



Provisional version

## Committee on Legal Affairs and Human Rights

# Strengthening international regulations against trade in goods used for torture and the death penalty

## Report\*

Rapporteur: Mr Vusal HUSEYNOV, Azerbaijan, Group of the European People's Party

### A. Draft recommendation

1. The absolute prohibition of torture and inhuman and degrading treatment or punishment in all circumstances is a peremptory norm of international law, incorporated into numerous treaties including Article 3 of the European Convention on Human Rights (the Convention), Article 7 of the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. This prohibition is so strict as to require States to take into account consequences of their actions that may occur in other countries.

2. The death penalty is now unlawful in all Council of Europe member States. Protocol no. 6 to the Convention, 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; and Protocol no. 13 to the Convention, which abolishes the death penalty in all circumstances, has been ratified by all member States except Armenia, Azerbaijan and the Russian Federation. 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 Convention.

3. 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.

4. The trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment can contribute to the incidence of capital punishment and torture or serious ill-treatment by providing those responsible with the means to act. The European Union's prohibition of sales of pharmaceutical products that could be used for capital punishment to third countries where it is known that the products will be used for that purpose, for example, has seriously hampered the ability of several States of the United States of America to execute the death penalty.

5. The Parliamentary Assembly cannot accept that companies or other individuals or entities in Council of Europe member States are involved in the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment. It is concerned that the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment continues to take place in some member States of the Council of Europe.

6. The Parliamentary Assembly takes note of the European Union's Council Regulation (EC) 1236/2005 (Regulation 1236/2005) concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, as amended by Regulation (EU)

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\* Draft recommendation adopted unanimously by the committee on 12 December 2017.

2016/2134. This regulatory regime is the most advanced and effective in the world. It represents an approach that can and should be applied by all Council of Europe member States. Since information sharing and technical cooperation, which are fundamental parts of any international regulatory mechanism, depend on normative and procedural compatibility, it is important to harmonise all Council of Europe member States' regulatory systems.

7. The Parliamentary Assembly welcomes and fully supports the Global Alliance to end trade in goods used for capital punishment and torture (the Global Alliance), launched by the European Union, Argentina and Mongolia on 18 September 2017, and its Political Declaration, adopted by 58 countries, including 41 Council of Europe member States, and the European Union. The Declaration recalls the essential principles of international law, condemns the trade in goods used for the death penalty, torture or inhuman or degrading treatment of punishment, commits States to taking regulatory action at national level and to cooperating at international level, and establishes a basic framework to facilitate this.

8. For the purposes of the present recommendation, the expression "goods used for the death penalty, torture or inhuman or degrading treatment or punishment" should be considered to cover items falling within the following categories, as defined in Annexes II, III and IIIa of Regulation 1236/2005, as revised in 2014 and 2016:

8.1. Goods which have no practical use other than for the purposes of the death penalty, torture or inhuman or degrading treatment or punishment, the trade in which should be prohibited, including:

8.1.1. Goods specifically designed for the execution of human beings and certain of their components;

8.1.2. Goods designed to restrain human beings but which are not suitable for such use by law enforcement authorities ;

8.1.3. Portable devices which are not suitable for use by law enforcement authorities for the purpose of riot control or self-protection; and

8.1.4. Certain types of whips;

8.2. Goods designed for legitimate use by police or security forces but which could be abused for the purpose of torture or inhuman or degrading treatment or punishment, the trade in which should require authorisation, including:

8.2.1. Certain goods designed for restraining human beings;

8.2.2. Certain weapons designed for the purpose of riot control or self-protection;

8.2.3. Certain weapons and equipment disseminating incapacitating or irritating chemical substances for the purpose of riot control or self-protection and certain related chemical substances; and

8.2.4. Products which could be used for the execution of human beings by means of lethal injection.

9. The term "trade" in goods used for the death penalty, torture or inhuman or degrading treatment or punishment should be considered to cover the following activities, as defined in Regulation 1236/2005, as amended in 2016:

9.1. Import and export of regulated goods;

9.2. Transit of regulated goods through national territory;

9.3. Brokering of transfers of regulated goods between third countries;

9.4. Provision of technical assistance in relation to regulated goods;

9.5. Training in the use of regulated goods;

9.6. Promotion of regulated goods at trade fairs; and

9.7. Buying from or selling to parties in third countries any form of advertising for regulated goods.

10. The Parliamentary Assembly calls on the member States of the Council of Europe, insofar as it is not already done, to:

10.1. Introduce legislation regulating the trade in goods used for the death penalty, torture or inhuman or degrading treatment or punishment, prohibiting trade in goods defined in paragraph 8.1. and requiring authorisation of trade in goods defined in paragraph 8.2., such authorisation to be withheld when there are reasonable grounds for believing that they might be used for capital punishment or torture or inhuman or degrading treatment or punishment in a third country;

10.2. Take full account of information from a range of sources, including the reports of international and regional human rights mechanisms and independent civil society bodies, on the situation regarding the death penalty, torture and inhuman or degrading treatment or punishment in third countries when examining requests for authorisation of trade in relevant goods;

10.3. Publish annual reports on their regulatory activities in this area, including details of decisions given on requests for authorisation of trade in specific goods and the reasons for those decisions;

10.4. On the basis of such annual reports and through direct contacts, take account of other member States' decisions on requests for authorisation of trade in specific goods, especially refusals to grant such authorisation;

10.5. Join the Global Alliance, 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 Global Alliance for the design and implementation of relevant legislation;

10.6. Ratify Protocols no. 6 and 13 to the Convention and request that the Committee for the Prevention of Torture make public any unpublished reports concerning them.

11. The Parliamentary Assembly calls upon the European Union and its institutions, as appropriate, to:

11.1. Encourage its member States that have not yet done so to publish the annual reports required of them under Regulation 1236/2005, ensuring that the European Commission's own future annual report is a comprehensive review of the situation across the European Union;

11.2. Consult independent civil society bodies with particular expertise in the field when preparing the Commission's review of implementation of Regulation 1236/2005, including with respect to possible amendment of the Regulation and revision of its Annexes II and III;

11.3. Continue promoting the Global Alliance throughout the world, and co-operate with the Council of Europe to this end as regards the latter's member States.

12. The Council of Europe is a global pioneer in abolition of the death penalty and enforcement of the prohibition on torture and along with its member States should continue to play a leading role in this field. The Parliamentary Assembly therefore calls upon the Committee of Ministers to:

12.1. Encourage those Council of Europe member States that have not yet done so to join the Global Alliance;

12.2. Provide technical support in relation to implementation of paragraph 10 of the present recommendation through cooperation activities with those member States that request it;

12.3. 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 Regulation 1236/2005 through harmonised national systems in non-EU member States, and which should include a mechanism to monitor progress made in implementing the recommendation;

12.4. Co-operate with the European Union to these ends.

## Explanatory memorandum by Mr Huseynov, rapporteur

### 1. Introduction

1. This report arises from a motion for a resolution tabled by Mr Cruchten and others on 14 October 2016. The motion referred to certain existing European standards in this area, including the European Convention on Human Rights and the 2014 Council of Europe Committee of Ministers' Declaration on business and human rights, as well as the European Parliament's 2016 vote in favour of strengthening the existing European Union (EU) Regulation 1236/2005 on trade in security equipment. It then noted that "some loopholes have still not been addressed, particularly in relation to technical assistance and training" and that civil society reports had found that "security equipment with no practical use other than to inflict torture and the death penalty is still being manufactured, marketed and sold in some Council of Europe Member States".

2. On this basis, the motion called on the Assembly 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".

3. The Committee appointed me rapporteur at its meeting on 7 March 2017. During the preparation of the report, the Committee held a hearing with Dr Michael Crowley, Research Associate at the Omega Research Foundation, and Mr Albert Straver, Administrator in charge of Foreign Policy-related Regulatory Instruments, Service for Foreign Policy Instruments, European Commission, at its meeting in Belgrade on 18 May 2017. I also sent a questionnaire to the parliaments of member and observer States seeking information on the national situation with respect to the trade in goods used for torture and the death penalty and regulation of that trade, to which I received twelve responses, from Andorra, Azerbaijan, Cyprus, the Czech Republic, France, Germany, Luxembourg, Norway, Poland, Spain, Sweden and Switzerland.

### 2. Past international activities and existing international standards on regulation of trade in goods used for torture and the death penalty

4. The absolute prohibition of torture and inhuman and degrading treatment or punishment in all circumstances is a peremptory norm of international law, incorporated into numerous treaties including Article 3 of the European Convention on Human Rights (the Convention), Article 7 of the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. This prohibition 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.

5. The death penalty is now unlawful in all Council of Europe member States. Protocol no. 6 to the Convention, 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; and Protocol no. 13 to the Convention, which abolishes the death penalty in all circumstances, has been ratified by all member States except Armenia, Azerbaijan and the Russian Federation. 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 Convention.

6. In its 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 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 and production and combat its proliferation, and to report thereon to the Commission". This call was reiterated in Resolution 2002/38.

7. In response, in 2003 the UN Special Rapporteur on torture, Mr Theo 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>1</sup> This 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... [T]he Special Rapporteur notes with appreciation a number of initiatives taken at the national and regional levels to prevent the trade and production in equipment specifically designed to inflict torture or other cruel, inhuman or degrading

<sup>1</sup> E/CN.4/2003/69, 13 January 2003.

treatment... [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."

8. I share the Special Rapporteur's view and consider that on the basis of their 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. The question is therefore how this can best be achieved.

9. The Special Rapporteur's subsequent report to the 2005 Session of the Commission on Human Rights concluded with the following recommendations to States:<sup>2</sup>

- To 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;
- To 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;
- To suspend the manufacture, transfer and use of equipment whose medical effects are not fully known or whose use in practice has revealed a substantial risk of abuse or unwarranted injury, pending the outcome of a rigorous and independent inquiry into its use;
- To monitor research and development of security and law enforcement technologies;
- To collect and disseminate disaggregated data on the manufacture and trade of security and law enforcement equipment;
- To consider the development of an international regulatory mechanism;
- To ensure that the transfer of expertise to, and/ or training of, military, security and police personnel of another country does not involve the transfer of skills, knowledge or techniques likely to lend themselves to torture in the recipient country;
- To introduce legislation to control and monitor the activities of private providers of military, security and police services to ensure that they do not facilitate or perpetrate torture.

10. Since then, considerable progress has been made at EU level towards effective regulation of the trade in goods used for torture and the death penalty. In 2005, the European Council adopted Regulation No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. The European Commission has twice, in 2011 and 2014, updated and extended the annexes to this Regulation that list prohibited and controlled goods (see further below). In 2016, the European Council and the European Parliament amended the 2005 Regulation more extensively.

11. The EU Regulation distinguishes between two different categories of items whose trade should be regulated. 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 trade and any technical assistance related to them is equally prohibited. It currently includes detailed lists of items under the following headings:

- 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.

12. Annex III lists goods that have been designed for other purposes (especially for law enforcement), but could be used for torture and ill-treatment; this category is subject to trade controls, requiring authorisation, on a case by case basis, by national authorities. It 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;

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<sup>2</sup> Report of the Special Rapporteur, Theo van Boven, E/CN.4/2005/62, 15 December 2004.

- Weapons and equipment disseminating incapacitating or irritating chemical substances for the purpose of riot control or self-protection and certain related substances;
- Products which could be used for the execution of human beings by means of lethal injection;
- Components designed for goods designed for the execution of human beings.

Finally, Annex IIIa lists products which could be used for the execution of human beings by means of lethal injection.

13. The Regulation requires Member States to put in place 'effective, proportionate and dissuasive' penalties for breaches of the Regulation. It also imposes information obligations on the competent authorities, which have to notify all other Member States' authorities and the Commission when they refuse to issue an authorisation; and on the Member States, which are required to publish an annual activity report concerning the number of applications received, the goods and countries concerned, and the decisions taken on these applications.

14. The 2016 revision of Regulation 1236/2005 introduced several significant new provisions. Transit of Annex II goods through EU member States is prohibited and transit of Annex III goods prohibited when the party executing the transit knows that any part of a shipment of such goods is intended to be used for torture or other cruel, inhuman or degrading treatment or punishment or for capital punishment in a third country. Brokering of Annex II goods is prohibited, regardless of the origin of the goods, and authorisation is required for brokering of Annex III goods. Supplying technical assistance related to Annex II goods to a customer in a third country is prohibited, as is accepting technical assistance related to such goods from a supplier in a third country. Suppliers of technical assistance and brokers are prohibited from supplying or offering training in the use of Annex II goods to parties in third countries. It is prohibited to display or offer for sale Annex II goods in an exhibition or fair taking place in the EU and EU-based individuals or companies are prohibited from selling or purchasing advertising in print or on the internet, television or radio relating to Annex II goods. It also established a license authorisation process for Annex IIIa goods (specifically certain anaesthetic agents) to ensure they would not be transferred for use in lethal injections, without curtailing or delaying their transfer for legitimate medical purposes.

15. The revised Regulation also established important new information and implementation mechanisms. Information sharing between EU member States is particularly important in the context of decisions on applications for authorisations of exports of Annex III goods, as States have since introduction of the regulation in 2005 been required to take into account "in particular whether an application in respect of an essentially identical export has been dismissed by another Member State in the preceding three years". In addition to the existing requirement on member States to "make a public, annual activity report" on regulation-related activities, the European Commission is now required to prepare its own annual report comprised of the national reports, to be made publicly available. The 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". Finally, a new "Anti-Torture Coordination Group" was established to "examine any questions concerning the application of this Regulation"; the Commission shall submit an annual report in writing to the European Parliament on the Group's activities.

16. The 2011 UN Guiding Principles on Business and Human Rights contain provisions relevant to regulation of the trade in goods used for torture and the death penalty. In particular, Principle 2 urges States to set out clearly the expectation that businesses domiciled in their territory and/ or jurisdiction respect human rights throughout their operations, and Principle 3 calls on States to enforce laws requiring businesses to respect human rights. Principle 7 notes that because the risk of human rights abuses is heightened in conflict-affected areas, States should help ensure that businesses operating in those contexts are not involved in such abuses. Principle 17, directed at businesses themselves, recommends that they conduct 'human rights due diligence' covering adverse human rights impacts which may be linked directly to its operations, products or services by its business relationships. The 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."

17. The 2016 Committee of Ministers' Recommendation to member States on human rights and business, intended to contribute to the effective implementation of the UN Guiding Principles at European level, contains detailed recommendations in appendix.<sup>3</sup> 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." Other provisions are also of interest, such as 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." There are also provisions addressing the authorities' role in ensuring human rights due diligence by businesses, especially those whose exports are subject to government licence (paragraphs 20, 22 and 28).

### 3. Trade in security equipment in the member States of the Council of Europe

18. As noted above, one of the aims set out in the original motion is to "investigate and report on trade in security equipment in the member States of the Council of Europe".

19. The UN Special Rapporteur on Torture's 2005 report (see paragraph 9 above) included measurements of global trade, by region. These indicate that between 2000-2004, Eastern European and "Western European and other"<sup>4</sup> states were home to 18 out of 20 manufacturers of 'leg irons' in the world; 255 out of 413 manufacturers, brokers and distributors of electro-shock weapons and 15 out of 56 manufacturers of such weapons; and 36 out of 54 manufacturers of chemical irritants and chemical irritant devices.

20. More recent information can be found in the reports of the Omega Research Foundation/ Amnesty International, including details provided by Dr Michael Crowley, Research Associate at the Omega Research Foundation, during the Committee hearing on 18 May 2017. I am disappointed and concerned to see that these reports reveal commercial activity in relation not only to goods regulated under Annex III of the EU Regulation but also goods prohibited under Annex II of the EU Regulation.

21. Thumbcuffs have been listed in Annex II of the EU Regulation since the Annexes were amended in 2014. Nevertheless, thumbcuffs have been promoted at trade fairs in France (Milipol, November 2015), including products marketed by French companies Le Protecteur-Scorpion-ATAM and Welkit, and Germany (IWA Outdoor Classics Event, Nuremberg, March 2015).<sup>5</sup>

22. Spiked batons and spiked shields have both been listed in Annex II of the EU Regulation since 2014. Again, such items were exhibited at Milipol 2015 in France. One Chinese firm even displayed a sample spiked shield on its stand, despite the import of such items into the EU being prohibited.<sup>6</sup> Amnesty International observers at Milipol 2017 found that once again, a Chinese firm was promoting spiked batons, a spiked arm-guard and similar products;<sup>7</sup> after Amnesty brought this to the attention of the Milipol organisers, the stand in question was closed.<sup>8</sup>

23. Weighted restraints have also been listed in Annex II of the EU Regulation since 2014. Again, Chinese firms exhibited such products at Milipol 2015 and 2017. German company Clemen & Jung produces a handcuff weighing 1,380g.<sup>9</sup> Cuffs for anchoring to a wall, floor or ceiling have also been listed in Annex II since 2014. The website of Czech company ALFA – PROJ spol. s.r.o. promotes an item capable of such use, although the description of this item as being intended "to confine persons in detention" was removed

<sup>3</sup> CM/Rec(2016)3.

<sup>4</sup> It is unclear from the report what this expression means, although it can be noted that North America and Australasia are not included in the other regional definitions used in the tables.

<sup>5</sup> ORF/ Amnesty International, "Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment", EUR 01/3636/2016, April 2016.

<sup>6</sup> "Grasping the Nettle: Ending Europe's Trade in Execution and Torture Technology", EUR 01/1632/2015, May 2015 and "Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment", Omega Research Foundation and Amnesty International.

<sup>7</sup> "EU: Amnesty discovers gruesome illegal torture equipment for sale in Paris", Amnesty International, 22 November 2017.

<sup>8</sup> "French Fair Shuts Stand After Amnesty Finds 'Torture Tool'", New York Times, 22 November 2017.

<sup>9</sup> "Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment", Omega Research Foundation and Amnesty International.

following inquiries by the Omega Research Foundation and Amnesty International.<sup>10</sup> Clemen & Jung also produces a 'heavy cuff with anchor', weighing over 1kg, apparently designed for attachment to a fixed object; this product was promoted at the IWA Outdoor Classics Event 2015.<sup>11</sup> Both of the aforementioned Clemen & Jung handcuffs now appear on the company's website as 'phantasie cuffs', although they appear quite robust enough for use (or abuse) by police or security forces. A Russian company has manufactured and promoted a single handcuff allowing a prisoner to be "safely chained to the wall", as well as bracelets allowing a group of up to five prisoners to be attached to a "fixed support".<sup>12</sup>

24. Body worn electric shock devices (including belts, vests and cuffs) activated by remote control appear in Annex II of the EU Regulation since 2014. The CPT "has made clear its opposition to the use of equipment of this kind for controlling the movements of detained persons, whether inside or outside places of deprivation of liberty. Such equipment is, in the Committee's opinion, inherently degrading for the person to whom it is applied, and the scope for misuse is particularly high. Alternative means of ensuring security during the movements of detained persons can and should be found."<sup>13</sup> Nevertheless, German company PKI Electronic Intelligence GmbH advertises on its website stun cuffs that can deliver a 60,000V shock by remote control from up to 300m away (with the slogan "You never saw an escaping person stop so quickly!") In correspondence with Omega Research Foundation and Amnesty International, PKI had twice previously denied manufacturing or selling this device.<sup>14</sup> 'Electronic shackles' produced by a Chinese company were promoted at Milipol 2015 in France.<sup>15</sup>

25. Cage or net beds are prohibited under the EU Regulation since 2014. Two Czech companies, Audy s.r.o. and Laboratorni a zdravotnická technika OPTING servis, were still marketing such items until at early 2015.<sup>16</sup> This is of particular concern as in its 2015 report on the Czech Republic, the CPT recalled having "repeatedly expressed its serious misgivings about the use of net-beds" in that country.

26. Electric shock batons and shields and stun guns are regulated under Annex III of the EU Regulation since 2014. The CPT has expressed "strong reservations" about the use of such direct contact weapons, which cause "very intense, localised pain, with the possibility of burns to the skin."<sup>17</sup> They are or have been produced and/ or marketed by firms based in a number of Council of Europe member States, including Bosnia and Herzegovina<sup>18</sup> and Poland (Eltraf Bis HPE Polska)<sup>19</sup> – in the latter cases promoting its products at a trade fair in the United Arab Emirates –, France (Magforce International, GK Professional and Dépot SD Equipements)<sup>20</sup>, Russia (March Group, which markets its products domestically and in countries including Iran, Saudi Arabia and Uzbekistan)?<sup>21</sup> the Czech Republic (Euro Security Products), Portugal (Inventarium Security, Research and Development) and Slovenia (GER d.o.o.).<sup>22</sup>

27. Certain chemical irritants are also listed in Annex III since 2014. The European Court of Human Rights has stated that "the unwarranted use of tear gas by law enforcement officers is not compatible with the prohibition of ill-treatment."<sup>23</sup> The CPT has stated of pepper spray, for example, that "this potentially dangerous substance should not be used in confined spaces. Further, if exceptionally it needs to be used in open spaces, there should be clearly defined safeguards in place... Pepper spray should never be deployed

<sup>10</sup> "Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment", Omega Research Foundation and Amnesty International. It should be noted that in its response to the questionnaire, the Czech Republic replied "N/A" to the question concerning manufacture or supply of goods appearing in the revised Annexes II and III.

<sup>11</sup> "Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment", Omega Research Foundation and Amnesty International.

<sup>12</sup> Presentation of Dr Michael Crowley, ORF, to the Committee meeting in Belgrade on 18 May 2017.

<sup>13</sup> CPT, "Electrical discharge weapons (Extract from the 20<sup>th</sup> General Report of the CPT, published in 2010)", CPT/Inf(2010)28\_part, para. 74.

<sup>14</sup> "Grasping the Nettle: Ending Europe's Trade in Execution and Torture Technology", Omega Research Foundation and Amnesty International, EUR 01/1632/2015, May 2015 ("Grasping the Nettle"). The rapporteur can confirm that this item still appeared on PKI's website when accessed on 8 November 2017.

<sup>15</sup> "Grasping the Nettle".

<sup>16</sup> "Grasping the Nettle".

<sup>17</sup> CPT/Inf(2010)28-part.

<sup>18</sup> Presentation of Dr Michael Crowley, ORF, to the Committee meeting in Belgrade on 18 May 2017.

<sup>19</sup> Omega Research Foundation, "Briefing Paper: Use of Tools or Torture in OSCE participating States", June 2017 (ORF Briefing Paper). In its response to the questionnaire, the Polish parliament indicated that there was no official information about manufacturers or suppliers of regulated goods in Poland.

<sup>20</sup> "Grasping the Nettle: Ending Europe's Trade in Execution and Torture Technology", Omega Research Foundation and Amnesty International, EUR 01/1632/2015, May 2015.

<sup>21</sup> ORF Briefing Paper.

<sup>22</sup> "Grasping the Nettle".

<sup>23</sup> *Iczi v. Turkey*, App. no. 42606/05, judgment of 23 July 2013.

against an inmate who has already been brought under control. Further, it should not form part of the standard equipment of a prison officer.”<sup>24</sup> Companies in many Council of Europe member States produce such items: for example, in France, SAE Alsetex produces a range of products including chemical irritant grenades and back-pack style sprayers, whose use has been documented in countries such as Côte d’Ivoire, the Democratic Republic of Congo and Bahrain,<sup>25</sup> and a Turkish company produces unmanned aerial vehicles with a 5km range and 30 minutes autonomy capable of dropping up to nine tear-gas projectiles onto groups of persons below.<sup>26</sup>

28. Acoustic devices are not regulated but also raise human rights concerns relating to their effects and possible abuse, as they may be capable of generating sound levels above the thresholds for pain and potential hearing damage. European companies produce and/ or promote such items (including Hugin Group International & PKI Electronic Intelligence GmbH in Germany), and they have been promoted at European trade fairs (e.g. items produced by the Israeli company Tar Ideal, at the Eurosatory 2014 exhibition in France).<sup>27</sup> Another technology of potential concern is the ‘millimetre wave weapon’, designed to project electro-magnetic radiation at specific wavelengths so as to cause discomfort or pain to the targets by heating the skin, but which may cause serious burns through over-exposure. These have in the past been marketed by AT-Marine Oy of Finland.<sup>28</sup>

29. Hoods, including spit hoods and those that may be attached to handcuffs, appear in Annex III of EU Regulation since 2014. The European Court of Human Rights has ruled that blindfolding a prisoner may constitute cruel or inhuman treatment when combined with certain other interrogation techniques<sup>29</sup> or even torture when used with certain other techniques;<sup>30</sup> the CPT has found that blindfolding “will frequently amount to psychological ill-treatment” and should be abolished,<sup>31</sup> and has called for the prohibition of blindfolding or hooding of prisoners in police custody, including during interviews.<sup>32</sup> Despite these long-standing concerns of the Court and the CPT, as recently as 2011, a Chinese firm was promoting an opaque hood attached to handcuffs at Milipol 2011 in France.<sup>33</sup>

30. The EU Regulation also covers provision of technical assistance, including training, although this is regulated (prohibited) only in relation to Annex II goods. In my view, European companies should also be regulated in the type of training they provide to security and police forces in third countries. For example, the Czech company Euro Security Products, which trades amongst other things in electric shock devices, pepper spray, restraints and batons, trains police and security forces in their use. Photographs on the company’s website of previous courses, in countries with poor human rights records including China, the Democratic Republic of Congo, India, Togo and Uganda, show training in the use of techniques such as ‘hog-tying’ (restraint into a hyper-extended position) and use of batons in neck-holds.<sup>34</sup>

31. As noted above, the Regulation requires EU member States to make a “public, annual activity report, providing information on the number of applications received, on the goods and countries concerned by these applications, and on the decisions they have taken on these applications”. According to research conducted by Liege University, “no such report has been published so far... [although] several Member States publish their statistics as concerns transactions [covered by the Regulation].”<sup>35</sup> The Liege University report mentions the United Kingdom’s publication of statistics; my own research and information from Omega Research Foundation shows that, to varying extents, also Bulgaria, the Czech Republic, Germany, Hungary, Ireland, Lithuania, Romania, Slovenia, Spain and Sweden have published some form of report, or at least statistics – although few of these have done so fully or systematically. Given the number of EU member States that are involved in the production or promotion of Annex III goods, this is a matter of concern and undermines the transparency that the regulatory regime is supposed to ensure. The first annual compilation

<sup>24</sup> CPT, “Report to the Swedish government [on the visit of 18-28 May 2015]”, CPT/Inf(2016)1, 17 February 2016.

<sup>25</sup> ORF Briefing Paper.

<sup>26</sup> Presentation of Dr Michael Crowley, ORF, to the Committee meeting in Belgrade on 18 May 2017.

<sup>27</sup> “Grasping the Nettle”.

<sup>28</sup> “Grasping the Nettle”.

<sup>29</sup> *Ireland v. United Kingdom*, App. no. 5310/71, judgment of 18 January 1978.

<sup>30</sup> *Oçalan v. Turkey*, App. no. 46221/99, Grand Chamber judgment of 12 May 2005.

<sup>31</sup> CPT, “Report to the Turkish government [on the visit of 02-14/09/01]”, CPT/Inf(2002)08.

<sup>32</sup> CPT, “Report to the Spanish government [on the visit of 19/9 – 01/10/07]”, CPT/Inf(2011)11.

<sup>33</sup> “Grasping the Nettle”.

<sup>34</sup> “Grasping the Nettle”. Again, it should be noted that in the Czech Republic’ response to the questionnaire, the reply to the question concerning companies training the police or security forces of other countries in techniques that could be misused for ill-treatment or torture was “N/A”.

<sup>35</sup> “The European Union Trade Control Regime of items which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment of punishment – Comment of the Legislation: article-by-article”, European Studies Unit, Liege University, January 2017.

report that the European Commission is required to prepare following the 2016 revision is expected to be published next year.

#### **4. Developing appropriate rules to prevent the trade or brokering of equipment which could facilitate torture and the application of the death penalty**

32. The most obvious issue in relation to regulation is that the EU regulations apply only to the 28 (soon to be 27) EU member States. As can be seen from the foregoing, these are not the only Council of Europe member States to be involved in some way in this trade. The most relevant regulatory standards that do apply to all Council of Europe member States are non-binding and substantively inadequate: the UN Guiding Principles on Business and Human Rights do not specifically mention this issue; and the one specific provision of the Committee of Ministers' Recommendation on human rights and business covers only trade in goods that can only be used for prohibited purposes, and not goods that could be abused for such purposes.

33. Effective regulation of the trade by non-EU member States of the Council of Europe in goods used for torture and the death penalty thus depends on domestic provisions with little guidance from a detailed international framework of standards.

34. In addition, the EU Regulation, although representing the state of the art in the matter, will always leave room for improvement, whether through updating in response to new developments, such as new forms of goods or new methods of trade, or to cover possible lacunae such as provision of technical assistance and training in relation to Annex III goods in certain circumstances.

#### **5. The Global Alliance to end trade in goods used for capital punishment and torture**

35. On 18 September 2017, the EU, Argentina and Mongolia launched the Global Alliance to end trade in goods used for capital punishment and torture at a special event on the occasion of the United Nations General Assembly in New York. 58 participants in the Alliance adopted a political declaration at the launch event, including 41 Council of Europe member States. The adopting states, having acknowledged that "the availability of goods used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment enables such practices", then resolved to "act together to further prevent, restrict and end trade"; to "take effective measures, *inter alia* through legislation and effective enforcement where appropriate, for the restriction of the trade"; to "strengthen cooperation in this area and to form a global network of Focal Points for the sharing of information and best practices"; and "to make available technical assistance for the design and implementation of relevant legislation".

36. I can only welcome this initiative, which has been supported by the great majority of Council of Europe member States, along with sixteen others, including Council of Europe observer States Canada and Mexico. I strongly encourage 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.

#### **6. Conclusions and recommendations**

37. Much progress has been achieved in Europe in relation to the concerns expressed in the UN by the Commission for Human Rights and the Special Rapporteur on Torture during the early years of the millennium. It is clear, however, that much remains to be done, including to clarify the situation on the overall Council of Europe level. The Global Alliance, whose declaration has been adopted by most Council of Europe member States, is an important political initiative, but will require detailed technical measures to be taken at national level if it is to have real practical effect: the provisions on legislation, enforcement mechanisms, international cooperation and mutual technical assistance are fundamental to this.

38. For those European Union member States that are already bound by the 'gold standard' of Regulation 1236/2005, it is a matter of concern to see that activities concerning the production, marketing and promotion of Annex III regulated and even Annex II prohibited goods have continued, even after the scope of the regulation was extended in 2014 and its provisions revised in 2016. Information deficits are evident both at national level, as shown by the Czech and Polish responses to the questionnaire which showed apparent ignorance of the activities of certain companies located in those countries, and at European level, given most EU member States' apparent failure to publish the reports required under Article 13 of the Regulation. The 'gold standard' of the EU regulatory regime will not reach its full potential until national authorities are fully informed of the activities of companies within their jurisdictions and the European Commission is fully informed of the regulatory activity of national authorities.

39. The situation with respect to non-EU member States of the Council of Europe is, of course, of potentially far greater concern. Of the responses to the questionnaire that I received from non-EU member States, both Azerbaijan and Norway indicated that their national legislation did not directly address the regulation of trade in goods used for the death penalty or torture (neither Andorra nor Switzerland answered this question). Unfortunately this means that I am not in a position to comment on the existence or quality of regulation in other countries. I see no reason, however, why all of these States should not follow the approach taken by the EU Regulation, whether by adopting new legislation or amending that which is already in force, as appropriate. Since information sharing and technical cooperation, which are fundamental parts of any international regulatory mechanism, depend on normative and procedural compatibility, it is important to harmonise all Council of Europe member States' regulatory systems. This could be facilitated by those States joining the Global Alliance and making full use of the cooperation and assistance mechanisms set out in its Declaration.

40. As a global pioneer in abolition of the death penalty and enforcement of the prohibition on torture, I consider that the Council of Europe as a whole should play a leading role in this field, both politically and technically. This could be done by supporting the Global Alliance, cooperating with the EU on its implementation in Council of Europe member States and providing technical assistance to those member States that seek it. Ideally, such technical assistance would be based on a Committee of Ministers' recommendation to member States setting out guidance on how to establish and implement an effective regulatory regime in effect extending the scope of the approach taken by Regulation 1236/2005 through harmonised national systems in non-EU member States.

41. My detailed proposals to these ends are set out in the accompanying preliminary draft resolution.