guidelines, and explicitly stresses states' responsibilities to address the trade in tools of torture.

36. The Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa<sup>26</sup> elaborate on Article 5 of the African Charter on Human and Peoples' Rights, which prohibits all forms of exploitation and degradation of human beings, particularly slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment. The Guidelines (Guideline 14) explicitly note States' obligation to "prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends".

37. The CPTA identified its annual theme for 2020 as "the prohibition of the use, production and trade of equipment or substances designed to inflict torture or ill-treatment". During its 69<sup>th</sup> ordinary session (15 November to 5 December 2021), the Commission discussed a draft report on the production, trade and use of tools of torture in Africa,<sup>27</sup> which recommended to States to introduce national controls in line with their obligations under Robben Island Guideline 14, and to report on implementation progress to the CPTA.

## **C. The Organization for Security and Co-operation in Europe Parliamentary Assembly (OSCE)**

38. The Ministerial Council of the Organization for Security and Co-operation in Europe (4 December 2020) in Decision 07/20 called on the participating 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>28</sup>

### **Measures adopted by States**

39. European Union member States have adopted national laws, regulations and decrees to facilitate the implementation of the EU Anti-Torture regulation.<sup>29</sup> Other States have addressed the matter through legislative acts, other than trade-specific legislation.<sup>30,31</sup> The USA has established national controls in

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<sup>25</sup> [African Commission on Human and Peoples' Rights Sessions \(achpr.org\)](https://www.achpr.org/).

<sup>26</sup> <https://www.apt.ch/en/resources/publications/robben-island-guidelines-2002>.

<sup>27</sup> [African Commission on Human and Peoples' Rights Sessions \(achpr.org\)](https://www.achpr.org/).

<sup>28</sup> OSCE doc. MC.DEC/7/20, 4 December 2020, available at <https://www.osce.org/files/f/documents/8/2/479762.pdf>

<sup>29</sup> See Secretary General's report, at para. 6 and following.

<sup>30</sup> *Ibid*, at para. 8

<sup>31</sup> *Information* provided by Amnesty International and the Omega Research Foundation, *Ibid*.

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effect prohibiting export of “specially designed implements of torture”<sup>32</sup> and controlling the export of a range of law enforcement equipment and execution equipment. The United Kingdom prohibits export of goods having “no practical use” other than for torture, other ill-treatment and the death penalty, and controls export of law enforcement goods to prevent their use in torture and other ill-treatment and of certain pharmaceutical chemicals to prevent their use in the death penalty.

40. The Group was unable to conclude that the practice of adopting respective legislation is widespread throughout various regions of the world.

**41. The Group believes that it would be beneficial to devote more research on domestic legislation and practice to gain a comprehensive picture, which could not be done for the purpose of this report.**

## V. Feasibility and draft parameters for common international standards

42. Legally binding instruments, i.e. treaties, codify and develop international obligations, including human rights obligations. Treaties may create reporting obligations for States Parties. Treaties may also give rise to rights, which are effective at the national level. States may have to pass implementing legislation in order to give the rights effect in the domestic legal order, while other domestic systems will consider some treaty provisions to be sufficiently clear and precise to be self-executing, and to take effect directly in national law.

43. Treaties regulating trade such as the 2013 Arms Trade Treaty and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provide for periodic reporting obligations of States parties. In addition, these treaties created record-keeping obligations on States parties. Under both conventions, the States parties are obliged to keep records of trade transactions of conventional arms and endangered species, respectively.

44. Treaties offer advantages in terms of credibility, precision, predictability, effectiveness, and delegation (the requirement for States to take measures to effect their treaty obligations domestically). States adhering to a treaty can anticipate the exact scope of implementation measures that are necessary to give effect to the specific obligations deriving from the treaty, which contributes to a more transparent and predictable international framework. In terms of effectiveness, treaties generate binding obligations on States Parties as a matter of international law.<sup>33</sup>

45. A further advantage of a treaty is domestic implementation leading to tangible changes to national laws, policies, and practices more effectively than non-binding guidance, including through enforcement before domestic courts.

46. Several civil society organizations<sup>34</sup> expressed support for the creation of a global, legally binding instrument to regulate the trade in torture and death penalty goods.

47. Non-binding arrangements, occasionally called in academic reference sources as ‘non-binding agreements’,<sup>35</sup> refer to instruments which contain a great variety of instruments, from declaration[s] recording statements of policy to formal agreements containing precise commitments.

48. One advantage is that States may more readily consent to a non-binding instrument which requires adherence to new principles or norms, including the trade of goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. Non-binding

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<sup>32</sup> Code of Federal Regulations, 15 CFR § 742.11 (eCFR :: 15 CFR 742.11 -- Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, and parts and accessories, n.e.s.).

<sup>38</sup> Commerce Controls lists, US Bureau of Industry and Security, Export Administration Regulations. <https://www.bis.doc.gov/index.php/documents/regulations-docs/2329-commerce-control-list-index-3/file>

<sup>39</sup> UK Department for International Trade Guidance on export controls on goods that can be used for torture or capital punishment ([www.gov.uk/guidance/controls-on-torture-goods](http://www.gov.uk/guidance/controls-on-torture-goods))

<sup>33</sup> See submission from the Harvard Law School International Human Rights Clinic, available at <https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Stakeholder-consultations.aspx>

<sup>34</sup> Including Amnesty International, the Omega Research Foundation, and the Harvard Law School International Human Rights Clinic

<sup>35</sup> Philippe Gautier, Non-Binding Agreements - Max Planck Encyclopedia of Public International Law (MPEPIL)

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agreements may also be the evolving channel through which new future norms on the matter are developed before being accepted in legal instruments.

49. The Group discussed the various options available in terms of common international standards. It also acknowledged concerns expressed by some members and States over the need to consider the possible impact on, and interference with international trade.

50. Out of the 46 States which provided inputs in the Secretary General's report, 24 favoured a binding instrument,<sup>36</sup> and recommended that inspiration for the drafting language be drawn from the various conventions prohibiting or preventing the proliferation of weapons, such as the Convention on Cluster Munitions or the Treaty on the Non-Proliferation of Nuclear Weapons. Other States suggested the adoption of a non-binding instrument in a form of a General Assembly Declaration or similar.

51. The Group discussed the possibility of supporting an initiative, which would bring together concerned states and business entities, with the aim of developing best practices for the prevention of proliferation of items, which have no other use than infliction of torture. However, the majority of the Group was of the opinion that it would not be in line with the mandate of this Group to recommend to the General Assembly to establish a process outside the framework of the United Nations.

## VI. Stakeholder consultations

52. On 17 January 2022, the Group convened virtual stakeholder consultations, opened widely to State representatives, national human rights institutions, NGOs, academia, members of international and regional organisations, and other experts.<sup>37</sup>

53. The focus of the consultations was to broaden engagement with large constituencies, thereby increasing the legitimacy of the process; and to inform its report to the General Assembly.

54. The European Union, as well as Denmark, Germany, and Panama expressed their support for the process, while China, Egypt, Iran, Jamaica and Singapore expressed concern over the impact of the process on trade rules, stressing that the fact that this Group is not the appropriate body to regulate trade, resulting in a procedural defect. China, Iran, Jamaica and Singapore highlighted that they contested the setting up and mandate of the Group.

55. China, Egypt, Iran and Singapore underscored that the standards being considered could be used as an excuse for protectionism, and would restrict free trade. China, Egypt and Jamaica further stressed that the mandate of the Group includes the regulation of goods related to the death penalty, while the death penalty is not prohibited under international law. Egypt, Iran, Jamaica and Singapore stated that capital punishment should not be conflated with torture and other cruel, inhuman or degrading treatment or punishment.

56. Several NGOs provided inputs, including a submission<sup>38</sup> drawing the Group's attention to the relevance of the *framework* convention model, as a flexible approach to treaty-making. Framework conventions consist in (i) the main treaty text, which ensures a general commitment from the State parties, and (ii) Protocols/annexes, which provide details, specific regulations, and technical standards. This model was described as offering several advantages, including allowing incremental progress, whereby States can commit to addressing an issue without waiting for a consensus around appropriate measures. Also, unlike traditional forms of treaty-making, framework conventions embody a more inclusive amendment procedure.

57. The Harvard Law School International Human Rights Clinic expressed the view that, based on the precedent of the Arms Trade Treaty, it is more likely that a treaty would result in tangible changes to national laws, policies, and practices that would help prevent torture internationally than non-binding guidance would. It further submitted that the death penalty should be included in the prospective instrument, on an equal footing with torture and other ill treatment, as there are persuasive arguments that the death penalty constitutes a form of ill treatment in international law. However,

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<sup>36</sup> Para. 36.

<sup>37</sup> The European Union, as well as 37 States and 11 NGOs attended [8 States and 5 NGOs made interventions]

<sup>38</sup> Geneva Graduate Institute

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recognizing that some states retain the death penalty, it was suggested to the Group to propose that states negotiate a main treaty that covers only law enforcement equipment, and a separate, optional, protocol regulating death penalty goods.

58. Alternatively, it was suggested that the treaty could include the goods and equipment it covers in annexes, making the annex covering law enforcement equipment mandatory, and the annex covering death penalty goods optional. The International Convention for the Prevention of Pollution from Ships (MARPOL) offers a precedent for this approach.

## VII. Possible scope of common international standards

### A. Scope and categories of goods

#### Categories of goods

59. In the Secretary General's report, a distinction is drawn between three categories of goods, which is also the model used by the EU Anti-Torture regulation:

- (a) Goods that have no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment;
- (b) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment;
- (c) Goods that could be used for the purpose of capital punishment.

60. A similar distinction was proposed by Italy.

61. In a recent submission, Mauritius submitted that the Group should envisage two categories: (i) goods which have no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment; and (ii) goods that could be used not only for the purpose of torture or other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes.

62. Amnesty International and the Omega Research Foundation envisaged lists of goods under four categories that should be regulated both at national and international levels.<sup>39</sup> The lists are largely in line with those included in the EU Anti-Torture regulation. However, goods that have no practical use other than for the purpose of capital punishment and goods that have no practical use other than for the purpose of torture or other forms of ill-treatment are considered under separate categories.

63. 15 States amongst the 46 States which submitted inputs to the Secretary General's report<sup>40</sup> had proposed an additional distinction between goods that have no practical use other than for the purpose of capital punishment and goods that have no practical use other than for the purpose of torture or other forms of ill-treatment. France had similarly proposed that all goods related to capital punishment be merged in a single category.

64. During its deliberations, one member of the Group was of the opinion that the death penalty should be entirely excluded from the Group's consideration, to respect the fact that there is no international consensus that the use of capital or corporal punishment amounts to torture or other cruel, inhuman or degrading treatment or punishment, nor that it is a violation of international law.

65. Another member of the Group suggested three categories, as follows: (a) Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment; (b) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment; and (c) goods related to the death penalty.

66. Some members of the Group suggested that the way the scope and categories of goods are proposed to be defined and outlined should promote certainty, so as not to have unintended effects on trade flows.

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<sup>39</sup> <https://www.amnesty.ch/de/themen/folter/dok/2020/handel-mit-folterwerkzeugen-regulieren/report-ending-the-torture-trade-tools-of-torture.pdf>.

<sup>40</sup> Para. 14.

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**67. The Group agreed to conduct its work on the basis of the following categories:**

- (a) Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment;
- (b) Goods that have no practical use other than for the purpose of capital punishment;
- (c) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment;
- (d) Goods that could be used for the purpose of capital punishment.

**Exhaustive list**

68. The Secretary-General's report concluded that a majority of Member States (33) suggested that an exhaustive list of goods should be adopted in order to ensure consistency in the application of common international standards. Some States considered that such a list might need to be updated regularly.<sup>41</sup>

69. The EU Anti-Torture regulation provides for a mechanism for amending its lists. Article 24 stipulates that the [European] Commission is empowered to amend Annexes, including those with the lists of goods through delegated acts and using urgency procedure when imperative grounds of urgency so require as well as to add goods designed or marketed for law enforcement to its Annexes.<sup>42</sup>

70. Regulation 2019/125 was preceded by Council Regulation (EC) No 1236/2005, which was amended several times to update and expand the Annexes to the Regulation listing prohibited and regulated goods. The Regulation further contemplates a mechanism for adding goods to Annex II, Annex III or Annex IV<sup>43</sup>. EU Member States are also autonomously entitled to introduce further national measures to regulate trade in certain additional goods.<sup>44</sup>

71. Recommendation CM/Rec (2021)2 contains three appendices listing prohibited and controlled goods,<sup>45</sup> composed of a non-exhaustive list of goods<sup>46</sup> and equipment.

72. In its submission, the EU delegation to the United Nations suggested that the list of goods should be as exhaustive as possible. Italy submitted that in order to respond quickly to the development of new goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, it would be appropriate to develop a mechanism to add goods where there is a clear and immediate risk that those goods will be used for purposes that entail such human rights abuses.

73. The Omega Research Foundation and Amnesty International recommended non exhaustive categories of goods to be included as a minimum within the scope of legally binding international trade controls.

74. During deliberations, an opinion was proffered that regard should be had to provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction which regulate the use of, but do not ban substances which are used as riot control agents.<sup>47</sup>

75. The Group had at its disposal, a draft list of proposed goods, based on suggested lists of goods used for capital punishment, torture or other forms of ill-treatment from the Secretary-General's report, the EU regulation, NGO reports and the recommendations from the Council of Europe.

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<sup>41</sup> A/74/969, para 43

<sup>42</sup> EU Regulation 2019/125

<sup>43</sup> Enabling an EU Member State to address a duly substantiated request to the Commission for consideration

<sup>44</sup> See first review report of the EU Regulation, available at

[com\\_2020\\_343\\_fl\\_report\\_from\\_commission\\_en\\_v2\\_p1\\_1089601\\_2.pdf \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2020/343/fl/report_from_commission_en_v2_p1_1089601_2.pdf)

<sup>45</sup> Appendix 1: List of prohibited inherently abusive goods and equipment; Appendix 2: List of pharmaceutical chemicals employed in lethal injection execution; and Appendix 3: List of controlled goods and equipment

<sup>46</sup> See submission received from the Council of Europe

<sup>47</sup> <https://www.opcw.org/chemical-weapons-convention>

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76. The Group agreed, for the purposes of ensuring clarity and predictability, on the need for an exhaustive list of goods under each category, while maintaining the flexibility to amend and update the list. The Group believes that more diverse expert advice is required on this matter. The Group further noted the need to be attentive to the identification and specification of goods, in order to avoid undue barriers to international trade.

77. The Group further agreed with the 33 States<sup>48</sup> which had suggested the establishment of a mechanism to regularly update the list, but believes that more diverse expert advice is required on this matter.

78. The Group agreed that some parts of the lists of goods in Annexes II, III and IV to the European Union Anti-Torture regulation could serve as a starting basis for discussions, but that inspiration should also be drawn from additional models and practices beyond the European Union.

## **B. Prohibition and/or control of trade, and production**

### **Goods that have no practical use other than for the purpose of torture or other forms of ill-treatment**

79. Mauritius proposed that common international standards are necessary to *prohibit* exports and imports of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment. Mauritius added that there should be a clear, explicit and exhaustive definition of the terms “no practical use”. Using the term “reasonable” instead of practical might be more accurate and closer to the objective of the prohibition.

80. Italy considered it necessary to *prohibit* exports and imports of goods, which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment. Germany similarly considered necessary to *prohibit* exports and imports of goods, which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.

**81. During their deliberations, the majority of experts agreed that common international standards could *prohibit*, rather than merely control, trade in goods that have no practical use other than for the purpose of torture or other forms of ill-treatment.**

### **Goods which may be used for legitimate purposes, but whose ordinary use could possibly be diverted for the purpose of torture or other forms of ill-treatment**

82. Several States<sup>49</sup> had indicated, in their submissions for the SG’s report, that control was necessary for goods that *could be used* for torture or other forms of ill-treatment.

83. Mauritius also considers it necessary to impose controls on exports of certain goods, which *could be used* not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes. Italy similarly considers it necessary to impose controls on exports of certain goods, which *could be used* not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes. Germany similarly deemed it necessary to impose controls on exports of certain goods, which *could be used* not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes.

84. The Group considered that further expertise is needed to avoid any trade restriction concerns that may arise.

85. During their deliberations, several members of the Group expressed that any comprehensive approach to torture prevention would need to include a range of proactive measures aimed at preventing torture, including trade in goods which may be used for legitimate purposes, but whose ordinary use could possibly be diverted for illegitimate purposes. In particular, the potential misuse of regular law-enforcement material, which may have a legitimate purpose when used in strict accordance with

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<sup>48</sup> A/74/969, para. 20

<sup>49</sup> Para. 22.

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international human rights and police standards, was considered to deserve special attention and regulation.

86. Other members were of the opinion that only goods which have no practical use, other than for the purpose of torture or other forms of ill-treatment should be the subject of possible common international standards, since the potential “dual use” would be hard to define given the variety of objects possibly used to inflict torture, thus creating uncertainty, and possible obstacles to trade.

### **Death penalty**

87. The majority of the Group’s experts acknowledged that, while there is an absolute and uncontested international prohibition on torture, the same cannot be said about the death penalty, and many retentionist countries who might otherwise accede to an instrument restricting the trade in goods used for torture, would likely not do so if the instrument also explicitly referred to the death penalty.

88. Some members were also of the view that there exists no basis for any common international standards to prohibit the exchange of goods aimed for the death penalty, when both contracting states apply the death penalty, based on their respective domestic laws, and considering that there is no consensus that the imposition of the death penalty violates international law. Other experts were of the opinion that, while the question of the death penalty should not be discarded altogether, it would be necessary to decouple it from torture, so that the proposed instrument could offer an “à la carte” model allowing States to opt-in an annexe or appendix to the main instrument, which would be devoted to the death penalty.

89. The Group is aware that, while the number of States that have abolished the death penalty in law or in practice, or declared moratoria on its execution has grown, there is no global abolition of the death penalty under current international law.

**90. The Group considered extensively the issue of the death penalty in its deliberations and agreed that it should be treated differently/separately from torture and other ill-treatment in the following discussions.**

## **C. Import, export and transfer<sup>50</sup> of goods and related activities**

91. General Assembly resolution 73/304 covers the import, export and transfer of goods. Additionally, a number of other activities, are closely associated with, or linked to, imports, exports and transfers. Several States (22) that provided submissions for the Secretary General’s report<sup>51</sup> proposed, in their submissions to the Secretary General, that the international regulatory framework include brokering services, technical assistance, training in the use of regulated goods, promotion at trade fairs or exhibitions, and advertising. In addition, some States proposed the regulation of transit,<sup>52</sup> manufacturing and production of relevant goods. On the other hand, New Zealand emphasized the need to be realistic in terms of the controls that States, especially small island States, could be expected to exercise over transnational activities such as transit and diversion. It noted that brokering was also a challenging issue and suggested focusing on activities more readily under complete national control.

92. The EU Anti-Torture regulation provides a clear distinction on the scope of control depending on the type of activity, whether it is export, import, transfer or related activities.

93. Regulation of other activities that facilitate the availability of, and enable the trade in goods used for capital punishment, torture or other forms of ill-treatment, namely, the manufacturing, production, sale and purchase of goods in relevant categories was proposed by several States, some suggesting that such activities should be prohibited in relation to goods that have no practical use other than for the purpose of capital punishment, torture or other forms of ill-treatment.

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<sup>50</sup> The Group understands transfer to have the same meaning as in General Assembly resolution 73/304

<sup>51</sup> Para. 24

<sup>52</sup> Ibid.

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94. Four multilateral mechanisms have established non-legally binding guidelines to regulate the trade in “dual-use goods”: the Nuclear Suppliers Group,<sup>53</sup> Wassenaar Arrangement,<sup>54</sup> Missile Technology Control Regime<sup>55</sup> and the Australia Group.<sup>56</sup> They operate by consensus.<sup>57</sup> These mechanisms have export licensing procedures and include criteria for risk assessments. The Secretary-General’s reports refers to a proposal by one State to draw on such mechanisms.<sup>58</sup> Another State suggested modelling the risk assessment mechanisms and criteria on those used in the Arms Trade Treaty.<sup>59</sup>

95. The Arms Trade Treaty provides for an export assessment mechanism. The regulation of import is limited to providing of appropriate and relevant information, upon request, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment. The treaty further contemplates that each importing State shall take measures allowing it to regulate, where necessary, imports under its jurisdiction of conventional arms. Such measures may include import systems and may request information from the exporting State Party concerning any pending or actual export authorizations where the importing State Party is the country of final destination.<sup>60</sup> However, it does not provide for a mechanism to authorize the import.

96. Other treaties and mechanisms regulating trade, such as the International Drug Control Conventions<sup>61</sup> and CITES<sup>62</sup> also include mechanisms for control in trade in relevant goods and species, although they are not directly analogous to the situation at hand.

97. According to Amnesty International and the Omega Research Foundation, a regulatory framework should:

- (a) Prohibit and prevent the *manufacture and transfer* of equipment that has no practical use in law enforcement other than for the purpose of torture, other ill-treatment and the death penalty.<sup>63</sup> Destroy any stock of prohibited equipment discovered by states within their jurisdiction.
- (b) License the *transfer* of controlled law enforcement equipment and related services, denying authorisation where there are reasonable grounds for believing that the law enforcement equipment and services will be used for torture or other ill-treatment or the goods will be diverted.
- (c) Control and license the *export and transit* of certain goods and pharmaceutical substances to ensure that they are not transferred for use in executions in states still applying the death penalty. However, States should not limit the trade of such goods or chemicals for legitimate uses, including medical, veterinary or other purposes.

### Ancillary activities

98. In its submission, Mauritius stressed that all activities ancillary to the “import, export or transfer” should be envisaged to ensure effectiveness and meaningfulness. These will naturally include transit, promotion, technical assistance and training, brokering, sharing technology, manufacturing, production and commercial marketing. Promotion in trade fairs or exhibitions, and advertising. The act of ordering, coercing, encouraging or inducing anyone to engage in any of the linked activities should also be encompassed.

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<sup>53</sup> See <http://www.nuclearsuppliersgroup.org/en/>

<sup>54</sup> See <http://www.wassenaar.org/>

<sup>55</sup> See <http://www.mtcr.info>

<sup>56</sup> See <http://www.australiagroup.net>

<sup>57</sup> European Parliament Workshop report on “Dual use export controls”, p.15 available at <https://www.statewatch.org/media/documents/news/2015/nov/ep-study-dual-use-exports.pdf>

<sup>58</sup> A/74/969, para 30

<sup>59</sup> See [https://thearmstradetreaty.org/hyper-images/file/ATT\\_English/ATT\\_English.pdf?templateId=137253](https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templateId=137253)

<sup>60</sup> See article 8 of Arms Trade Treaty [https://thearmstradetreaty.org/hyper-images/file/ATT\\_English/ATT\\_English.pdf?templateId=137253](https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templateId=137253)

<sup>61</sup> See

[https://www.unodc.org/documents/commissions/CND/Int\\_Drug\\_Control\\_Conventions/Ebook/The\\_International\\_Drug\\_Control\\_Conventions\\_E.pdf](https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf)

<sup>62</sup> See <https://cites.org/eng/disc/text.php>

<sup>63</sup> The prohibition includes related brokering activities (that is, organizing transfers between third countries); transport, financial, insurance, promotion and advertising services; and technical assistance and training in torture or other ill-treatment.

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99. Italy submitted that the international regulatory framework could include the following activities linked to import, export and transfer: brokering services, technical assistance, training in the use of the regulated goods, promotion in trade fairs or exhibitions, and advertising.

100. Amnesty International and the Omega Research Foundation recommended that international standards should cover certain associated technical assistance and training: In their view, technical assistance and training related to any of the prohibited equipment should itself be prohibited. Similarly, technical assistance or training relating to controlled equipment should be strictly regulated to ensure it does not facilitate or encourage abusive techniques and practices. Training in other techniques employed for torture or other ill-treatment not directly related to law enforcement equipment (including sleep deprivation, stress positions) should also be prohibited.

**101. Most members were of the view that such ancillary activities should be included, especially as this was supported by several States that had provided input to the Secretary General's report.<sup>64</sup> Other members noted that what activities are concerned are difficult to identify and particularise, which could cause uncertainty and obstacles to international trade.**

#### **Export authorizations and import controls**

102. The EU Anti-Torture Regulation includes import prohibition for goods, which have no practical use other than for the purpose of capital punishment, torture or other forms of ill-treatment.<sup>65</sup> Due to the nature of goods and species that they regulate, and although they are not directly analogous to the situation at hand, the International Drug Control Conventions<sup>66</sup> and CITES<sup>67</sup> have detailed procedures for export and also import of such goods and species.

103. The Council of Europe recommended a regulation and licensing regime in relation to the export and transit of certain pharmaceutical chemicals, a list of which is annexed to Recommendation CM/Rec (2021)2, in order to ensure that they are not transferred for the use in lethal injection executions in States still applying the death penalty. Other measures concern the putting in place of a license and transit-control regime for the export of law-enforcement goods and equipment that can have a legitimate function when used in a manner consistent with international and regional human rights standards and other relevant standards on the use of force, but which may be misused by law enforcement and other officials to inflict torture and other inhuman or degrading treatment or punishment. A non-exhaustive list of such controlled goods and equipment is annexed to Recommendation CM/Rec (2021).

**104. The Group agreed that the experience and practice gathered in the context of the EU Anti-Torture Regulation could be considered as a starting point, but stressed that other sources and regimes should be examined.**

### **D. Need for a risk assessment mechanism and criteria for risk assessment**

105. In his report, the Secretary General reported the importance, expressed by States, of export authorization requirements and end-use verification as appropriate mechanisms for inclusion in the scope of common international standards, and the need to consider the risk of diversion. The need for further deliberations on the matter was also stressed, guided by existing international and regional treaties, agreements and regulations on dual-use goods.

106. The UK suggested criteria for the common international standards similar to those under the EU Anti-Torture Regulation.<sup>68</sup> The criteria for risk assessment in the Regulation are rather general: Authorization is not granted when there is a reasonable grounds to believe that the goods might be used for capital punishment or torture or other forms of ill-treatment. The competent authorities deciding on authorizations should take into account available international court judgments, findings of the

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<sup>64</sup> Para. 24 and following

<sup>65</sup> See <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R0125>

<sup>66</sup> See

[https://www.unodc.org/documents/commissions/CND/Int\\_Drug\\_Control\\_Conventions/Ebook/The\\_International\\_Drug\\_Control\\_Conventions\\_E.pdf](https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf)

<sup>67</sup> See <https://cites.org/eng/disc/text.php>

<sup>68</sup> SG report, para. 32

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competent bodies of the United Nations, reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and other relevant information, including available national court judgments, reports and other information prepared by civil society organizations.<sup>69</sup>

107. Slovakia highlighted the importance of establishing international register or website for authorized importers/exporters with easily accessible information on the import, export and transport rules valid in each country.

108. In its submission to the Group, the EU delegation to the United Nations stated that in order to respond quickly when new goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, are developed, it would be appropriate to develop a mechanism to add goods where there is a clear and immediate risk that those goods can be used for purposes that entail such human rights abuses.

109. Mauritius reported that periodic and updated guidelines will need to be elaborated for the import, export and transfer of goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment and for the purpose of capital punishment. These guidelines will outline best practices and flag key trends. Mauritius further suggested that there could be a watchlist of persons, suppliers or countries known to manufacture, sell, buy, transfer, transport, broker items. The guidelines could also classify geographical regions by number of victims of torture or capital punishment and also indicate the means or items used to torture or kill them.

110. According to Amnesty International and the Omega Research Foundation, States should keep comprehensive, regularly updated internationally agreed lists of prohibited and controlled goods and services. There should also be requirements for a record-keeping and annual national reporting on the volume, value, destination, end users, and proposed end use of all exports and imports of equipment, weapons, related technical assistance and of training listed. These reports should be made public.

111. Amnesty International and the Omega Research Foundation further submitted that an international implementation support and monitoring body should detect and track developments in the global trade in of goods and services covered under the scope of the instrument; and review cases brought to it by relevant UN, regional and national torture prevention mechanisms, States parties and civil society. This body would further facilitate international information exchange, cooperation and assistance measures.

## **VIII. Conclusions and recommendations**

112. The Group was specifically requested by the General Assembly “to examine, commencing in 2020, the feasibility, scope of the goods to be included and draft parameters for a range of options to establish common international standards for the import, export and transfer of goods used for (a) capital punishment, (b) torture or other cruel, inhuman or degrading treatment or punishment.” The following presents the Group’s conclusions and recommendations on these three elements.

113. The Group based its discussions on the inputs and opinions provided by States and other stakeholders, as well as the experience and expertise of its own members.

114. During its deliberations, the Group agreed on the universal and consensual prohibition of torture or other cruel, inhuman or degrading treatment or punishment within the international community. The Group also agreed that there is no comparable absolute prohibition concerning the death penalty, and that there are differing views among States as to whether international standards should be elaborated for goods related to the imposition of the death penalty.

115. Most members of the Group believe that the regulation of the import, export and transfer of goods that have no other use or could be used for torture and capital punishment is a proactive measure aimed at preventing the occurrence of human rights violations.

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<sup>69</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R0125>.

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## Feasibility

116. Acknowledging the variety of opinions within its members, and the opinions expressed in the course of calls for inputs and consultations held, the Group observes that:

a) Most members of the Group consider it feasible to establish international standards in relation to goods that have no other use than for the purpose of torture or other cruel, inhuman or degrading treatment or punishment.

b) Most members of the Group consider it feasible to establish international standards in relation to the import, export and transfer of goods that could be misused for the purpose of torture or other cruel, inhuman or degrading treatment or punishment, as long as their application is restricted to a clearly defined and narrow scope of goods, for which expertise on specific fields is needed.

c) There is a diversity of views on the feasibility of establishing international standards on the import, export and transfer of goods related to the death penalty.

d) Most members of the Group consider that the feasibility of establishing international standards on goods related to the death penalty depends on the nature and structure of the instrument.

117. The Group recommends that the UN General Assembly establish a forward-looking process on the matter, taking into consideration the conclusions and further recommendations presented below:

### Scope of goods to be included

118. The Group conducted its work on the basis of the following categories of goods to be considered individually in any instrument to be adopted:

a) Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment;

b) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment;

c) Goods that have no practical use other than for the purpose of capital punishment.

d) Goods that could be used for the purpose of capital punishment.

119. The Group notes that there is disagreement between States, and within the Group, as to whether and how to regulate the trade in goods related to the death penalty. The concern about regulating these categories of goods is primarily based upon the fact that the death penalty is not universally and absolutely prohibited in international law, and that a general legally binding regulation of goods relating to the death penalty would therefore go beyond the current state of international law.

120. **The Group therefore recommends that the issue of goods related to the death penalty be treated separately, and that the General Assembly further considers, whether and how to include these categories of goods in connection with its deliberations on developing international standards.**

121. The Group recommends that, for the sake of clarity and predictability, an exhaustive list of goods which should be prohibited/regulated, be adopted under each category. The Group recommends that some parts of the lists of goods in Annexes II, III and IV to the European Union Anti-Torture regulation, as well as the Annexe of the Council of Europe's Recommendation CM/Rec (2021)2, be used as examples a starting basis for discussions.

122. The Group also recommends that these lists are regularly updated through an expert mechanism with all relevant technical expertise and diverse regional backgrounds, and working on the basis of clear and objective evidentiary standards.

123. There is broad support among the Group for prohibiting trade in tools that can be used for no other purpose than torture and ill-treatment.

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124. **The Group recommends that a prohibition of the production, import, export, transfer and brokering, as well as ancillary activities around this category of goods is included in any future international standard.**

125. In relation to goods that *could be used* for the purpose of torture or other cruel, inhuman or degrading treatment or punishment, including equipment used for law-enforcement or detention practice, where there are reasonable grounds for believing that the law enforcement/detention equipment will be used for torture or other cruel, inhuman or degrading treatment or punishment, the Group observes that it is necessary to ensure that the scope of goods to be included is clearly defined to avoid undue interference with trade in regular/daily use items.

126. **The Group therefore recommends that any future international standards include controls on the import, export and transfer of a clearly defined category of equipment used for law-enforcement or detention practice where there are reasonable grounds for believing that the law enforcement/detention equipment will be used for torture or other cruel, inhuman or degrading treatment or punishment.**

127. **The group also proposes that any control in relation to the import, export and transfer of goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment should take into account relevant information from United Nations agencies, international organizations, as well as other relevant stakeholders, including NGOs, national human rights institutions (NHRIs) and regional mechanisms.**

### **Parameters for a range of options to establish common international standards**

128. Out of the States that provided inputs to the Secretary General's report, 24 support a legally binding instrument. A number of States favour non-binding standards. A number of States do not support any attempt to establish common international standards.

129. The Group notes that a large number of States from most UN regional groups have not expressed an opinion on what kind of international standard they prefer, leaving a significant degree of uncertainty as to the existing level of support for either a legally binding, or non-binding instrument within the General Assembly. It is therefore difficult for the Group to propose one specific way forward.

130. The Group notes that the inclusion of goods related to death penalty is one of the main reasons cited by those States who oppose a legally binding instrument. However, the Group observes support for the development of a global regulation in relation to (a) Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment; and (b) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment.

131. Therefore, in response to the General Assembly's request for the Group to present "draft parameters for a range of options to establish common international standards" and in light of the considerations above, the Group proposes the General Assembly consider the following options:

#### **Option a: Legally binding instrument**

132. **The General Assembly could proceed to negotiate an international legally binding instrument, either in the form of an optional protocol to an already existing treaty or a new instrument, which should be decided on the basis of the scope of goods to be addressed.**

133. **Such instrument would seek to regulate the following categories (a) Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment; and (b) Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment.**

134. **Such instrument may also contemplate the possibility of an opt-in mechanism with respect to goods related to the imposition of the death penalty.**

135. For this purpose, the General Assembly could mandate an intergovernmental process that would seek increased participation of States, as well as relevant subject matter expertise.

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136. For this process, the General Assembly may wish to consider establishing an expert Working Group, with a broad range of subject matter expertise, to ensure that all relevant technical aspects of such standards are covered.

**Option b: Non-Binding Standards**

137. **The General Assembly could proceed to develop international non-binding standards in the form of Guiding Principles. Most group members observed that this may serve as a first step towards the negotiation of legally binding standards.**

138. **Such standards would include the following categories of goods:**

(a) **Goods that have no practical use other than for the purpose of torture and other cruel, inhuman or degrading treatment or punishment;**

(b) **Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment.**

139. **Such non-binding standards may also include:**

(a) **Goods that have no practical use other than for the purpose of capital punishment; and**

(b) **Goods that could be used for the purpose of capital punishment.**

140. The Group considers that the Working Group on Business and Human Rights, which led to the adoption of the guiding principles in such area could be an example to follow.

141. The Group also considered that the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict can also be an example of a set of Guiding Principles and good practices that can be used as a model for a future process.

142. For this purpose, the General Assembly could mandate an intergovernmental process that would seek increased participation of States, as well as relevant subject matter expertise.

**143. In this framework, the General Assembly may wish to consider establishing an expert Working Group, with a broad range of subject matter expertise, to ensure that all relevant technical aspects of such standards are covered.**

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## ANNEXE

### SEPARATE OPINIONS BY MEMBERS

#### **Ms. Natalie Y. Morris-Sharma**

1. I note the diversity of views on the feasibility of establishing international standards on torture-free trade, and remain concerned with the scant attention given in the report to trade implications and States' concerns, including whether the General Assembly is the appropriate body to regulate trade matters and the possibility of international standards on torture-free trade serving as an excuse for protectionist measures.

2. Additionally, I view the discussion of the death penalty as being misplaced. That notwithstanding, I note the need to acknowledge, in paragraph 22 of the report, the significant support for OP1 of General Assembly resolution 75/183, which reaffirms the sovereign right of all countries to determine their own legal systems, including appropriate legal penalties, in accordance with their international law obligations, including the use of the death penalty.

#### **Mr. Bakhtiyar Tuzmukhamedov (partially dissenting)**

##### *Summary*<sup>70</sup>

1. The Majority of the Group had no sound reasons to reject the proposal, along with options of a legally binding instrument and non-binding standards, of the option of establishing common international standards by means of bringing together concerned states and business entities, with the aim of developing best practices for the prevention of proliferation of tools of torture (paragraph 51).

2. The Majority of the Group had no sound reasons to reject the proposal that a prospective expert Working Group to be established by the General Assembly, as suggested in the Report, to develop concrete modalities of developing common standards, be of open-ended composition. The open-ended composition would not only allow broader and balanced participation, as well as help to bypass the hurdles of election processes, but also would be in line with the UN common practice of establishment of open-ended groups tasked with development of new international standards (identical paragraphs 136 and 143).

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<sup>70</sup> The full separate opinion of Mr. Bakhtiyar Tuzmukhamedov is available at <https://www.ohchr.org/sites/default/files/2022-05/Separate-opinion-BT.docx>