

# ESSENTIAL ELEMENTS OF A TORTURE-FREE TRADE TREATY

ASSESSED FOR RISKS OF TORTURE

PROHIBITIONS  
INHERENTLY ABUSIVE EQUIPMENT

PROTECTING HUMAN RIGHTS

RISKS OF TORTURE

RISKS OF TORTURE

ASSESSMENT

RISK

ROBUST AND COMPREHENSIVE

EXPORTS AND TRANSITS

INTERNATIONAL COOPERATION

MONITORING & REPORTING

PREVENT TORTURE & OTHER ILL TREATMENT

TRADE CONTROLS

INTERNATIONAL STANDARDS

END-USER CERTIFICATIONS

REGULATION

NOTIFICATION PROCEDURES

OBLIGATIONS

NATIONAL REGULATION

PROCEDURES

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# 1. INTRODUCTION

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Despite the categorical prohibition of torture and other cruel, inhuman or degrading treatment or punishment (“other ill-treatment”) under international law, trade in law enforcement equipment used in violation of this prohibition continues globally. While a patchwork of regional law and standards regulates some of this trade, the absence of international standards has prevented the emergence of a comprehensive and coherent global response. In May 2022, at the request of the UN General Assembly, a Group of Governmental Experts set up by the UN Secretary-General released a report seeking to address this gap. The Group recommended the establishment of common international standards and put forward the option of a treaty – a legally binding instrument – to achieve this goal.<sup>1</sup> This position paper outlines the essential elements that should inform the content of such a treaty.

An international Torture-Free Trade Treaty should have two central aims: first, to prohibit the production of and trade in equipment used in law enforcement that has no practical use other than for the purpose of torture or other ill-treatment (“inherently abusive equipment”), as well as related activities; and second, to establish effective human rights safeguards to control the trade in law enforcement equipment that could be used for torture or other ill-treatment. Such prohibitions and controls would aid the prevention of torture and other ill-treatment by taking inherently abusive equipment out of circulation and limiting risks that other law enforcement equipment could be used in violation of the absolute prohibition of torture and other ill-treatment. A Torture-Free Trade Treaty would also stop companies involved in the trade in law enforcement equipment from

profiting from acts of torture or other ill-treatment and prevent states that supply equipment from contributing to those abuses.

“Law enforcement equipment”, as it is used in this position paper, refers to goods that relate to the use of force by law enforcement officials (including officials working in custodial settings, such as prisons, detention centres and secure medical facilities), but excludes firearms, whose trade is regulated under existing international treaties and standards.<sup>2</sup> “Law enforcement equipment” includes instruments and weapons used for crowd control (such as tear gas, water cannons and batons); for dealing with violent individuals (such as pepper spray, electric shock projectile weapons and kinetic impact projectiles); for arrest and in detention (including a wide variety of restraints,

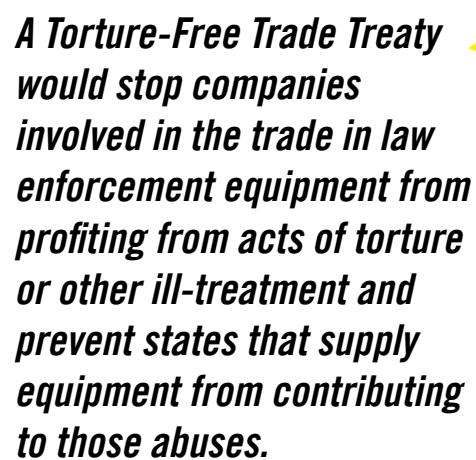
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- 1 UN Office of the High Commissioner for Human Rights (OHCHR), *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards: Report of the Group of Governmental experts*, A/76/850, 31 May 2022, [ohchr.org/en/documents/reports/a76850-towards-torture-free-trade-examining-feasibility-scope-and-parameters](https://www.ohchr.org/en/documents/reports/a76850-towards-torture-free-trade-examining-feasibility-scope-and-parameters). The Group put forward two options for common international standards: option a, a legally binding instrument; and option b, non-binding standards. This position paper discusses option a.
  - 2 Arms Trade Treaty, adopted by the UN General Assembly on 2 April 2013; UN Office on Drugs and Crime (UNODC), *The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol)*, adopted by Resolution 55/255 of 31 May 2001.

such as handcuffs).<sup>3</sup> It also includes a narrower range of inherently abusive equipment, such as electric shock batons, thumb cuffs and other inhumane restraints. Goods that are not designed or intended to be used for force (such as, for example, law enforcement officials' office supplies, communications systems and certain protective equipment) would therefore not fall under the scope of the proposed treaty.<sup>4</sup>

The second section of this position paper outlines how a Torture-Free Trade Treaty could reflect its general principles and goals, including ensuring the scope of covered equipment is clearly delineated. The third section provides guidance on the potential content of provisions to prohibit activities relating to inherently abusive equipment. The fourth section addresses how to structure obligations to control the trade in equipment that could be used for torture or other ill-treatment. The fifth section covers operative aspects of the treaty regime, such as reporting and mechanisms to monitor and support implementation, as well as international cooperation and assistance. Annex I contains a list of equipment that can be considered inherently abusive, and Annex II, equipment that could be used for torture or other ill-treatment.

As part of discussions on a Torture-Free Trade Treaty process, there is an opportunity to explore prohibiting goods used exclusively to implement the death penalty and controlling the trade in goods that could be used to carry out executions.

These goals could be incorporated within a Torture-Free Trade Treaty or addressed separately, such as through an optional protocol to that treaty. The Group of Governmental Experts chose to treat death penalty goods separately in its report, focusing its recommendations on law enforcement equipment.<sup>5</sup> Consequently, while this position paper points to examples of how death penalty goods could be incorporated within a Torture-Free Trade Treaty process, it does not explore the topic in depth.



***A Torture-Free Trade Treaty would stop companies involved in the trade in law enforcement equipment from profiting from acts of torture or other ill-treatment and prevent states that supply equipment from contributing to those abuses.***

3 OHCHR, UN Code of Conduct for Law Enforcement Officials, Resolution 34/169, Commentary on Article 1, para 1: "The term 'law enforcement officials', includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention." The definition used in this position paper is more expansive. The intention is to focus on the equipment and avoid drawing artificial distinctions between the custodial and non-custodial settings in which equipment can be used. In some cases, private actors carrying out law enforcement functions, such as employees of private security or prison companies, may have access to some of the equipment a Torture-Free Trade Treaty would regulate, in which case the treaty's provisions would continue to apply. Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (EU Regulation 2019/125), [perma.cc/858U-JEEP](https://perma.cc/858U-JEEP), Article 2 (c): "law enforcement authority' means any authority in a third country responsible for preventing, detecting, investigating, combating and punishing criminal offences, including, but not limited to, the police, any prosecutor, any judicial authority, any public or private prison authority and, where appropriate, any of the state security forces and military authorities."

4 Consequently, goods such as surveillance equipment and vehicles would not fall under the scope of the proposed treaty.

5 OHCHR, *Towards torture-free trade*, A/76/850, 31 May 2022 (previously cited), paras 64 and 87-90.

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## 2. GENERAL PRINCIPLES AND GOALS

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The Torture-Free Trade Treaty should set out its object and purpose, including to establish strong international standards that help prevent torture and other ill-treatment, in its operative part. Because the treaty will create new binding international obligations, its goals and the scope of equipment it covers should be clearly defined. The treaty’s preamble provides a space to reinforce its object and purpose and highlight existing international and regional law, standards and guidance that give momentum to the creation of a treaty, as well as inform its text.

**A. The treaty should help prevent torture and other ill-treatment through setting strong international standards and a floor for national regulation**

Key principles underlying the treaty should be outlined in an object and purpose provision, particularly the goal of helping prevent torture and other ill-treatment by prohibiting inherently abusive equipment and controlling the transfer of law enforcement equipment that could be used for these acts.<sup>6</sup> The preamble could draw out the human rights challenges that trade in this area poses, underscoring the pressing need for strong and effective international standards.

Importantly, while the treaty would contain the highest standards negotiating states are able to collectively agree to, its obligations should be viewed as a floor on which new regional or national standards could be built. In other words, the treaty would establish a minimum set of actions for states parties to take in this

area, albeit a minimum that represented high standards. The treaty could draw on language used in the Arms Trade Treaty to the effect that the treaty aims to establish the “highest possible common international standards for regulating or improving the regulation of the international trade” in law enforcement equipment, among other obligations.<sup>7</sup>

To ensure new or unknown categories of equipment that are inherently abusive or pose risks of being used for torture or other ill-treatment are not overlooked, a provision should make clear that states parties are free – and encouraged – to take action nationally to regulate a larger range of law enforcement equipment if they wish.<sup>8</sup> The principle that the treaty sets a floor and not a ceiling for national regulation of law enforcement equipment would go beyond applying trade controls to additional equipment. States parties could be encouraged, for example, to assess for a range of human rights risks and not only risks of torture or other ill-treatment, as part of trade licensing processes.

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6 Some treaties include provisions specific to object and purpose (see, for example, Arms Trade Treaty, Article 1), although in all cases, what comprises the treaty’s object and purpose is a matter of interpretation, UN Vienna Convention on the Law of Treaties, 23 May 1969, Article 31.

7 Arms Trade Treaty, Article 1.

8 The Arms Trade Treaty, for example, encourages states to apply its provisions to “the broadest range of conventional arms”. Arms Trade Treaty, Article 5(1).



Weighted leg irons and fixed cuffs © Omega Research Foundation

## B. States should have clarity on the scope of equipment the treaty covers

The treaty should distinguish between two types of law enforcement equipment: first, inherently abusive equipment (which should be prohibited); and second, equipment that could be used for torture or other ill-treatment (which should be subject to human rights-based trade controls).

Equipment is considered inherently abusive if it has no practical use other than for the purpose of torture or other ill-treatment.<sup>9</sup> Examples include spiked batons, spiked shields, electric shock ‘stun’ belts and other body-worn electric shock devices, as well as unnecessarily painful, injurious or humiliating devices used to restrain people, such as leg irons, and wall-, thumb- and finger-cuffs.<sup>10</sup> Equipment that is not inherently abusive but could be used for torture or other ill-treatment encompasses the range of tools that law enforcement officials ordinarily have access

to, including batons, handcuffs and chemical irritants such as pepper spray, as well as those that are deployed in particular circumstances, such as tear gas grenades, kinetic impact projectiles (commonly known as rubber bullets) and launchers, and crowd control shields. For this second category, the goal would be to control the trade in items that are exclusive, or nearly exclusive, to the application of force in law enforcement or custodial settings, not the trade in every item a law enforcement official might have access to (such as office equipment).<sup>11</sup>

The treaty could outline the scope of covered equipment in several different ways. One option would be to describe the two categories in an operative part of the treaty and leave implementation and interpretive authority to domestic bodies which would develop national lists of covered equipment. The Arms Trade Treaty, which sets out eight categories of covered arms in an operative provision, follows this approach, requiring states parties to develop national lists and share them with each other.<sup>12</sup> Another option would be to include lists in the treaty itself, in the form of annexes or appendices. The Convention on International Trade in Endangered Species (CITES) is an example of a treaty that adopts this approach.<sup>13</sup>

The second approach – using annexes – would avoid inconsistencies that could result from lists being left exclusively in the hands of national authorities.<sup>14</sup> Annexed lists could be negotiated alongside the main treaty text, or decided in other forums, such as conferences of states parties. To craft these lists, drafters could draw on existing regional standards and independent research on the types of relevant equipment that companies are currently manufacturing, promoting, and

<sup>9</sup> See discussion in Section 3 of this document.

<sup>10</sup> Amnesty International and Omega Research Foundation, *Tackling the Trade in Tools of Torture and Execution Technologies*, (Index Number: ACT 30/6998/2017), 18 September 2017, [perma.cc/LKA5-4U6Y](https://perma.cc/LKA5-4U6Y)

<sup>11</sup> The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles), adopted on 7 September, recognize that there are tools specific to law enforcement contexts: “Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms” (Principle 2). See also OHCHR, *UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, HR/PUB/20/1, 2020, [perma.cc/CJ7R-VK8L](https://perma.cc/CJ7R-VK8L)

<sup>12</sup> Arms Trade Treaty, Articles 2 and 5.

<sup>13</sup> The Convention on International Trade in Endangered Species (CITES), adopted in 1963, Articles 3–5.

<sup>14</sup> OHCHR, *Towards torture-free trade*, A/76/850, 31 May 2022 (previously cited), para 76.

supplying to law enforcement bodies.<sup>15</sup> As a starting point for discussion, this position paper includes two annexes with suggested lists, one for inherently abusive equipment and the other for equipment that could be used for torture or other ill-treatment.

The treaty should also include mechanisms to ensure annexes remain up to date, such as through regular revision at conferences of states parties or review conferences. To facilitate good practice and help states parties determine when the treaty's lists of equipment might need updating, a state that adds items to its national lists should notify the Torture-Free Trade Treaty's implementation support unit (or whatever body is established to coordinate cooperation among states) as well as other states parties.

### C. National trade control systems should encompass law enforcement equipment

In most jurisdictions, goods such as arms and related materials are already subject to national trade controls. The treaty should require its states parties to incorporate law enforcement equipment into their national control systems or establish new systems so that proposed transfers of equipment can be rapidly identified and assessed according to the treaty's provisions. For states with underdeveloped national control systems or lacking implementation capacity, international assistance should be available.<sup>16</sup>

Human rights-based trade controls facilitate the legitimate trade in law enforcement equipment, allowing law enforcement officials to have access to the tools required to undertake their lawful functions.<sup>17</sup> At the same time, such controls ensure that there are human rights checks in place to prevent transfers of inherently abusive equipment and to ensure risks that other equipment could be used for torture or other ill-treatment are evaluated.

A number of states already apply controls to the trade in certain types of law enforcement equipment and their experiences offer lessons in this area. For example, pursuant to the European Union Anti-Torture Regulation (first adopted in 2005, now Regulation (EU) 2019/125), EU member states prohibit inherently abusive equipment and death penalty equipment, and have trade controls on equipment that could be used for torture or other ill-treatment, as well as on certain chemicals that could be misused to carry out executions.<sup>18</sup> In 2021, the Committee of Ministers of the Council of Europe (through CoE Recommendation CM/Rec(2021)) likewise recommended that its member states take steps, including establishing national export and transit control measures, to address the trade in goods used for the death penalty, torture or other ill-treatment.<sup>19</sup> Outside regional measures, in some cases individual states have national trade controls on particular types of equipment or other administrative measures.<sup>20</sup>

15 See the annexes to EU Regulation 2019/125 (previously cited) and appendices to Council of Europe (CoE), *Recommendation CM/Rec(2021)2 of the Committee of Ministers to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment* (CoE Recommendation CM/Rec(2021)2) adopted on 31 March 2021, [perma.cc/9HJ3-XK4T](https://perma.cc/9HJ3-XK4T). Amnesty International and Omega Research Foundation, *Combating torture: The need for comprehensive regulation of law enforcement equipment*, (AI Index: ACT 30/9039/2018), 24 September 2018, [perma.cc/XVL4-XW7M](https://perma.cc/XVL4-XW7M)

16 See discussion in Section 5.

17 Basic Principles (previously cited), Principle 2, makes clear that law enforcement officials should be “[equipped] with various types of weapons and ammunition that would allow for a differentiated use of force and firearms” as well as “self-defensive equipment, such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.”

18 Prohibitions and trade controls were established under Council Regulation (EC) 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* (EU Regulation 1236/2005), 27 June 2005 and then subsequently strengthened (for example, pharmaceutical chemicals were not covered under the original regulation). EU Regulation 2019/125 is the most recent iteration, as of September 2022.

19 CoE, Recommendation CM/Rec(2021)2 (previously cited).

20 See, for example, US Department of Commerce, Bureau of Industry and Security, *Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, and parts and accessories, n.e.s.*, [perma.cc/YZU9-QDFD](https://perma.cc/YZU9-QDFD), Title 15, Part 742, § 742.11; UK Statutory Instruments, *The Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations, 2020*, [perma.cc/EX6B-TQLQ](https://perma.cc/EX6B-TQLQ), No. 1479.



#### D. Existing international standards and obligations provide guidance and momentum

The treaty's preamble could recognize the variety of existing international obligations, standards and guidance relevant to torture-free trade. Numerous treaties enshrine the prohibition of torture and other ill-treatment, notably the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture).<sup>21</sup> The prohibition is also a norm of customary international law, which binds all states and not only those that have joined particular treaties. The absolute prohibition of torture has the status of a peremptory norm in customary international law, subject to no exceptions.<sup>22</sup> States also have obligations to take effective measures to prevent torture and other ill-treatment.<sup>23</sup>

The Torture-Free Trade Treaty's preamble could recall relevant UN General Assembly resolutions, including its regular resolution on torture and other ill-treatment, which has addressed inherently abusive equipment since 2001. In the most recent version of that resolution, states are encouraged 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 and other ill-treatment."<sup>24</sup> Likewise, the work of UN Human Rights Council special procedures mandate holders – particularly reports of successive Special Rapporteurs on Torture and a 2021 mandate holders' joint call to end police brutality against peaceful protestors – could be referenced, as well as the efforts of regional bodies to address the torture trade.<sup>25</sup> The preamble could also outline key steps and documents in the process that led to the treaty.<sup>26</sup>

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- 21 International Covenant on Civil and Political Rights (ICCPR), Article 7; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture), Article 1. See also, Convention on the Rights of the Child (CRC), Article 37a; Convention on the Rights of Persons with Disabilities (CRPD), Article 15(1); and at the regional level, the African Charter on Human and Peoples' Rights (ACHPR), Article 5; American Convention on Human Rights (ACHR), Article 5(2); The Arab Charter on Human Rights (ACHR), Article 8; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3; Inter-American Convention to Prevent and Punish Torture; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The obligation is also part of international humanitarian law. See, for example, common Article 3 to the 1949 Geneva Conventions; 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, (Fourth Geneva Convention), Article 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 75(2).
- 22 Committee Against Torture, General Comment No 2, CAT/C/GC/2, 2008, para 1.
- 23 UN Convention against Torture, Article 2(1) and ICCPR, Article 2(1).
- 24 UN General Assembly (UNGA), Resolution 74/143: *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2019, UN Doc. A/RES/74/143. Human Rights Council resolutions could also be referenced, for example: UN Human Rights Council (UNHRC), Resolution A/HRC/RES/46/15: *Torture and other cruel, inhuman or degrading treatment or punishment: the roles and responsibilities of police and other law enforcement officials*, adopted on 23 March 2021, UN Doc. A/HRC/RES/46/15.
- 25 UNHCR, "UN experts call for an end to police brutality worldwide", 11 August 2021, [perma.cc/RW8H-NVCZ](https://perma.cc/RW8H-NVCZ). UN General Assembly (UNGA), Resolution 73/304: *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*, adopted on 28 June 2019, UN Doc. A/RES/73/304; See also Statement by UN High Commissioner for Human Rights, "Towards Torture-Free Trade: Opportunities and Challenges", 11 December 2020; OHCHR, *Towards torture-free trade*, A/76/850, 31 May 2022 (previously cited).
- 26 For example, UN Special Rapporteur on the question of torture, Report: *Civil and Political Rights, Including the Questions Of Torture And Detention*, 15 December 2004, E/CN.4/2005/62; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report: *Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, 21 July 2017, A/72/178, para 59. In addition to the regional standards already referenced, see African Union, Guidelines and Measures for the Prohibition and the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), October 2002; African Commission on Human and Peoples' Rights (ACHPR), Resolution 472 on the prohibition of the use, production, export and trade of tools used for torture, December 2020, ACHPR/Res.472 (LXVII) 2020; Ministerial Council of the Organization for Security and Co-operation in Europe (OSCE), Decision No. 7/20 on the prevention and eradication of torture and other cruel, inhuman or degrading treatment or punishment, 4 December 2020, MC.DEC/7/20.

The connection between freedom from torture and other ill-treatment and a range of human rights, including the rights to freedom of expression and peaceful assembly, could be highlighted in the preamble. Standards relevant to the use of force and treatment of detainees could also be noted, in particular: the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Nelson Mandela Rules (revised UN Standard Minimum Rules for the Treatment of Prisoners); and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>27</sup> In light of the role that private industry plays in the production of and trade in law enforcement equipment, the business and human rights framework could be recognised through a reference to the UN Guiding Principles on Business and Human Rights.<sup>28</sup>



*Police using tear gas, water cannon and rubber bullets to disperse demonstrators © Thikamporn Tamtiang*

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27 Other relevant international standards that could be referenced include: UN Code of Conduct for Law Enforcement Officials, adopted on 17 December 1979 by General Assembly resolution 34/169; UNODC, Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), resolution adopted by the General Assembly on 21 December 2010 on the report of the Third Committee (A/65/457); and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), adopted on 14 December 1990 by General Assembly resolution 45/113.

28 OHCHR, UN Guiding Principles on Business and Human Rights, 2011.

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# 3. PROHIBITIONS

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In its operative part, the treaty should establish an absolute prohibition on equipment that is inherently abusive. All activities relating to equipment that has no practical use other than for the purpose of torture or other ill-treatment should be prohibited. This absolute ban would cover, among other things, transfer, acquisition, production and brokering, as well as related technical assistance, including training in the use of inherently abusive equipment. The treaty should also prohibit training in the use of law enforcement equipment for torture or other ill-treatment, as well as training on techniques for torture or other ill-treatment, regardless of whether equipment is involved. The treaty's prohibitions could additionally encompass goods that have no purpose other than for the death penalty, if the treaty ultimately covers that category of goods.

## **A. The definition of “inherently abusive” can draw on existing standards**

“Inherently abusive” equipment refers to equipment that has no practical use other than for the purpose of torture or other ill-treatment. The phrase “inherently abusive” is a succinct way of describing this category and is used in the most recent international instrument on the topic, the 2021 Council of Europe Recommendation. Understandings of this category have developed progressively through UN General Assembly resolutions, reports of Special Rapporteurs on Torture, civil society research and other mechanisms.<sup>29</sup>

Starting in 2001, UN General Assembly annual resolutions on torture and other cruel, inhuman or degrading treatment or punishment called

on states to prohibit activities associated with “equipment that is specifically designed to inflict torture or other [ill-treatment]”.<sup>30</sup> In 2011, the annual (now biennial) resolution language shifted to become more expansive, referring instead to “equipment that [has] no practical use other than for the purpose of torture or other [ill-treatment]”.<sup>31</sup> This language also appears in the preamble to the 2019 General Assembly resolution that charged a Group of Governmental Experts with assessing the feasibility, scope and parameters for possible common international standards on torture-free trade.<sup>32</sup> Successive Special Rapporteurs on Torture have likewise called attention to the category and articulated understandings of equipment that should be prohibited, with a 2017 report noting that equipment can be considered inherently cruel, inhuman or degrading “if it is either specifically designed or of a nature (that is, of no other

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29 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report on the extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, 21 July 2017, A/72/178, para 49.

30 UN General Assembly (UNGA), Resolution 56/143, *Torture and other cruel, inhuman or degrading treatment or punishment*, adopted on 19 December 2001, UN Doc. A/RES/56/143, para 11.

31 UN General Assembly (UNGA), Resolution 66/159, *Torture and other cruel, inhuman or degrading treatment or punishment*, adopted on 19 December 2011, UN Doc. A/RES/66/150, para 24.

32 UN General Assembly (UNGA), Resolution 73/304: *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*, adopted on 28 July 2019, UN Doc. A/RES/73/304.

practical use than) to: (a) employ unnecessary, excessive or otherwise unlawful force against persons; or (b) inflict pain and suffering on powerless individuals”.<sup>33</sup>

**B. Prohibitions should be sufficiently broad to capture all activities relating to inherently abusive equipment, including transfer, production, advertising, brokering, and technical assistance**

In line with calls in the biennial UN General Assembly resolution on torture and other ill-treatment, and to ensure that there are no loopholes, the treaty should ban the broad range of activities that can support the continued existence and use of inherently abusive equipment.<sup>34</sup> Both the EU Anti-Torture Regulation and the 2021 Council of Europe Recommendation adopt this comprehensive approach, which reflects the goal of eliminating inherently abusive equipment to help prevent torture and other ill-treatment.<sup>35</sup> Analogous treaties that absolutely ban particular types of weapons because of their humanitarian impact also take this approach. The Anti-Personnel Mine Ban Convention and Convention on Cluster Munitions, for example, ban use, development, production, acquisition, stockpiling, retention and

transfer, as well as assisting, encouraging or inducing anyone to engage in prohibited activities.<sup>36</sup>

The treaty should ban the transfer of inherently abusive equipment. The definition of “transfer” varies from treaty to treaty, but typically covers activities including import, export, and transit.<sup>37</sup> The terms “export”, “import” and “transit” likewise take different meanings under different international instruments.<sup>38</sup> In a Torture-Free Trade Treaty, the definitions of these terms should be encompassing, to prevent loopholes that would run contrary to the treaty’s object and purpose from emerging. Importantly, the transfer of ownership or control of equipment to or by a state party or company/individual(s) under its jurisdiction – with or without the equipment’s physical movement and regardless of where it is located in the world – should either be included within the prohibition on “transfer” or separately prohibited.<sup>39</sup> In addition to banning international trade, states should be required to make it domestically unlawful for a person or entity within a state party to transfer inherently abusive equipment to another person or entity in that state.<sup>40</sup> Consequently, all domestic and international transfers – whether from companies, private individuals, state bodies or other entities – would be covered by the prohibition.

33 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report: *Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, 21 July 2017, A/72/178, para 50. See also Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Interim report, 9 August 2013, UN Doc. A/68/295, Section III para 58.

34 States may wish to create a very limited exemption regime to allow for the display of inherently abusive equipment in museums. In general, exemptions should be atypical and requests met with significant scrutiny.

35 EU Regulation 2019/125; Council of Europe Recommendation CM/Rec(2021)2 (previously cited).

36 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Anti-Personnel Mine Ban Convention), Article 1(1); Convention on Cluster Munitions, Article 1(1). See also Treaty on the Prohibition of Nuclear Weapons, Article 1(1), which includes an even larger range of prohibited activities relevant to nuclear weapons, including to “threaten to use” nuclear weapons or to “allow any stationing, installation or deployment” of nuclear weapons in a state party’s territory or areas under its control.

37 What comprises a state’s territory for the purposes of transfer is outside the scope of this position paper.

38 See, for example, the World Customs Organization’s definitions of “exportation” and “importation”, World Customs Organization, Glossary of International Customs Terms, 2018, [perma.cc/6MXL-ZHX5](https://perma.cc/6MXL-ZHX5), pp. 18 and 21. On transit, see discussion in Andrew Clapham and others, *The Arms Trade Treaty: A Commentary*, June 2016, Article 9, para 9.30, and, for example, World Trade Organization (WTO), General Agreement on Tariffs and Trade (GATT 1947), [perma.cc/C5EV-DFHS](https://perma.cc/C5EV-DFHS), Article V(1) (Freedom of Transit).

39 See, for example, Convention on Cluster Munitions, Article 2(8): “‘Transfer’ involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions.” Some states interpret this provision as requiring physical movement in addition to transfer of title or control for an action to be captured. For clarity, a Torture-Free Trade Treaty should spell out that transfer of title or control is included in the definition of transfer, or separately prohibit this action.

40 See, for example, CITES, Article XIV(1).



Military-style tear gas grenade fired against protesters.  
© Iraqi Network for Social Media

Prohibited activities should include the production or manufacture of inherently abusive equipment, as well as its acquisition and stockpiling. The treaty should also require destruction of any inherently abusive equipment within a state party or under its control. While it is unlikely that states would hold large stockpiles of inherently abusive equipment, a ban on stockpiling and requirement to destroy this equipment would close a potential loophole and prevent diversion of redundant stock.<sup>41</sup> To ensure that actors within a state party do not facilitate the existence or use of inherently abusive equipment outside the state party, prohibitions should extend to the provision

of brokering, financial, insurance, advertising and transport services related to such equipment, as well as investment in companies producing inherently abusive equipment.<sup>42</sup>

Providing any kind of technical assistance related to inherently abusive equipment should also be within the scope of the ban. Drawing on the EU Anti-Torture Regulation, technical assistance refers to a broad range of activities, from technical support for repairs or manufacture to advice or training.<sup>43</sup> Suppliers of technical assistance may not be limited to state bodies, but could include individuals, companies or other entities.<sup>44</sup> Drawing inspiration from the Convention on Cluster Munitions, Anti-Personnel Mine Ban Convention and the Treaty on the Prohibition of Nuclear Weapons, the treaty could include a prohibition on assistance as a general matter, and prohibit states parties from assisting, encouraging or inducing anyone to undertake a prohibited activity.<sup>45</sup>

In recognition of the role training can play in facilitating torture or other ill-treatment, the treaty's prohibition on training should go beyond banning training on the use of inherently abusive equipment. It should also prohibit trainings on how to use any law enforcement equipment for torture or other ill-treatment, as well as trainings that impart techniques for torture or other ill-treatment – for example, inherently abusive interrogation techniques, including the infliction of sleep deprivation, stress positions or waterboarding – regardless of whether the training covers use of equipment.

41 See obligations on stockpiling and destruction in Convention on Cluster Munitions, Article 1; The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), Article 1 and Verification Annex; Biological Weapons Convention, Article 1; Anti-Personnel Mine Ban Convention, Article 1; Treaty on the Prohibition of Nuclear Weapons, Article 1. For a definition of stockpile, refer to UNODA, *The International Ammunition Technical Guidelines (IATG)*, March 2021, [perma.cc/53YU-34X4](https://perma.cc/53YU-34X4), 3.261-3.264.

42 EU Regulation 2019/125 (previously cited), Articles 2(k) and 6. Activities that could involve a broker include: proposing or arranging transactions for the sale, purchase or supply of equipment or provision of technical assistance; assisting parties to a transaction to obtain necessary documentation; or selling or buying equipment located in a non-state party for transfer to another non-state party. UNGA, *The illicit trade in small arms and light weapons in all its aspects*, Report of the Group of Governmental Experts established pursuant to General Assembly Resolution 60/81 to consider further steps to enhance international co-operation in preventing, combating, and eradicating illicit brokering in small arms and light weapons, 30 August 2007, UN Doc. A/62/163, paras 8 - 10.

43 EU Regulation 2019/125, Article 2(f).

44 EU Regulation 2019/125, Article 2(m).

45 Convention on Cluster Munitions, Article 1(c); Anti-Personnel Mine Ban Convention, Article 1(c); Treaty on the Prohibition of Nuclear Weapons, Article 1(e).

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## 4. TRADE CONTROLS AND RELATED MEASURES

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In addition to prohibiting inherently abusive equipment, in its operative part, the treaty should require states parties to control the transfer of equipment that could be used for torture or other ill-treatment (or for the death penalty, if that topic is included in the treaty). Before authorizing the export or transit of these goods, licensing authorities should carry out a thorough risk assessment. If there is a clear or substantial risk that these goods could be used for torture or other ill-treatment, then the treaty should require those authorities to deny the proposed export or transit. Related services – such as brokering – and technical assistance (including training) should be subject to the same controls. A requirement for end-user documentation and other measures to prevent diversion should also be included in the treaty.

**A. All proposed exports and transits of equipment and related technical assistance and services should be assessed for risks of torture or other ill-treatment**

A Torture-Free Trade Treaty should require states to assess for risks that goods could be used for torture or other ill-treatment when considering whether to allow or deny an export or transit of law enforcement equipment that is not inherently abusive. When there is a clear or substantial risk that equipment could be used for torture or other ill-treatment, the treaty should prohibit states parties from granting export or transit authorizations. Related technical assistance, including training, and services, such as brokering, should also be subject to risk assessment. While the responsibility to allow or deny an export or transit would remain the

responsibility of states, the treaty's requirements would circumscribe the discretion of officials with decision-making powers.<sup>46</sup>

All proposed exports and transits should be subject to risk assessment. For example, risks should be assessed not only when a company seeks permission to export equipment, but also when a state party hopes to export equipment to another state (for instance as part of a security assistance project). Export authorizations would likewise be required when a state party – or company/individual under that state party's jurisdiction – seeks to transfer control or ownership of equipment, including when that equipment is located outside the state party's territory. Given the potential for changed circumstances, rather than granting general licences that allow for multiple exports over a certain period, each proposed export and transit should be evaluated on a case-by-case basis.

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<sup>46</sup> See, for example, Arms Trade Treaty, Article 7; CITES, Articles III-V.



A selection of straight, side handled and telescopic batons.  
© Omega Research Foundation

There is a large body of knowledge on risk assessment that states parties to a Torture-Free Trade Treaty could take advantage of for this exercise.<sup>47</sup> States that already control the trade in law enforcement equipment can share their experiences assessing for risks of torture or other ill-treatment, and many other states have transferable knowledge on human rights-based risk assessment from the arms trade context. Under the Arms Trade Treaty, which has 111 states parties as of September 2022, states have a duty to conduct an “export assessment” using a variety of factors to determine whether a proposed export of conventional arms presents an “overriding risk” that those arms could be used to commit or facilitate serious violations of international humanitarian law or international human rights law, among other considerations.<sup>48</sup>

## B. The treaty should require robust and comprehensive risk assessment, complemented by notification procedures

While evidence of past use of equipment can play a role in assessing the risk a proposed export or transit poses, risk assessment should be forward looking in nature, taking into account developments that could affect the risk calculation. To assess the likelihood of a proposed export or transit being used for torture or other ill-treatment, licensing authorities should engage in a risk assessment process that draws on a variety of sources, including officials working in other parts of their own government (such as foreign embassies), international bodies – particularly those that conduct torture/other ill-treatment monitoring activities, such as the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) – and civil society groups.<sup>49</sup> The treaty could direct states parties to particular sources and allow for guidance on risk assessment to be developed iteratively through conferences of states parties.

Risk assessment should not be a one-off exercise that ends once an export or transit is authorized. The Arms Trade Treaty includes a provision encouraging states to reassess authorisation if they become aware of new and relevant information after an export has been allowed and a Torture-Free Trade Treaty should require reassessment in those circumstances.<sup>50</sup> Additionally, to assist the exporting state party to conduct risk assessment, importing states parties should be required to provide information on request.<sup>51</sup>

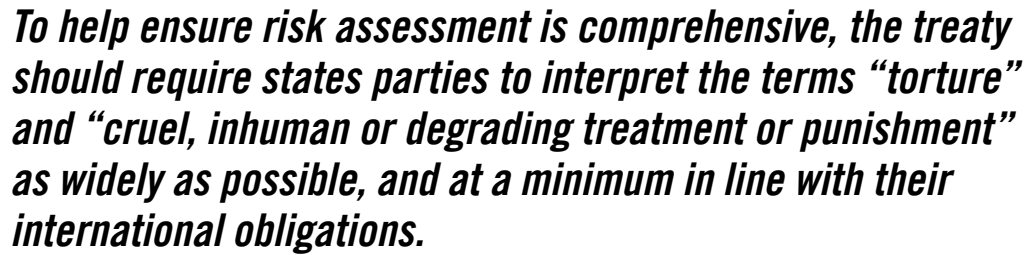
47 See, for example: International Committee of the Red Cross (ICRC), *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria—a Practical Guide*, August 2016, [perma.cc/NGB5-VUEA](https://perma.cc/NGB5-VUEA); Small Arms Survey, *The Arms Trade Treaty: A Practical Guide to National Implementation*, August 2016, [perma.cc/66KX-FEVC](https://perma.cc/66KX-FEVC); Control Arms, *How to Use the Arms Trade Treaty to Address Gender-Based Violence: A Practical Guide for Risk Assessment*, August 2018, [perma.cc/Z2EA-GPVQ](https://perma.cc/Z2EA-GPVQ); Stimson Center and International Human Rights Clinic at Harvard Law School, *The Arms Trade Treaty’s Gender-Based Violence Risk Assessment: A Questionnaire for Information Sources*, 23 March 2021, [perma.cc/8RM2-4AB3](https://perma.cc/8RM2-4AB3); Saferworld, ATT expert group, *Arms Exports, Terror and Crime: Reducing Risk under the Arms Trade Treaty*, April 2021, [perma.cc/6T7P-AWQ6](https://perma.cc/6T7P-AWQ6). See also the documents on Articles 6 and 7 of the Arms Trade Treaty produced by Treaty’s Working Group on Effective Treaty Implementation, available at [thearmstradetreaty.org/tools-and-guidelines.html](https://thearmstradetreaty.org/tools-and-guidelines.html).

48 Arms Trade Treaty, Articles 7(1) and 7(3).

49 EU Regulation 2019/125, Article 12; and Council of Europe (CoE), Recommendation CM/Rec(2021)2 (previously cited), Article 3.2.2.

50 Arms Trade Treaty, Article 7(7).

51 Arms Trade Treaty, Article 8.



***To help ensure risk assessment is comprehensive, the treaty should require states parties to interpret the terms “torture” and “cruel, inhuman or degrading treatment or punishment” as widely as possible, and at a minimum in line with their international obligations.***

As part of its risk assessment, the Torture-Free Trade Treaty should specifically call attention to discrimination and its relationship to torture and other ill-treatment, drawing on the precedent of the Arms Trade Treaty’s inclusion of risks of gender-based violence in its export assessment.<sup>52</sup> Discrimination, particularly racial discrimination, is an acknowledged issue in many law enforcement contexts and human rights bodies have recognized the need to tackle multiple and intersecting forms of discrimination to achieve substantive equality, a goal robust risk assessment in a Torture-Free Trade Treaty could contribute towards.<sup>53</sup>

To help ensure risk assessment is comprehensive, the treaty should require states parties to interpret the terms “torture” and “cruel, inhuman or degrading treatment or punishment” as widely as possible, and at a minimum in line with their international obligations. Under the UN Convention against Torture, which has 173 states parties as of September 2022, torture refers to any act by which severe mental or physical pain

or suffering is intentionally inflicted on a person for particular purposes (such as: obtaining information or a confession; to punish the person or a third party for an act; to intimidate or coerce the person or a third party; or for reasons based on discrimination) with the involvement or acquiescence of a public official.<sup>54</sup> However, other treaties do not require all these elements, and the UN Convention against Torture itself notes that its definition is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.<sup>55</sup> What constitutes other ill-treatment depends on the nature, purpose, and severity of the treatment and “should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental”.<sup>56</sup>

Risk assessment should be complemented by notification procedures to facilitate information sharing regarding export and transit authorization denials. Each time a state party’s licensing authorities deny a proposed export or transit authorization, the treaty should require them to

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52 Article 7(4) of the Arms Trade Treaty requires exporting authorities to assess for risks of gender-based violence as part of the larger export assessment.

53 Racial discrimination means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD), Article 1. Multiple discrimination can refer to “a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated” and intersectional discrimination to “a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable”. Committee on the Rights of Persons with Disabilities (CRPD), General Comment 6: on equality and non-discrimination, 26 April 2018, UN Doc. CRPD/C/GC/6, para 22.

54 UN Convention against Torture, Article 1.

55 UN Convention against Torture, Article 1(2). See, for example, ICCPR, Article 7 - torture is not defined in the ICCPR, but the Human Rights Committee’s interpretation does not require the involvement or acquiescence of a public official; Human Rights Committee, General Comment 20, adopted on 10 March 1992, Article 7, para 2; Inter-American Convention to Prevent and Punish Torture, Article 2 - does not require severe mental or physical suffering: “Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”; Rome Statute of the International Criminal Court, Article 7(2)(e) - does not include a requirement that the person inflicting treatment has a particular purpose, but does require custody or control of the person treatment is inflicted on.

56 Commentary to the Code of Conduct for Law Enforcement Officials, Article 5, para c.



notify the treaty's implementation support unit (or whatever body is established to coordinate cooperation among states) and other states parties through established information-sharing mechanisms. A state that subsequently receives a similar application within a certain period would then be required to consult with the state that refused the export or transit. EU member states have a notification system along these lines, with the EU Anti-Torture Regulation requiring officials to consider another member state's denial of an "essentially identical export" within the last three years as part of the criteria for granting export authorizations.<sup>57</sup>

### C. End-user certifications should be mandatory

The treaty should require states to put into place end-user certification procedures. Such procedures are designed to identify and authorize end users and commit them to certain undertakings, as well as verify delivery of equipment.<sup>58</sup> End-user documentation is a common component of arms export control regimes. For example, the UN Programme of Action on Small Arms and Light Weapons commits states to using "authenticated end-user certificates and effective legal and enforcement measures" when controlling the export and transit of small arms and light weapons.<sup>59</sup> End-user certifications can provide assurance that controlled goods will not be used for purposes



Protesters face riot police. © Grzegorz Żukowski

other than those they have been authorized for. In the arms trade arena, they also help to prevent the diversion of arms to non-state actors or governments with poor human rights records and could play a similar role in the torture-free trade context.<sup>60</sup> In its most comprehensive form, which the Torture-Free Trade Treaty should endorse, end-user certification contains an assurance that items will be used exclusively by the declared end user (such as an individual police department) for the declared end use; re-export or domestic resale, if permitted at all, would typically involve the original exporter's explicit authorization.<sup>61</sup>


57 EU Regulation 2019/125, Article 12(1). See also Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, WA-DOC (19) PUB 007, December 2019, [perma.cc/CF3Z-UQTH](https://perma.cc/CF3Z-UQTH), 'Guidelines and Procedures, Including the Initial Elements', II(4), p. 5.

58 For insight into the importance of end-user certification procedures, see UNIDIR, *Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings*, 13 August, 2017, p. 13. That publication uses the term "end use/r control systems" "to demonstrate that the research project and the study are not only interested in the format and content of end use/r documentation, but also in the processes of certification, authentication and verification of such documentation and its role in international cooperation to prevent diversion".

59 UN Programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects' (PoA), A/CONF.192/15 (2001), section II, para 12. See also Inter-American Convention Against the Illicit Manufacturing of and Tracking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), approved on 13 November 1997; Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Nairobi Protocol), adopted on 21 April 2004.

60 Arms Trade Treaty, Articles 7 and 11.

61 See UNIDIR, *Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings*, 13 August 2017, [perma.cc/6PLG-PU57](https://perma.cc/6PLG-PU57), pp. 17–18.



***To prevent torture and other ill-treatment through trade regulation, the treaty should include obligations aimed at preventing the diversion of law enforcement equipment***

**D. States should take additional measures to prevent diversion of equipment**

To further the treaty's goal of advancing the prevention of torture and other ill-treatment through trade regulation, the treaty should include obligations aimed at preventing the diversion of law enforcement equipment; comprehensive end-user certification is one such measure, international cooperation on diversion is another. Diversion refers to "the transfer of controlled items authorized for export to one end user, but delivered to an unauthorized end user or used by the authorized end user in unauthorized ways".<sup>62</sup> Unauthorized end users could include non-state actors, such as transnational criminal organizations and non-state armed groups, as well as state security forces.

Measures to prevent diversion could include incorporating the risk of diversion into export and transit authorization processes, requiring additional documentation from exporters, and engaging in post-shipment verification.<sup>63</sup> Post-shipment verification could incorporate physical inspections of law enforcement equipment in the country of destination, aimed at checking that the equipment is in fact in the possession of the stated end user after its receipt, even several years later.<sup>64</sup> Post-shipment verification complements end-user certification and information gathered in the verification process can feed into subsequent risk assessment processes when exports or transits to the same end user are proposed.

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62 Matt Schroeder and others, "Deadly Deception: Arms Transfer Diversion," in *Small Arms Survey 2008: Risk and Resilience*, p. 114; see also, UNIDIR, *The Arms Trade Treaty: Obligations to Prevent the Diversion of Conventional Arms*, 23 June 2020, [perma.cc/7G49-8K96](https://perma.cc/7G49-8K96).

63 See Arms Trade Treaty, Article 11(2) and 11(4).

64 Andrea Edoardo Varisco and others, *Post-Shipment Control Measures*, SIPRI Background Paper, December 2020, [perma.cc/V2ZV-EAGK](https://perma.cc/V2ZV-EAGK), p. 2.

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# 5. MONITORING AND OPERATIONAL ASPECTS

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Mechanisms to monitor and support states parties' implementation, such as a monitoring body and implementation support unit, should be established to ensure a robust and sustainable treaty regime. Operational and procedural aspects in treaties, including provisions on conferences of states parties and amendment processes, aid in creating such a regime. The treaty should require record keeping and reporting, as well as international cooperation and assistance. Excellent record keeping facilitates reporting, and reporting requirements are critical for transparency and accountability. International cooperation and assistance support states parties to implement their obligations effectively.

**A. The treaty regime should include mechanisms to monitor and support implementation**

To ensure effective implementation, the treaty regime should include a body that is mandated to monitor and report on the Torture-Free Trade Treaty's implementation. Drawing on the functions and experiences of treaty bodies in the human rights space, this body should comprise a committee of independent experts empowered to monitor states parties' compliance with the treaty's provisions, based on regular reviews of each state party that include input from civil society. In addition to these reviews, through annual reporting, that body would also outline trends in the treaty's implementation and global developments in the area. As part of its mandate, such a monitoring body would be encouraged to explore synergies and cooperation with other international bodies that aim at the prevention of

torture and other ill-treatment, such as through information-sharing and joint activities.

Human rights treaty bodies offer examples of how implementation monitoring can take place.<sup>65</sup> For example, the Committee against Torture, which was established under the UN Convention against Torture, "consist[s] of ten experts of high moral standing and recognized competence in the field of human rights" who are elected by states parties.<sup>66</sup> Under the UN Convention against Torture, each state party is required to submit a report "on the measures they have taken to give effect to their undertakings under [the UN Convention against Torture]" within a year after they join the treaty, and then every four years.<sup>67</sup> To formulate its findings on a state party's implementation of the treaty, the Committee relies not only on information from the state under review, but also information from civil society, and enters into a dialogue with the state. The Committee additionally has the power to clarify the scope and meaning of the UN Convention

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65 There are 10 human rights treaty bodies: Committee on the Elimination of Racial Discrimination (CERD); Committee on Economic, Social and Cultural Rights (CESCR); Human Rights Committee (CCPR); Committee on the Elimination of Discrimination against Women (CEDAW); Committee against Torture (CAT); Committee on the Rights of the Child (CRC); the Committee on Migrant Workers (CMW); Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED).

66 UN Convention against Torture, Article 17(1).

67 UN Convention against Torture, Article 19(1).

against Torture through general comments, undertake confidential inquiries, and – for those states that have made declarations recognizing its competence to do so – receive and consider inter-state communications and/or communications from individual victims of torture or other ill-treatment.<sup>68</sup>

In the torture-free trade context and separate from the establishment of a committee of independent experts, a more administrative unit, such as an implementation support unit, should be mandated to support the treaty's administration, through activities such as coordinating conferences of states parties and promoting cooperation among states. For example, the Arms Trade Treaty's secretariat receives and makes available state reports, maintains lists of national points of contact, facilitates international assistance and conferences of states parties, and carries out any other duties conferences of states parties decide on.<sup>69</sup>

More generally, to assist in the establishment of a robust and sustainable treaty regime, the treaty should contain the range of provisions considered standard in international treaties, such as on entry into force, how disputes between states parties are resolved, and amendment processes.<sup>70</sup> In particular, the treaty should set out a requirement for states parties to meet annually at a meeting or conference of states parties (once the treaty enters into force), with mechanisms in place for regular review of the lists of covered equipment built into those meetings. An annual conference of states parties could contribute to the implementation of the treaty by reviewing developments in the field and challenges in

implementation, and providing a forum for dispute resolution.<sup>71</sup> A review conference could take place every five years and allow for a more in-depth and strategic analysis of the treaty's impact and implementation.<sup>72</sup>

### **B. Record keeping should be mandatory and states should report nationally and internationally on implementation**

States should be required to keep records of their export and transit authorizations and their actual exports of equipment and related technical assistance (including training) for a minimum of 10 years.<sup>73</sup> Such a requirement would be in line with the Arms Trade Treaty and the Firearms Protocol.<sup>74</sup> Records should include, at a minimum, detailed information on the quantity, value, and model/type of equipment authorized, as well as copies of end-user documentation.<sup>75</sup> Export or transit authorization denials and details of the risk assessment process undertaken in relation to each export or transit authorization request should also be recorded. In addition, the treaty should require states to keep records on imports of law enforcement equipment.

Coupled with reporting, record keeping enables states and civil society to build a picture of states' practices and identify positive or problematic patterns in trade. Record keeping also assists in preventing diversion, as it facilitates tracing equipment that makes its way to unintended end users back to its origin, enabling authorities to understand how the diversion occurred so that they can take steps to prevent similar activities from occurring in future.

68 UN Convention against Torture, Articles 20, 21, and 22.

69 Arms Trade Treaty, Article 18.

70 As examples of entry of force thresholds: the UN Convention against Torture and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects set the threshold at 20 states; 30 states for the Convention on Cluster Munitions; 35 for the ICCPR and ICESCR; 40 for the Anti-Personnel Mine-Ban Convention; and 50 for the Arms Trade Treaty and Treaty on the Prohibition of Nuclear Weapons.

71 Arms Trade Treaty, Article 17.

72 See, for example, Convention on Cluster Munitions, Article 12; Anti-Personnel Mine-Ban Convention, Article 12.

73 For example, the 2021 Council of Europe Recommendation CM/Rec(2021)2 includes “maintaining records of all export licences, transit authorizations, authorizations of brokering services, related technical assistance and training” among measures necessary for effective national export and transit control. Article 3.2.6.

74 Arms Trade Treaty, Article 12; Firearms Protocol (previously cited), Article 7. See Andrew Clapham, and others, *The Arms Trade Treaty: A Commentary*, June 2016, Article 12. See also, International Tracing Instrument, Article IV; Programme of Action on Small Arms and Light Weapons, II, para 9.

75 See Modular Small Arms Control Implementation Compendium (MOSAIC) 05.30, “Marking and recordkeeping”, Section 6.

Reporting is a standard feature of many treaty regimes and helps keep states parties accountable to domestic and international constituencies.<sup>76</sup> Under a Torture-Free Trade Treaty, reporting should take place at several levels: first, in each state the domestic authorities responsible for the treaty's implementation should be required to report to their legislature on the measures taken to implement the treaty, including national control systems, regulations and related administrative procedures; second, states should annually publish and make publicly available meaningful information to ensure effective oversight; and third, states should report annually to a body established under the treaty regime (such as an implementation support unit).

Drawing on the Arms Trade Treaty's reporting requirements, a state party's initial report to a body established under the treaty regime should include details about domestic measures taken to implement the treaty, including "national laws, national control lists and other regulations and administrative measures."<sup>77</sup> Annual reports subsequent to an initial report would detail the number, type and value of each authorized and actual export, transit and import of equipment and related technical assistance (including training), as well as details of risk assessment processes. Reports to an expert-committee monitoring body, which would likely happen on a regular reporting cycle of four or five years, would provide more qualitative information and be based on human rights factors. To allow civil society and other actors to monitor and analyze compliance within and across states, the treaty should mandate that all state reports are public.<sup>78</sup>

### C. International cooperation and assistance should be required

International cooperation and assistance play an important role in ensuring states parties are supported to implement their treaty obligations and a Torture-Free Trade Treaty should be no exception.<sup>79</sup> International cooperation and assistance obligations form a thread running through international human rights law and humanitarian disarmament treaties in particular.<sup>80</sup> One form of cooperation would be through information-sharing activities, such as the reporting and notification procedures outlined above. More substantively, assistance includes states parties providing direct assistance to other states to help in the implementation of the treaty, such as through legal or legislative assistance, institutional capacity-building, and technical, material or financial assistance.

Drawing on international human rights law and humanitarian disarmament, a Torture-Free Trade Treaty should make two aspects clear: first, that states parties have the right to request assistance and second, that states parties in a position to assist other states parties are required to provide assistance if requested.<sup>81</sup> In addition to such direct assistance, a Torture-Free Trade Treaty should establish a fund for states parties to contribute towards for use in supporting implementation activities; such funds are a common feature in related treaty regimes.<sup>82</sup> To promote international cooperation in its broadest sense, the treaty could require that states parties encourage states that are not party to the treaty to join it, with an ultimate aim of universal adherence.<sup>83</sup>

76 For example, Convention on Cluster Munitions, Article 7; Anti-Personnel Mine Ban Convention, Article 7; ICCPR, Article 40(1); UN Convention against Torture, Article 19.

77 Arms Trade Treaty, Article 13(1).

78 See, for example, Control Arms, Arms Trade Treaty Monitor, [attmonitor.org](http://attmonitor.org): "[T]he civil society-based global resource that provides independent analysis and information on the effectiveness of the ATT, and supports the implementation of, and accession to the Treaty."

79 See, for example, Arms Trade Treaty, Articles 15–17; Convention on Cluster Munitions, Articles 6, 7, 11, and 12.

80 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(1); Convention on the Rights of the Child (CRC), Article 4; Convention on Rights of Persons with Disabilities (CRPD), Articles 4 and 32; Convention on Cluster Munitions, Article 6; Anti-Personnel Mine-Ban Convention, Article 6; Treaty on the Prohibition of Nuclear Weapons, Article 7.

81 Arms Trade Treaty, Article 15-16; Convention on Cluster Munitions, Article 6; Anti-Personnel Mine-Ban Convention, Article 6.

82 Optional Protocol to the UN Convention against Torture, Article 26; Arms Trade Treaty, Article 16(3); Convention on Cluster Munitions, Article 6(9); Anti-Personnel Mine Ban Convention, Article 6(4).

83 See, for example, Treaty on the Prohibition of Nuclear Weapons, Article 12.

# CONCLUSION

In its essential elements, a Torture-Free Trade Treaty should:

- **Establish high standards through new obligations aimed towards torture-free trade**, while complementing and reinforcing existing regional and international law, standards and guidance.
- Lay out a **clear scope for the law enforcement equipment** it covers.
- Require states parties to incorporate law enforcement equipment into **national trade control systems** or establish new systems and **set a floor for national regulation** of the trade in law enforcement equipment.
- **Prohibit law enforcement equipment that has no practical use other than for the purpose of torture or other ill-treatment**, including through prohibitions on transfer (export, import, and transit), production, technical assistance, and related services, such as brokering and advertising.
- **Mandate trade controls for law enforcement equipment** and related technical assistance and services **that could be used for torture or other ill-treatment**, requiring states to deny exports and transits when they pose clear or substantial risks of torture or other ill-treatment, while ensuring robust end-user documentation for approved exports and transits and taking measures to prevent diversion.
- **Oblige states parties to keep records and report nationally and internationally**, to ensure transparency and accountability that supports strong treaty implementation, alongside **international cooperation and assistance** and other measures that should be part of the treaty regime, such as **mechanisms to monitor and support implementation**.

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# ANNEX I: PROHIBITED GOODS

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**Goods used for law enforcement or in detention that have no practical use other than for the purpose of torture or other cruel, inhuman or degrading treatment or punishment**

## ***A. Certain mechanical restraint devices***

- Thumb-cuffs and finger-cuffs.
- Thumbscrews and finger-screws.
- Bar fetters.
- Leg irons (shackles).
- Gang chains.
- Weighted hand or leg restraints.
- Weighted gang chains connected to bar fetters, leg irons (shackles) or weighted leg restraints.
- Combination handcuffs linked by a rigid bar to leg restraints.
- Neck restraints and neck combination cuffs.
- Cuffs for restraining human beings, designed to be anchored to a wall, floor, ceiling or any other fixed object.
- Restraint chairs with metallic restraints and restraint chairs with non-metallic restraints not employed for medical purposes.
- Shackle boards and shackle beds with metallic restraints and shackle boards and beds not employed for medical purposes.
- Cage or net beds.
- Hoods and blindfolds for law enforcement, specially designed to block the vision and/or enclose the face of a prisoner or detainee, including such hoods and blindfolds when linked by a chain to ordinary handcuffs or other restraints.

## ***B. Certain portable striking and kinetic impact devices and weapons***

- Batons or other hand-held striking weapons with spikes or serrations made of metal or other hard material.
- Shields and body armour with spikes or serrations made of metal or other hard material.
- Weighted batons and weighted gloves or other similar devices.
- Whips, including those fitted with barbs, hooks, spikes, and metal wire, strengthened whips and 'sjamboks'.
- Automatic, automated and/or multi-barrel kinetic impact launchers that are inherently inaccurate or which result in unnecessary injuries.
- Non-metallic single projectiles that are inherently injurious or inaccurate.
- Non-metallic ammunition containing multiple projectiles that are inherently injurious or inaccurate.

### ***C. Certain electric shock devices and weapons***

- Body-worn electric shock devices, such as belts, sleeves and cuffs, that deliver painful and potentially incapacitating electric shocks to the wearer.
- Portable electric shock weapons that deliver painful electric shocks when the weapon is placed directly on the body of a targeted individual. These include electric shock batons, electric shock shields, electric shock stun guns, electric shock gloves and electric shock grabbing devices.
- Electric shock launchers designed to fire multiple projectiles at the same time or in rapid succession from a distance on two or more individuals at the same time. The individual projectiles discharge a painful and/or incapacitating shock to those impacted.
- Combination batons that can be used to inflict a painful and/or incapacitating electric shock as well as to dispense riot control agents.

### ***D. Certain riot control agent dispersal equipment***

- Fixed equipment for the dissemination of riot control agents that can be attached to a wall or ceiling inside a prison or place of detention, activated using a remote control or automated system, that delivers injurious amounts of riot control agents.
- Automatic, automated, multiple-barrel or other launchers and dissemination devices that are inherently inaccurate or are designed to deliver injurious amounts of riot control agent.
- Equipment and munitions for dispensing riot control agents from aerial platforms, for example, from an aircraft, helicopter or unmanned aerial vehicle (drone) where the mode of such dispersal is inherently inaccurate or the equipment or munitions are designed to disperse amounts of riot control agent that are injurious.
- Large calibre munitions containing riot control agents including mortar shells, howitzer shells, artillery shells and rocket-propelled projectiles.

### ***E. Certain acoustic or directed energy equipment or weapons***

- Equipment or weapons employing audible sound wave technology designed to target individuals or groups from a distance, that cause long-term or permanent loss or damage to hearing.
- Equipment or weapons employing millimetre wave energy technology that cause extremely painful heat sensation on the skin of the targeted individual or group of individuals from a distance.
- Equipment or weapons employing laser or optical light, that cause long-term or permanent loss or damage to sight or visual acuity of an individual or group of individuals.

### ***F. Components***

- Unique components and parts specifically designed or modified to perform a necessary function in the operation of the above prohibited equipment and weapons, including in their assembly and repair.



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# ANNEX II: CONTROLLED GOODS

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## **Goods used for law enforcement or in detention that could be used for torture or other cruel, inhuman or degrading treatment or punishment**

### ***A. Mechanical restraint equipment***

- Adjustable leg-cuffs and other adjustable ankle restraints that are not weighted.
- Ordinary handcuffs consisting of two adjustable wrist cuffs joined together by a short chain that allows a limited degree of movement.
- Combination cuffs – incorporating ordinary handcuffs, adjustable leg-cuffs or waist restraints, or a combination thereof – for the restraint of individuals.
- ‘Rigid or hinged handcuffs’ with a rigid bar or hinge, instead of a chain linking the two cuffs.
- ‘Single locking handcuffs’, which can be progressively tightened along a ratchet.
- Fabric/plastic/nylon restraints, wraps, limb restraints and similar devices.
- Spit hoods, spit guards and similar items not intended to block the vision of a prisoner or detainee.
- Restraint chairs, shackle boards and shackle beds fitted with leather or fabric straps intended for legitimate medical purposes carried out in line with human rights law and standards, including in prisons or other detention settings.

### ***B. Portable striking and kinetic impact devices and weapons***

- Batons including straight batons, side-handle batons (‘tonfas’), extendable and telescopic batons.
- Crowd control shields.
- Single or limited shot kinetic impact projectile launchers and associated non-metallic projectiles, including plastic bullets, rubber bullets and other projectiles such as bean bags that are not inherently injurious or inaccurate.

### ***C. Electric shock devices and weapons***

- Portable electric shock weapons that can be used to inflict a painful and potentially incapacitating electric shock at a distance, utilizing wired darts or other projectiles, with the intention of temporarily disabling the targeted individuals.

#### ***D. Riot control agents, malodorants and related equipment***

- Riot control agents.
- Malodorants, provided they are non-injurious and have no long-lasting health effects.
- Portable devices designed to dispense small amounts of riot control agents or malodorants over short distances and limited areas, targeting individuals. These include hand-held aerosols, sprayers and hand-thrown grenades.
- Equipment for the dissemination of riot control agents or malodorants targeting groups of individuals, provided that the equipment is designed to disseminate non-injurious amounts of riot control agent or malodorant. This equipment includes certain sprayers, 'foggers', water cannon, individual and multiple projectile launchers and their associated projectiles such as cartridges, encapsulated projectiles and grenades.

#### ***E. Other weapons and devices***

- Acoustic devices or weapons employing audible sound wave technology intended to target individuals or groups from a distance, that do not cause long-term or permanent loss or damage to hearing.
- Devices employing laser or optical light designed to temporarily disrupt the sight or visual acuity of an individual or group of individuals, that do not cause long-term or permanent loss or damage to sight or visual acuity.
- Stun grenades and smoke grenades.
- Ground vehicles which are manned or unmanned, armoured or unarmoured, and are designed or modified for crowd control, the employment of mobile water cannon, the removal of barricades, the deployment of mobile barriers, and the discharge of riot control agents or kinetic impact munitions.
- Unmanned aerial vehicles designed to discharge riot control agents, kinetic impact munitions or electric shocks.

#### ***F. Components***

- Unique components and parts specifically designed or modified to perform a necessary function in the operation of the above controlled equipment and weapons, including in their assembly and repair.



