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Articles

The Export of Goods Used for Torture and the Applicability of Article 3 ECHR

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Abstract

Article 3 of the European Convention on Human Rights (ECHR or Convention) is currently not understood to apply when Council of Europe member states export goods that could be used for torture, the death penalty, or other ill-treatment in third states. In 2021, the Committee of Ministers of the Council of Europe recommended states to take measures against trade in such goods, also recalling Article 3 ECHR. Following an analysis of relevant rules in the EU Anti-Torture Regulation, the UN Convention Against Torture, and the ECHR, the paper demonstrates how Article 3 ECHR may be interpreted so as to apply to export. As the person (at risk of) suffering torture, the death penalty, or other ill-treatment will be located abroad, the paper examines three alternative models for extraterritorial jurisdiction. It concludes that, at a minimum, the Convention could accommodate an obligation to investigate after an export has taken place.

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Keywords

torture – death penalty – Article 3 ECHR – Article 1 ECHR – jurisdiction – extraterritorial application – export – duty to investigate

1 Introduction

The extraterritorial application of the European Convention on Human Rights (ECHR or Convention) has been subject to much legal and academic debate. Questions of extraterritorial human rights protection usually arise when states act abroad, such as in the context of a military operation, or when they act domestically but impact the rights of an individual abroad. This impact can be direct, such as when a state authorises a drone strike, collects personal data, or pollutes an international waterway. It can also be more remote, namely when a state contributes to a violation of someone's human rights committed by another actor. When a state fails to prevent or even facilitates another actor causing harm to an individual outside of that state's territory and jurisdiction in the sense of Article 1 ECHR, the Convention is not normally considered to apply.[1] To a large degree, this makes sense; states cannot be expected to protect the rights of everyone, everywhere in the world.[2] But, where the connection between a state's conduct and the ultimate harm is clear, and that harm is exceptionally serious and practically irreparable, the categorical non-applicability of the ECHR might be considered problematic.

Torture and inhuman or degrading treatment or punishment (ill-treatment) is a serious and irreparable harm.[3] The prohibition of torture and ill-treatment is laid down in Article 3 ECHR, and the European Court of Human Rights (ECtHR or Court) has continuously confirmed its absolute and non-derogable

1 As is well known, the notion of 'jurisdiction' in Article 1 ECHR operates as a threshold criterion for applicability of the Convention. See *Al-Skeini v the United Kingdom* [GC] 55721/07 (ECtHR, 7 July 2011) para 130.

2 Compare, *Banković and Others v Belgium and 16 Contracting States* [GC] 52207/99 (ECtHR, 12 December 2001) para 75. See also Mr Justice Jones in *R* (*Zagorski and Baze*) *v Secretary of State for Business, Innovation and Skills and Archimedes Pharma UK Ltd* (*Interested Party*) [2010] EWHC 3110 (Admin), [2010] 11 WLUK 768 [73(5)], with respect to the extraterritorial application of the Charter of Fundamental Rights of the European Union in a case similar to the problem central to this paper, and S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to Extraterritoriality' (2012) 25 *Leiden Journal of International Law* 857, 859.

3 *Soering v the United Kingdom* 14038/88 (ECtHR, 7 July 1989) para 90.

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nature.[4] To give effect to the prohibition of torture, states are obliged to do more than just refrain from committing torture (the negative obligation). States have a number of positive obligations, namely the substantive obligation to put in place an effective legislative and regulatory framework, the substantive obligation to take preventive operational measures to protect potential victims, and the procedural obligation to investigate arguable claims of torture or ill-treatment, irrespective of whether the acts were committed by state officials or private actors.[5] The Court has also read the principle of *non-refoulement* into Article 3 ECHR, which means that contracting states are prohibited from transferring someone when this entails a real risk that they will be subjected to treatment contrary to Article 3 ECHR in the receiving or another state.[6] The prohibition of *refoulement* can be framed as a negative obligation, a positive obligation, or something in between.[7]

4 *Ireland v the United Kingdom* 5310/71 (ECtHR, 18 January 1978) para 163. On Article 3 ECHR's absolute nature, see M Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing 2021).

5 *X and Others v Bulgaria* [GC] 22457/16 (ECtHR, 2 February 2021) para 178 and, further, para 184, on the duty to investigate allegations of ill-treatment caused by private actors. Mavronicola also follows this categorisation, using the terms 'general (framework) duties', 'operational duties', and 'investigative duties', respectively. See Mavronicola (n 4) 138–139.

6 *Soering* (n 3) para 91.

7 As I explain further in section 3.2, I see it as a negative obligation (the transfer prohibition) with a positive aspect (the risk assessment). The ECtHR implicitly framed the prohibition of *refoulement* as a negative obligation in the following cases: *Soering* (n 3) para 91; *Hirsi Jamaa and Others v Italy* [GC] 27765/09 (ECtHR, 23 February 2012) para 114; *Ilias and Ahmed v Hungary* [GC] 47287/15 (ECtHR, 21 November 2019) para 126. In *Paposhvili v Belgium* [GC] 41738/10 (ECtHR, 13 December 2016), it did so explicitly for the first time (para 188). For a general critique of the *Paposhvili* judgment, see V Stoyanova, 'How Exceptional Must 'Very Exceptional' Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*' (2017) 29(4) *International Journal of Refugee Law* 580. For arguments as to why the principle of *non-refoulement* should be seen as a positive obligation, see V Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36(1) *Michigan Journal of International Law* 129, 159–160. See also V Tzevelekos and E Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 *Nordic Journal of International Law* 427, 439; G Noll, *Negotiating Asylum the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 472; M Hakimi, 'State Bystander Responsibility' (2010) 21 *European Journal of International Law* 341, 366; K Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) *International Journal of Refugee Law* 264, 279. In comparison, see M Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement Under the European Convention on Human Rights' (2008) 10(3) *European Journal of Migration and Law* 277, 291, and references therein. According to Den Heijer '[i]f one insists on labeling the prohibition of *refoulement* as either a positive or negative obligation, the most tenable

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A matter not understood to be covered by the Convention in general and Article 3 ECHR in particular is the export of goods that could be used for torture in third states. In 2021, the Council of Europe's Committee of Ministers (CoM)[8] adopted a Recommendation on Measures Against the Trade in Goods Used for the Death Penalty, Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Recommendation).[9] The goal of the Recommendation is for Council of Europe member states to regularly review their legislation and practice concerning export control in order to prevent the trade in goods that could be used for treatment incompatible with Article 3 ECHR. This Recommendation has been inspired by EU Regulation (EU) 2019/125 (ATR or Anti-Torture Regulation), which is, to date, the only legally binding instrument concerning the trade in such goods.[10] The UN Convention against Torture (CAT or Torture Convention)[11] could also be considered relevant, although it has not yet been applied to the issue at hand.[12] To address the current gap, an initiative for a treaty on torture-free trade is being explored at UN level. Within the Council of Europe, one way to give effect to the Recommendation would be for states to adopt a treaty too. Another way could be to make use of the ECHR.

solution probably is to consider removal cases as hybrid cases which impose both positive and negative obligations on an expelling State' (291). I agree, but I would still frame the prohibition of *refoulement* as a negative obligation, whilst qualifying the risk assessment as a positive aspect necessary to give proper effect to the prohibition. This is consistent with the ECtHR in *Hirsi Jamaa and Others* (n 7) (paras 146–147 and 156–157). See also Mavronicola (n 4) 161, citing, C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 191.

8 The CoM is the Council of Europe's statutory decision-making organ made up of the member states' Ministers of Foreign Affairs. See Articles 14 and 15(b) Statute of the Council of Europe.

9 Committee of Ministers, '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' (31 March 2021) CM/Rec(2021)2 (Recommendation CM/Rec(2021)2).

10 European Parliament and European Council Regulation 2019/125 of 16 January 2019 Concerning Trade in Certain Goods Which Could be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment [2019] OJ L30/1 (ATR). See section 3.1, below.

11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT). See section 3.2, below.

12 United Nations Economic and Social Council, 'Civil and Political Rights, Including the Question of Torture and Detention: 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, Submitted by Theo van Boven, Special Rapporteur on Torture, Pursuant to Resolution 2002/38 of the Commission on Human Rights' (13 January 2003) E/CN.4/2003/69.

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This paper argues that in light of the many obligations that Article 3 ECHR can already accommodate, this provision can also apply when states authorise or otherwise allow the export of goods used for torture.[13] The Court has repeatedly held that 'the provisions of the Convention cannot be interpreted and applied in a vacuum'[14] and that the Convention must be interpreted 'in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties' (VCLT),[15] including, specifically, 'any relevant rules of international law applicable in the relations between the parties.'[16] This general rule of treaty interpretation, laid down in Article 31(3)(c) VCLT, is known as the rule or principle of systemic integration.[17] Its use is not uncontroversial.[18] However, given that the Court itself has used it to interpret the Convention, and the content and scope of the rights and freedoms in the Convention can change and expand to reflect what is needed and expected in society over time, I follow this interpretive method for this paper, bearing in mind that not all Council of Europe member states are bound by the Anti-Torture Regulation.

Section 2 briefly discusses the Recommendation. Section 3 presents an analysis of the relevant rules in the ATR, the CAT, and the ECHR, including those developed in the ECtHR's jurisprudence. As the application of Article 3 ECHR depends on the interpretation of 'jurisdiction' in Article 1 ECHR, section 4 examines alternative models for extraterritorial jurisdiction which have been proposed by academics, developed by other human rights bodies,

13 I phrase the state's conduct like this intentionally: for an authorisation, the state will issue an export licence following an application, while for allowing an export, such an application might never have been made.

14 See, for example, *Al-Dulimi and Montana Management Inc v Switzerland* [GC] 5809/08 (ECtHR, 21 June 2016) para 134.

15 Ibid; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

16 VCLT (n 15) Article 31(3)(c). See, for example, *Al-Dulimi and Montana Management Inc* (n 14) para 134; *Al-Adsani v the United Kingdom* [GC] 35763/97 (ECtHR, 21 November 2001) para 55.

17 For a general discussion, see O Dörr, 'Article 31', in *Vienna Convention on the Law of Treaties – A Commentary*, O Dörr and K Schmalenbach (eds), (2nd ed, Springer 2018) 521, 603 and thereafter. See also C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279. See, for the ECtHR in particular, V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECTHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 *Michigan Journal of International Law* 621.

18 See A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 *International and Comparative Law Quarterly* 557.

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or established by the Court itself. Section 5 argues that, depending on how the duty to prohibit or control the export of goods that could be used for torture is framed and which jurisdictional model is followed, Article 3 ECHR could apply when contracting states authorise or otherwise allow the export of goods that could be used for torture or ill-treatment and oblige them to investigate businesses as well as perhaps the authorities' own conduct in the event that such goods are exported. I have used the CoM's 2021 Recommendation and other Council of Europe documents; the ATR, the CAT, and the ECHR; authoritative interpretations of these instruments, including the Court's jurisprudence and the (non-binding) output of UN treaty bodies; and relevant academic publications.

Before setting out, a few caveats are due. First, I focus on the *export* of goods that could be used for torture, the death penalty, and other ill-treatment. Depending on how this particular conduct is qualified, different rules will apply. In turn, the applicable rules can be framed in different ways, namely as negative or positive and substantive or procedural obligations. Second, when a state's conduct meets the conditions of aid or assistance as laid down in Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), the state in question can be held responsible for complicity on this basis.[19] This mode of responsibility is excluded from the present analysis, which focuses instead on identifying a possible *obligation* and not necessarily on establishing a state's *responsibility*.[20] Third, while I focus on Article 3 ECHR, developments for extraterritorial jurisdiction in relation to the right to life have been taken into account too, insofar as they apply to the obligations read into the prohibition of torture.[21] Finally, I classify the death penalty *as such* – not just the anticipation thereof[22] or the method used[23] – as a type of 'cruel, inhuman or degrading treatment or punishment', if not torture.[24]

19 United Nations International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) A/56/10 (ASR).

20 It is worth noting that the ECtHR included ASR (n 19) Article 16 under the heading of 'the applicable law' in the judgments on the responsibility of several contracting states for their role in the extraordinary rendition programme.

21 *Al-Saadoon and Mufdhi v the United Kingdom* 61498/08 (ECtHR, 2 March 2010) para 120.

22 *Soering* (n 3) paras 106–111.

23 United Nations Human Rights Committee, 'Chitat Ng v Canada' (7 January 1994) CCPR/C/49/D/469/1991, para 16.4.

24 The ECtHR held in *Al-Saadoon and Mufdhi* that Article 2(1) ECHR does not continue 'to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty'. See *Al-Saadoon and Mufdhi* (n 21) paras 115–125. See also *AL (XW) v Russia* 44095/14 (ECtHR, 29 October 2015) para 64; Recommendation CM/Rec(2021)2 (n 9) Recital (10). This corresponds to the classifications of the EU, the

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2 The Recommendation on Measures Against the Trade in Goods Used for Torture

The problem with the trade in goods which have no practical use other than for torture, the death penalty, or other ill-treatment (i.e., goods which are inherently abusive by design) was first explicitly recognised by the Council of Europe in 2016, when the CoM adopted Recommendation CM/Rec(2016)3 on Business and Human Rights.[25] Under the heading 'State Action to Enable Corporate Responsibility to Respect Human Rights', which gives expression

African Commission on Human and Peoples' Rights, several UN Special Rapporteurs, and Amnesty International. For the EU, see ATR (n 10) Article 2(a) and (b). See also ATR (n 10) Recitals (5), (6), and (7). For the African Commission on Human and People's Rights, see African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life* (*Article 4*) (4 – 18 November 2015): <https://achpr.au.int/en/node/851> para 22. For the UN Special Rapporteurs, see, most recently, United Nations Office of the High Commissioner for Human Rights, 'UN Experts Warn of Associated Torture and Cruel Punishment: World Day Against the Death Penalty' (10 October 2022): <https://www.ohchr.org/en/press-releases/2022/10/un-experts-warn-associated-torture-and-cruel-punishment>. See also United Nations General Assembly, 'Seventieth Anniversary of the Universal Declaration of Human Rights: Reaffirming and Strengthening the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (20 July 2018) A/73/207, para 44; United Nations General Assembly, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 2012) A/67/279, paras 53–64 and 72; United Nations General Assembly, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' (14 January 2009) A/HRC/10/44, paras 41–48. See also the *amicus curiae* brief submitted to the UK Supreme Court on appeal from the High Court of Justice by Professor C Heyns, intervener and former Special Rapporteur on extrajudicial, summary or arbitrary executions (*Elgizouli* (*Appellant*) *v Secretary of State for the Home Department* (*Respondent*) [2020] UKSC 10, [2021] AC 937 [148]). In comparison, see *Ng* (n 23) para 16.2. See also United Nations Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights' (30 October 2018) CCPR/C/GC/36. The United Nations Human Rights Committee (HRC) has stopped short of concluding that the death penalty is incompatible with the International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 7, but, see para 51. For Amnesty International, see <https://www.amnesty.org/en/what-we-do/death-penalty>, noting that: 'Amnesty International holds that the death penalty breaches human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment.'

25 Committee of Ministers, 'Human Rights and Business: Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States' (2 March 2016) CM/Rec(2016)3 (Recommendation CM/Rec(2016)3).

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to the state duty to protect human rights as included in the first pillar of the UN Guiding Principles on Business and Human Rights (UNGPs),[26] this Recommendation included the following paragraph:

> [i]n order *not to facilitate* the administration of capital punishment or torture in third countries *by providing goods* which could be used to carry out such acts, 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 [ill-treatment].[27]

In 2018, the Parliamentary Assembly of the Council of Europe (PACE) took the initiative for a Recommendation Towards the Strengthening of International Regulations Against Trade in Goods Used for Torture and the Death Penalty.[28] The first paragraph recalls the absolute prohibition of torture and ill-treatment in all circumstances, a prohibition which is 'so strict as to require States to take into account consequences of their actions that may occur in other countries.'[29] The second paragraph recalls the abolition of the death penalty, explicitly adding that in 2010, the ECtHR had concluded that 'the death penalty amounted to inhuman or degrading treatment and thus fell within the prohibition set out in Article 3 of the Convention.'[30] The third paragraph states:

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26 United Nations Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) A/HRC/Res/17/4, endorsing United Nations Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (UNGPs). But, see Commentary to Principle 2: 'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.'

27 Recommendation CM/Rec(2016)3 (n 25) Appendix, para 24. See also Recommendation CM/Rec(2021)2 (n 9) Explanatory Memorandum, para 43 (emphasis added). Note that this paragraph only refers to goods 'which have no practical use other than for the purpose of' torture and ill-treatment.

28 PACE, 'Strengthening International Regulations Against Trade in Goods Used for Torture and the Death Penalty' (26 January 2018) Recommendation 2123 (2018) (PACE Recommendation 2123 (2018)).

29 Ibid para 1.

30 Ibid para 2.

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> 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*.[31]

A subsequent paragraph underlines that the trade in such goods 'can contribute to the incidence of capital punishment and torture or serious ill-treatment by providing those responsible with the means to act',[32] adding that the ATR's prohibition regarding the export of drugs that could be used for the death penalty to countries where it was known that they would be used for that purpose had 'seriously hampered the ability of several [American] States [...] to execute the death penalty.'[33] Given the ATR's apparent success with respect to capital punishment,[34] the PACE called on the CoM to adopt a Recommendation to Council of Europe member states in order to set up a regulatory regime that would 'extend the scope of the approach taken by [the ATR].'[35]

In 2021, the CoM adopted Recommendation CM/Rec(2021)2.[36] One of the first recitals recalls 'member States' obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the [Convention]';[37] another specifically recalls 'member States' obligation to prohibit torture and inhuman or degrading treatment or punishment in accordance with Article 3 [ECHR]'.[38] In line with the ATR,[39] the Recommendation distinguishes between goods that are *exclusively* meant to carry out executions or inflict torture, and are therefore inherently abusive; certain pharmaceuticals that *could* be used for executions; and law enforcement equipment that *could* be used for torture

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31 Ibid para 3 (emphasis added). See also Recommendation CM/Rec(2021)2 (n 9) Explanatory Memorandum, para 12.

32 PACE Recommendation 2123 (2018) (n 28) para 4.

33 Ibid.

34 See European Commission, 'Report from the Commission to the European Parliament and the Council on the Review of Regulation (EU) 2019/125 of 16 January 2019 Concerning Trade in Certain Goods Which Could be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment' (30 July 2020) COM(2020)343, para 4.4. See also PACE Recommendation 2123 (2018) (n 28) para 6.

35 PACE Recommendation 2123 (2018) (n 28) para 12.3.

36 Recommendation CM/Rec(2021)2 (n 9).

37 Ibid.

38 See ibid.

39 ATR (n 10) Annex II, III, and IV.

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or ill-treatment.[40] The last two categories can also be classified as potentially abusive goods. The recommended measures set out in the appendix include a total trade ban on inherently abusive goods and an export control system for potentially abusive goods. For this category of controlled goods, states are recommended to conduct a risk assessment prior to granting an export licence, and to withhold or revoke a licence for an ongoing export when there are reasonable grounds for believing that they will be, have been, are being, or risk being used for torture and other cruel, inhuman or degrading treatment or punishment.[41] For all categories, member states 'should ensure that effective, proportionate and dissuasive sanctions exist'[42] for breaches of the prohibitions and regulations.

The trade in inherently abusive goods, a relatively narrow category, should always be prohibited, as it is under the Anti-Torture Regulation and is foreseen by the CoM's Recommendation. As for potentially abusive goods, there is a tension between the need to ensure that trade in goods used for torture and the death penalty is not a lucrative business, on the one hand, and the interest in guaranteeing that international human rights standards do not create undue barriers on the free flow of goods and services, on the other. The recommended measures do not only cover export prohibitions and controls, but also ban promotion, brokering, training, and technical assistance.[43] These activities support the trade in so-called torture tools, and by extension, acts of torture themselves.[44] As stated above, this paper solely focuses on export. The Recommendation clearly sets out which goods should be prohibited or controlled, as does the ATR. These categories are further explained in section 3.1, below. In the interest of legal certainty, it is important that if Article 3 ECHR is understood to apply to the export of goods used for torture, the goods in question are clearly defined.

40 One type of instrument that belongs to this category are electric discharge weapons. See Recommendation CM/Rec(2021)2 (n 9) Appendix 3 (ii) and (iii). See also *Anzhelo Georgiev and Others v Bulgaria* 51284/09 (ECtHR, 30 September 2014) paras 75–76 and 42–43.

41 Recommendation CM/Rec(2021)2 (n 9) paras 3.2.3 and 3.2.4.

42 Ibid paras 1.7, 2.3, and 3.1.5.

43 Ibid Explanatory Memorandum, para 39.

44 This is not an academic or incidental issue. See Steering Committee for Human Rights (CDDH), 'Draft Feasibility Study of a Legal Instrument to Strengthen International Regulations Against Trade in Goods Used for Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment and the Death Penalty' (21 November 2019) CDDH(2019)31, Appendix I; Amnesty International and Omega Research Foundation, 'Ending the Torture Trade: The Path to Global Controls on the "Tools of Torture"' (11 December 2020): <https://www.amnesty.org/en/documents/act30/3363/2020/en/>. See also Recommendation CM/Rec(2021)2 (n 9) Explanatory Memorandum, para 57.

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3 Relevant Rules in the ATR, the CAT, and the ECHR

This section presents an analysis of the relevant rules for the export of goods used for torture. It examines the export prohibitions and authorisation requirements in the ATR (section 3.1), the obligation to prevent, the obligation to punish, and the principle of *non-refoulement* in the CAT (section 3.2), and the principle of *non-refoulement* and the notion of 'acquiescence and connivance' under Article 3 ECHR (section 3.3).[45]

3.1 *The EU Anti-Torture Regulation*

Council Regulation (EC) 1236/2005, which entered into force in 2006, was the first legally binding instrument to establish rules governing the trade in certain goods which could be used for the purpose of torture, the death penalty, or other ill-treatment in third countries.[46] After multiple amendments and updates, it was repealed and codified once more in 2019.[47] As mentioned above, the ATR imposes a total export ban for inherently abusive goods[48] and requires an export authorisation system for potentially abusive goods, namely goods that *can* be used for torture or ill-treatment[49] and drugs that *can* be used for executions.[50] The goods belonging to these respective categories are listed exhaustively in the Regulation's Annexes.[51] Articles 11(1) and 16(1) ATR also specify that the Annexes shall only comprise goods which are primarily used for law enforcement purposes, goods which present a material risk for misuse given their design and technical features, and goods which have been approved or actually used for executions by one or more countries that have not yet abolished the death penalty. This way, items such as ballpoint pens and

45 See also Recommendation CM/Rec(2021)2 (n 9) Recital (7): 'Considering the jurisprudence of the European Court of Human Rights […]'.

46 European Council Regulation No 1236/2005 of 27 June 2005 Concerning Trade in Certain Goods Which Could be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment [2005] OJ L200/1. Also note ATR (n 10) Recital (50). In addition, the ATR does also not cover transfer of goods between EU member states and a number of third states.

47 ATR (n 10).

48 See ibid Article 3. Note the one exception in Article 3(2): export may be authorised if it is demonstrated that the goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.

49 See ibid Article 11 and thereafter.

50 See ibid Article 16 and thereafter.

51 See Annex II for inherently abusive goods (ATR (n 10) Article 3 and thereafter), Annex III for goods which could be used for torture or ill-treatment (ATR (n 10) Article 11), and Annex IV for goods which could be used for the death penalty specifically (ATR (n 10) Article 16).

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water bottles will not be subject to the ATR. The CoM's Recommendation has taken a similar approach.[52]

For the export of potentially abusive goods, Articles 12(2) and 17(2) ATR require the competent authorities to refuse an authorisation when there are *reasonable grounds to believe* that goods listed in Annex III or IV *might* be used for torture, the death penalty, or other ill-treatment in a third country. This requirement resembles the risk assessment laid down in the EU Common Position Defining Common Rules Governing Control of Exports of Military Technology and Equipment, which requires states to refuse an export authorisation if there is a *clear risk* that the military technology or equipment to be exported *might* be used in the commission of serious violations of international humanitarian or human rights law.[53] Once an authorisation is granted, the competent authorities may still annul, suspend, modify, or revoke it.[54] They are also obliged to notify other EU member states and the EU Commission of any decision dismissing an application for an export authorisation or annulling an authorisation already granted.[55] One of the ATR's last provisions, Article 33(1), obliges member states to lay down rules on penalties applicable to infringements of the ATR. Penalties include administrative and criminal sanctions, which apply to natural and legal persons, and can range from fines and confiscation of goods to imprisonment.[56]

Finally, for the category of goods that might be used for torture and ill-treatment specifically, Article 12(2) ATR refers to the misuse of such goods by law enforcement authorities and by *any natural or legal persons*.[57] This indicates that the ATR is not limited to preventing torture and ill-treatment by state officials in third countries, but seeks to prevent the misuse of law enforcement equipment by non-state actors abroad, too. The reference to natural or legal persons also expands the definitions of torture and ill-treatment in the ATR, which match the definitions of torture and ill-treatment in the CAT and require a certain degree of state involvement.[58]

52 Recommendation CM/Rec(2021)2 (n 9) Appendices and Explanatory Memorandum paras 1 and 11.

53 See European Council Common Position 2008/944/CFSP of 27 June 2005 Defining Common Rules Governing Control of Exports of Military Technology and Equipment [2005] OJ L200/1, Criterion 2(a) and 2(c) (EU Common Position).

54 See ATR (n 10) Article 21(5).

55 See ATR (n 10) Article 23(1).

56 See European Commission (n 34) para 3.4.

57 See ATR (n 10) Article 12(2). Compare, ATR Article 17(2), which does not include natural or legal persons.

58 See ibid Article 2(a) and (b); CAT (n 11) Articles 1 and 16.

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3.2 *The UN Convention Against Torture*

The CAT forms an integral part of the international legal framework on the absolute prohibition of torture. It does not reiterate the duty to refrain from committing torture codified in other human rights treaties,[59] but this has not stopped the UN Committee Against Torture from holding states responsible for committing acts of torture on the basis of Article 1 or Article 2 CAT.[60] Article 1(1) CAT provides a definition of torture, which requires a minimum level of state involvement: the pain or suffering must have been inflicted 'by or at the instigation of *or with the consent or acquiescence* of a public official or other person acting in an official capacity'.[61] Article 2(1) CAT requires states to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' The discussion whether Article 1 CAT is an adequate basis for establishing state responsibility notwithstanding, it is clear that the negative obligation to refrain from committing torture is implied in the CAT. The next question is then whether the CAT includes any obligations that would be relevant where a state decides to authorise or otherwise allows the export of goods that could be used for torture or ill-treatment abroad.

The Committee Against Torture's General Comment No 2 on Article 2 explains that the effective measures required by Article 2(1) must 'prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention.'[62] If authorising an export were to be considered a form of acquiescing, otherwise participating, or even complicity in torture, this

59 See ICCPR (n 24) Article 7. See also United Nations Human Rights Committee, 'CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 March 1992) A/44/40, para 2.

60 See G Zach, 'Article 1 Definition of Torture', in *The United Nations Convention Against Torture and its Optional Protocol: A Commentary*, M Nowak, M Birk, and G Monina (eds), (2nd edn, Oxford University Press 2019) 23, 63 and sources cited therein: n 240 – n 242.

61 The same applies for ill-treatment. See CAT (n 11) Article 16 (emphasis added). Note that this is the definition of the crime of torture as laid down by the CAT, but it is not necessarily the definitive definition of torture in international law. See also CAT (n 11) Article 1(2). See further, N Rodley, 'The Definition(s) of Torture in International Law' (2002) 55(1) *Current Legal Problems* 467; H Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *The American Journal of International Law* 379.

62 United Nations Committee Against Torture, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No 2: Implementation of Article 2 by States Parties' (24 January 2008) CAT /C/GC/2, para 17.

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provision could be relevant.[63] However, the obligation to prevent only applies in relation to acts of torture 'in any territory under its jurisdiction',[64] which would appear to exclude cases where the person at risk of being subjected to torture is located abroad.[65] Conversely, the obligation to criminalise torture in Article 4 CAT, is not limited by jurisdiction. As Pollard has pointed out: the duty to criminalise complicity or participation in torture in Article 4(1) 'does *not* exclude cases where a complicit or participating act in the State's territory or jurisdiction relates to pain or suffering actually applied in another State's territory or jurisdiction [...].'[66] In other words, states are also required to criminalise acts of complicity or participation in torture abroad emanating from their territory. This would include corporate complicity. Some authors have even interpreted Article 4(1) CAT to include state complicity.[67]

Another relevant rule is the prohibition of *refoulement* laid down in Article 3 CAT. I classify this as a *negative* obligation, as it requires states to refrain from a specific type of conduct, namely the transfer of a person to a place where they 'would be in danger of being subjected to torture.'[68] Having said that, as it protects individuals against a future and potential harm and requires states to assess the risk of the harm materialising prior to a transfer, the rule also has

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63 J Bauer, 'Obscured by "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence under the Convention Against Torture' (2021) 52(2) *Columbia Human Rights Law Review* 738, 750. According to Bauer, a failure to take effective preventive measures can be regarded as 'acquiescence'. See also 782 and 787 and sources cited therein: n 180.

64 See United Nations Committee Against Torture (n 62) paras 5 and 16.

65 In their 1988 handbook, Burgers and Danelius noted that the state's territorial sea, ships flying its flag, and aircraft registered in that state are included. See JH Burgers and H Danelius, *The United Nations Convention Against Torture* (Martinus Nijhoff Publishers 1988) 123–124. Compare, United Nations General Assembly, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (7 August 2015) A/70/303, paras 32–33.

66 M Pollard 'Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained Through Torture by Another State' (2005) 23(3) *Netherlands Quarterly of Human Rights* 349, 364.

67 S Fulton, 'Cooperating with the Enemy of Mankind: Can States Simply Turn a Blind Eye to Torture?' (2012) 16(5) *The International Journal of Human Rights* 773, 782; B Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62 *International and Comparative Law Quarterly* 523, 526; United Nations General Assembly, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez' (10 April 2014) A/HRC/25/60, para 48; United Nations General Assembly, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (7 August 2015) A/70/303, para 21. Compare, NHB Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16(11) *Chinese Journal of International Law* 11, 22.

68 CAT (n 11) Article 3(1).

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a *positive* and arguably even procedural aspect.[69] The duty to conduct a risk assessment and the criteria that the state must take into account are laid down in Article 3(2) CAT. An analogy can be made between *refoulement* and export: both involve a transfer from the state's territory and jurisdiction to another state's territory and jurisdiction, the consequence of which may be that an act of torture occurs in the recipient state.[70] But this is also where the analogy falls short: the CAT does not take the geographical starting point of the transfer, but the location of the person who is at risk of being tortured as the trigger for the state's obligation. This means that the person in a receiving state will likely not hold any rights vis-à-vis the exporting state.

Save the problem with jurisdiction, the prohibition of *refoulement* is still similar to an export prohibition in the sense that it imposes an independent obligation on the state which can be breached when a state decides to extradite or export, despite the existence of a risk of harm but regardless of whether or not that harm actually occurs. Some authors have qualified the prohibition of *refoulement* as a type of non-complicity rule, albeit a specific and preventive one.[71] The relevance of the prohibition of *refoulement* to the notion of state complicity is apparent from the ECtHR's jurisprudence on the extraordinary rendition programme, discussed below.

3.3 *The European Convention on Human Rights*

The ECtHR has recognised certain rules and concepts under Article 3 ECHR that could be expanded to include or be used as an analogy for export prohibitions

69 See n 7. On the duty to conduct a risk assessment as a procedural aspect, see A Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2017) 60 *German Yearbook of International Law* 667, 687.

70 This analogy has been made by others, too, in relation to the arms trade. See, for example, A Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87(859) *International Review of the Red Cross* 467, 479–480; NHB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108(4) *The American Journal of International Law* 722, 729; A Bellal, 'Arms Transfers and International Human Rights Law', in *Weapons Under International Human Rights Law*, S Casey-Maslen (ed), (Cambridge University Press 2014) 448, 450. All of these sources have cited S Marks and A Clapham, *International Human Rights* (Oxford University Press 2005) 13.

71 M Jackson, 'Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27(3) *European Journal of International Law* 817, 824; M Ammer and A Schüchner, 'Article 3 Principle of Non-Refoulement', in *The United Nations Convention Against Torture and its Optional Protocol: A Commentary*, M Nowak, M Birk, and G Monina (eds), (2nd edn, Oxford University Press 2019) 98, 100; S Egan, *Extraordinary Rendition and Human Rights, Examining State Accountability and Complicity* (Palgrave Macmillan 2019) 86–87.

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and authorisation requirements, namely the prohibition of *refoulement* and the notion of 'acquiescence and connivance'. This section discusses the relevant jurisprudence.[72]

3.3.1 Non-Refoulement

As stated above, the prohibition of *refoulement* – in other words, the ban on removal – can be seen as a negative obligation imposed by Article 3 ECHR, albeit with a positive aspect.[73] Referring to the prohibition of *refoulement* explicit in Article 3 CAT, the Court held in the famous case of *Soering v the United Kingdom* that '[t]he fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 [ECHR].'[74] Interestingly, Burgers and Danelius have noted in their handbook on the CAT that the rule in Article 3 CAT was actually inspired by the jurisprudence of the now defunct European Commission of Human Rights on Article 3 ECHR.[75] On the nature of the prohibition of *refoulement* in Article 3 ECHR, the Court concluded that:

> [i]t would hardly be compatible with the underlying values of the Convention […] were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture […]. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 […], would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to [ill-treatment] proscribed by that Article […].[76]

Over three decades later, this principle has been expanded to practically all other cases where individuals are removed or pushed back by a contracting

72 See n 45.
73 See n 7.
74 *Soering* (n 3) para 88.
75 Burgers and Danelius (n 65) 125, referring to *Altun v Germany* 10308/83 (ECmHR, dec, 3 May 1983) 231–232.
76 *Soering* (n 3) para 88.

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state.[77] It applies in relation to the death penalty and other forms of ill-treatment, including where such ill-treatment might be carried out by non-state actors.[78] It was also used in the extraordinary rendition cases. The 'extraordinary rendition programme' involved the transfer of 'high value detainees' to secret detention sites all over the world, of which torture and ill-treatment were an inherent part. In *El-Masri*, the first in this series of cases, the Court held that by transferring the applicant into the custody of the US authorities, the state had 'knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3.'[79] In subsequent cases, the Court found that 'by enabling the CIA to transfer the applicant to its other secret detention facilities, the [...] authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention.'[80] This is again where an analogy with the export of torture tools can be made: by enabling the transfer of inherently or potentially abusive goods to a state that will use them for torture or ill-treatment, the exporting state will expose someone to a foreseeable serious risk of torture or ill-treatment as it thereby – to use the words of the PACE in their 2018 Recommendation – 'provides those responsible with the means to act.'[81]

As mentioned in section 3.2 above, the duty to conduct a risk assessment might also be qualified as a *procedural* obligation, in the sense that it requires states to make enquiries and thereby 'investigate' the risk of torture or

77 See, for example, *Ilias and Ahmed* (n 7) para 126. The principle of *non-refoulement* also applies extraterritorially. See, for example, *Al-Saadoon and Mufdhi* (n 21); *Hirsi Jamaa and Others* (n 7). Note that in these cases, the victims were still within the contracting state's jurisdiction. For the sake of completeness, it is worth noting that the principle of *non-refoulement* has also been expanded to other Convention obligations, namely Articles 2, 5, and 6 ECHR.

78 See *HLR v France* 24573/94 (ECmHR, dec, 29 April 1997) para 40.

79 *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] 39630/09 (ECtHR, 13 December 2012) para 220. See also *Nasr and Ghali v Italy* 44883/09 (ECtHR, 23 February 2016) para 288. Note that while this is straightforward application of the principle of *non-refoulement*, the Court applied it to the transfer of the person by Macedonian officials to American officials on Macedonia's territory. See also Egan (n 71) 95.

80 *Al Nashiri v Poland* 28761/11 (ECtHR, 24 July 2014) para 518; *Husayn (Abu Zubaydah) v Poland* 7511/13 (ECtHR, 24 July 2014) para 513; *Al Nashiri v Romania* 33234/12 (ECtHR, 31 May 2018) para 678; *Abu Zubaydah v Lithuania* 46454/11 (ECtHR, 31 May 2018) para 643. Note again that the *refoulement* did not only consist of the transfer to the US authorities who subsequently transferred the detainees to other secret detention sites in other countries, but also to the exposure of the person to the risk of treatment contrary to Article 3 ECHR on the contracting state's own territory. See *Al Nashiri v Poland* (n 80) para 442(b); *Abu Zubaydah v Poland* (n 80) para 444(b); *Al Nashiri v Romania* (n 80) para 589(c); and *Abu Zubaydah v Lithuania* (n 80) para 576(c).

81 See n 32.

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ill-treatment occurring *ex ante*.[82] I have not identified any (ECtHR) case law qualifying the risk assessment that is necessary to give proper effect to the principle of *non-refoulement* as such, but as the ECtHR has established a third model for extraterritorial jurisdiction in relation to procedural obligations specifically, this argument might be worth pursuing.

3.3.2 Acquiescence and Connivance, the Duty to Protect, and the Duty to Investigate

In the extraordinary rendition cases, the Court not only held Macedonia,[83] Poland, Romania, and Lithuania responsible for violating the prohibition of *refoulement*, but also for breaching certain positive obligations under Article 3 ECHR, including the obligation to protect.[84] Moreover, the Court concluded that the authorities had not merely *failed to take measures to ensure* that the individuals within their territory were not subjected to torture or ill-treatment by others;[85] they had *acquiesced and connived* in the acts of torture committed by other actors on their territory:

> the [state], for all practical purposes, facilitated the whole process of the operation of the [Extraordinary Rendition] Programme on their territory [...]. [T]he authorities – even if they did not see or participate in the specific acts of ill-treatment and abuse endured by the applicant [...] – must have been aware of the serious risk of treatment contrary to Article 3 occurring in the CIA detention facility on [their] territory. Accordingly, the [...] authorities, *on account of their "acquiescence and connivance"* [...] must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on their territory.[86]

In these cases, 'acquiescence and connivance' has clearly been used to give expression to the state's responsibility for complicity, yet the exact function

82 Seibert-Fohr (n 69) 687.

83 Now North Macedonia.

84 They were also held responsible for breaching the procedural limb, but I will not discuss this in detail here.

85 For the difference between failing to protect an individual from abuse on the one hand and acquiescing and/or conniving in abuse on the other, compare, *Paul and Audrey Edwards v the United Kingdom* 46477/99 (ECtHR, 14 March 2002); *Women's Initiatives Supporting Group and Others v Georgia* 73204/13 and 74959/13 (ECtHR, 16 December 2021).

86 See *Abu Zubaydah v Lithuania* (n 80) para 642 (emphasis added). The exact same conclusion was reached in *Al Nashiri v Romania* (n 80) para 677; *Abu Zubaydah v Poland* (n 80) para 512; *Al Nashiri v Poland* (n 80) para 517. See also *El-Masri* (n 79) para 206, with respect to the treatment at Skopje airport.

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of this concept or formula in the Court's jurisprudence remains unclear.[87] The formula also appears in the Court's jurisprudence in other types of cases, all of which – save the extraordinary rendition case law[88] – relate to human rights abuses by private actors within the state's territory and jurisdiction.[89] One line of case law containing this formula relates to discriminatory hate crimes committed by private actors, but with the acquiescence and/or connivance of the state's authorities. Furthermore, the Court has not only used this formula where the authorities failed to take protective operational measures in relation to an individual or group at risk of harm, but also where the authorities failed to effectively investigate the crimes committed *ex post*. With respect to the latter, the Court held in *Identoba v Georgia,* a case concerning violence committed by private actors against demonstrators at the International Day Against Homophobia march, that:

> it was essential for the relevant domestic authorities to conduct the investigation […], taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question. […] The Court considers that without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant *indifference would be tantamount to official acquiescence to or even connivance* [*in*] *hate crimes*.[90]

This conclusion has been repeated in other cases concerning acts of violence perpetrated by private actors against members of the LGBTQI+ community[91]

87 It is also confusing that the Court sometimes refers to 'acquiescence *or* connivance' and sometimes to 'acquiescence *and* connivance'. The terms do not mean the same thing; connivance designates a stronger form of involvement than acquiescence. See also M Milanovic 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies* 295, 364–365.

88 *El-Masri* (n 79) was the first time that the Court applied the formula in the context of a state facilitating the act of other state actors. See also Milanovic (n 87) 358.

89 For an in-depth study on the Court's use of this formula up to 2020, see Milanovic (n 87) and M Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights', in *Secondary Rules of Primary Importance*, G Kajtár, B Çalı, and M Milanovic (eds), (Oxford University Press 2022) 221.

90 *Identoba and Others v Georgia* 73235/12 (ECtHR, 12 May 2015) para 77 (emphasis added).

91 See *Women's Initiatives* (n 85) para 63; *MC and AC v Romania* 12060/12 (ECtHR, 12 April 2016) para 124; *Sabalic v Croatia* 50231/13 (ECtHR, 14 January 2021) para 95; *Association ACCEPT and Others v Romania* 19237/16 (ECtHR, 1 June 2021) para 124 (this case concerned a violation of Article 14 ECHR in conjunction with Article 8 ECHR (the right to private

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and domestic violence against women;[92] cases concerning Article 2 or Article 3 ECHR in conjunction with Article 14 ECHR (the prohibition of discrimination). To the best of my knowledge, this formula has not been used for procedural violations with respect to crimes committed without such discriminatory overtones. More so than the principle of *non-refoulement*, the 'acquiescence and connivance' formula has often been relied on by applicants and used by the Court to assign state responsibility where the state's conduct amounts to more than a mere failure to intervene, such as facilitation or complicity. This is also clear from the extraordinary rendition case law.[93] In *El-Masri*, the Court even used the formula as a rule of attribution of conduct, leading to the state's direct responsibility.[94] In all of the cases identified, 'acquiescence and connivance' has been used in connection with alleged violations of positive obligations under Articles 2 and 3 ECHR.

The 'acquiescence and connivance' formula is included in the Court's Guide on Article 3 ECHR, where it is not mentioned as part of the positive substantive or procedural obligations, but under the heading of the *prohibition* of torture.[95] The heading's wording refers to torture 'inflicted or facilitated by State agents.'[96] The inclusion of the formula under the negative obligation is rather curious. Does this mean that the 'acquiescence and connivance' formula gives expression to some kind of negative non-facilitation rule under Article 3 ECHR? Or do these terms simply reflect the definition of torture in Article 1 CAT, which has also been adopted by the Court? It should be noted that the Court's Guides are prepared by the Court's Registry and do not bind the Court

life). The Court rejected the complaint in relation to Article 3 ECHR, as the minimum level of severity had not been attained).

92 *Tkhelidze v Georgia* 33056/17 (ECtHR, 8 July 2021) para 51. Compare, *A and B v Georgia* 73975/16 (ECtHR, 10 February 2022) para 45. In this case, the Court held that the domestic courts should have investigated the police officers' acquiesce or connivance in the gender-motivated abuses by their colleague.

93 See the case law cited in n 79, n 80, and *Women's Initiatives* (n 85) para 78.

94 See *El-Masri* (n 79) paras 206 and 211. See, on this point, A Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (EJIL:Talk!, 24 December 2012): <https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>.

95 ECtHR, 'Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture' (31 August 2022): <https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG> 12, para 29. The text of this paragraph does not tell us anything new. It reads as follows: 'Linked to the above, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of others within its jurisdiction may engage that State's responsibility under the Convention (*Chernega and Others v. Ukraine*, 2019, § 127).'

96 Ibid 12.

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itself. The two paragraphs under this heading have also been copy-pasted from *Chernega and Others v Ukraine*, and it is likely that the author indeed had the Torture Convention's definition of torture in mind, as opposed to any legal obligations (or prohibitions). Indeed, the 'acquiescence and connivance' formula appears to be closer to a mode of responsibility specific to the ECHR than to an obligation under Article 3 ECHR.

Regarding the export of goods used for torture, the 'acquiescence and connivance' formula could be used when a state fails to prohibit or control such an export. Framing the state's conduct as a failure to protect an individual in a third state could amount to a breach of a substantive obligation under Article 3 ECHR. Moreover, a failure to investigate the circumstances of an export could amount to 'official acquiescence or even connivance' in a company's contribution to acts of torture or ill-treatment abroad. It goes without saying that this is not currently how Article 3 ECHR is interpreted; this is my suggestion for how Article 3 ECHR *could* be interpreted, in order to give effect to the measures against trade in goods used for torture included in the CoM's Recommendation, which are based on the rules in the ATR. As stated in section 1, my focus is on the construction of an obligation that could capture some of these rules, and not the attribution of responsibility to or any qualification of responsibility of the exporting state. But before identifying any obligation, we must address the problem presented by the Court's current understanding of the notion of jurisdiction in Article 1 ECHR.

4 Export of Goods Used for Torture and Extraterritorial Jurisdiction

I have presented the idea that the duty to refrain from authorising or otherwise allowing an export could be read into Article 3 ECHR in a similar way as the Court has done for the prohibition of *refoulement*. However, the Convention's extraterritorial application has never really been at issue in *non-refoulement* cases (section 4.1). The following paragraphs therefore consider three alternative models for extraterritorial jurisdiction.[97] Whether they are relevant in the case

97 These models are not mutually exclusive and could even overlap. On an overlap or the link between the model proposed under 4.2 and the model discussed under 4.4, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 215–219. Compare, L Raible, *Human Rights Unbound – A Theory of Extraterritoriality* (Oxford University Press 2020) 83.

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of an export of goods used for torture will depend on how the state's duties are framed. First, Pollard and Milanovic have proposed a specific interpretation of jurisdiction in relation to negative obligations (section 4.2). Second, other human rights bodies, including the HRC, and academics, including Shany and Moreno-Lax, have adopted a functional approach to jurisdiction (section 4.3). Third and last, the ECtHR has developed a separate model for jurisdiction in relation to the procedural obligation to investigate (section 4.4).

4.1 *Jurisdiction is Mainly Territorial and Depends on the Location of the Victim*

The Court held in *Soering* that Article 1 ECHR 'sets a limit, notably territorial, on the reach of the Convention',[98] namely to 'secure' the rights and freedoms of persons within the state's own 'jurisdiction'. As noted above, the Court held that extradition in the circumstances of the case would be contrary to the 'spirit and intendment' of Article 3 ECHR and that the prohibition of *refoulement* was an 'inherent obligation' under this provision.[99] This interpretation of Article 3 ECHR did not mean that a state would be responsible for conduct occurring outside its jurisdiction;[100] rather, it would be responsible for 'having taken action which has as a direct consequence the exposure of an individual'[101] to treatment contrary to Article 3 ECHR. As the applicant was on British soil, the United Kingdom owed them the obligations under the Convention, including the right not to be exposed to the real risk of treatment contrary to Article 3 ECHR. In other words, *Soering* expanded the scope of the prohibition of torture, but not the notion of jurisdiction. The fact that the ultimate harm which the state is obliged to prevent from materialising may occur abroad does not change this conclusion.[102]

If contracting states do not owe Convention obligations vis-à-vis individuals in another state despite taking action that exposes those individuals to a risk of torture or ill-treatment, states can cause or contribute to acts of torture or the death penalty abroad without incurring any responsibility under the ECHR.[103]

98 *Soering* (n 3) para 86.
99 Ibid para 88.
100 Ibid para 83.
101 Ibid para 91.
102 See also CM O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 *Business and Human Rights* 47, 71. Compare, Tzevelekos (n 7) 158–159. Admittedly, not all human rights have developed this way, but Article 3 ECHR, and also Articles 2, 5, and 6 ECHR, have.
103 See also M Gibney, K Tomasevski, and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights Journal* 267, 268.

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To date, the Court has accepted three grounds for extraterritorial jurisdiction, two of which are well-established. These are the spatial concept of jurisdiction (through effective control over an area where the victim is located) and the personal concept of jurisdiction (through state agent authority and control[104] over the victim).[105] In its admissibility decision in the case of *Ukraine and the Netherlands v Russia*, the Court explicitly noted a third ground, namely when there is a jurisdictional link between the victim or their next of kin and the respondent state for the procedural obligation under Article 2 ECHR (the right to life).[106] A person outside the exporting state's territory who is at risk of suffering torture in another state cannot easily be brought within the exporting state's jurisdiction on the basis of either the spatial or the personal model, and therefore these models will not be discussed further.[107] I discuss the third model in section 4.4 below.

4.2 *The Idea that Negative Obligations are Territorially Unbound*

Pollard and Milanovic have both proposed an alternative reading of the jurisdictional clauses contained in most human rights treaties, including Article 1 ECHR.[108] Following their proposed interpretation, the notion of jurisdiction would remain bound to territory, but only for a state's positive obligations to secure (or ensure) human rights; the negative obligation to refrain from infringing human rights, on the other hand, would be 'territorially unbound.'[109] In other words, Article 1 ECHR could be read to impose a positive obligation to *secure* human rights within the state's jurisdiction, while remaining silent on the negative obligation to *respect* human rights. This would

104 The terms authority, control and power are used conjunctively and probably all mean the same thing. See *Al-Skeini* (n 1) heading above paras 133 and 136. See also Raible (n 97) 100.

105 For recent examples, see *Ukraine and the Netherlands v Russia* [GC] 8019/16, 43800/14, and 28525/20 (ECtHR, dec, 30 November 2022) paras 565–572.

106 Ibid para 559.

107 The exporting state will not exercise effective control over the area where the individual at risk of harm is located and the exporting state's agents will not exercise authority and control over that person's body either.

108 See Pollard (n 66) 361–366; Milanovic (n 97) 209–228 and 263. See also Fulton (n 67) 783.

109 Milanovic (n 97) 210. This interpretation is supported by the text of the human rights treaties, including the ECHR, which obliges contracting states to 'secure to everyone within their jurisdiction the rights and freedoms defined in [...] the Convention.' See *Banković* (n 2) para 66. See also para 65: 'the scope of Article 1, at issue in the present case, is *determinative of the very scope of the Contracting Parties' positive obligations* and, as such, of the scope and reach of the entire Convention system of human rights' protection [...]' (emphasis added).

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mean that the negative obligation to respect human rights is not conditioned by any territorial or jurisdictional limitation at all, and would therefore apply in all circumstances.[110] According to Pollard, this teleological and textual interpretation of the jurisdictional clause would not give rise to the problem that one state's 'limitless obligation' *not* to act would interfere with another state's sovereignty.[111] For Milanovic, the justification for this approach is that states can choose whether or not to act. If by refraining from certain conduct, an individual's rights are not adversely impacted, this places no extra burden on the state.[112]

The distinction between positive and negative duties is not so clear-cut.[113] This is especially so regarding the principle of *non-refoulement*, and the duty to prohibit the export of inherently abusive goods and to control the export of potentially abusive goods has presented us with the same predicament. With both *refoulement* and exports, the issue is often not (just) about what the state *did*, but (also) about what it *failed to do*. If the measures foreseen by the CoM's Recommendation are all qualified as positive obligations, namely duties to protect and to regulate, then the negative-obligations model would not be useful. But if we agree that certain measures in relation to export, or at least, certain aspects of these measures, are duties of result requiring a state to refrain from a particular course of conduct, then this model could be of relevance. The 'slippery slope' argument would not hold up, as, as Pollard and Milanovic have also demonstrated, states have the decision whether or not to act in a certain way. Regarding the question where this would end, the right response is always 'somewhere'.

One of the Court's Judges has engaged with the idea in a separate opinion, posing the question whether negative obligations are wider than the positive obligations under the ECHR, 'in the sense that the latter are restricted by the territoriality criterion under Article 1'.[114] In other words, that would not be an expansion of the notion of jurisdiction in Article 1 ECHR as such, but of the negative obligations under the substantive provisions of the Convention, which

110 Milanovic (n 97) 209–222. See also United Nations General Assembly, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (7 August 2015) A/70/303, para 28.

111 Pollard (n 66) 362.

112 Milanovic (n 97) 210.

113 Milanovic admits this too. See ibid 222. See also Raible (n 97) 83, 86–88; C Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the Operational Model' (2020) 21 *German Law Journal* 385, 386.

114 *Georgia v Russia* (*II*) [GC] 38263/08 (ECtHR, 21 January 2021) Partly Concurring Opinion of Judge Serghides, para 22.

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do not in and of themselves impose any territorial restrictions.[115] In essence, that would not be a major departure from what the Court did in *Soering*, to the extent that it read into Article 3 ECHR the duty to refrain from exposing an individual to a real risk of torture or ill-treatment. Granted, Mr Soering was within the state's territory and jurisdiction, but the decision hinged on the interpretation of Article 3 ECHR. Similarly, if a state decides to authorise an export licence for a drug which could be used for the death penalty, this could be conceptualised as a breach of the duty not to expose someone or causally contribute to treatment incompatible with Article 3 ECHR: a negative obligation.

If Article 3 ECHR is understood to include such a negative obligation regardless of the location of the victim, then an exporting state could be in breach of that obligation by deciding to authorise the export despite the risk.[116] But, given that this jurisdictional model has no basis in practice and due to the persistent problem with framing the measures that contracting states have been recommended to take in relation to the export of goods used for torture as purely negative duties, other approaches to jurisdiction need exploring.

4.3 *The Functional Approach to Jurisdiction*

In 2018, the UN Human Rights Committee (HRC) unequivocally adopted the so-called functional approach to jurisdiction in General Comment No 36 on the right to life.[117] On the relationship between Article 2(1) (the ICCPR's jurisdictional clause) and Article 6 (the right to life) of the ICCPR, it stated that:

> [...] a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons *over whose enjoyment of the right to life it exercises power or effective control*. This includes persons located outside any territory effectively controlled by the State, *whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner*. States also have obligations under international law *not to aid or assist* activities undertaken by other States and non-State actors that violate the right to life.[118]

115 Ibid para 26.

116 Milanovic has acknowledged that this model 'would require a radical rethink of the Court's approach.' See Milanovic (n 97) 211.

117 General Comment No 36 (n 24).

118 Ibid para 63 (emphasis added). See United Nations Human Rights Committee, 'A.S., D.I., O.I. and G.D. v Malta' (28 April 2021) CCPR/C/128/D/3043/2017, paras 6.5 and 6.7; United

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What matters here is not the state's control over a geographical area or over a person's body, but its control over a person's *rights*. This control – and impact – is what makes jurisdiction *functional*, instead of territorial or extraterritorial *per se*. No distinction is made between positive and negative obligations.[119] Furthermore, the reference to the obligation not to aid or assist[120] directly after the statement on extraterritorial jurisdiction indicates that the HRC probably also considers this model to apply when a state assists another actor that violates the right to life outside of that state's borders, if the act of assistance impacts the right to life in a 'direct and reasonably foreseeable manner'.[121] The functional approach has been adopted by other human rights bodies[122] and referenced by academics and lawyers.[123] It has also been referred to by

Nations Human Rights Committee, 'A.S., D.I., O.I. and G.D. v Italy' (28 April 2021) CCPR/C/130/D/3042/2017, paras 7.5 and 7.7–7.8. See also M Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity Under International Law' (2021) 97 *International Law Studies* 1268, 1354–1355.

119 General Comment No 36 (n 24) cites United Nations Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13 and two concluding observations: one on the UK use of detention facilities in Iraq and Afghanistan (United Nations Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (30 July 2008) CCPR/C/GBR/CO/6, para 14), another on the United States' use of drones for targeted killings abroad (United Nations Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (23 April 2014) CCPR/C/USA/CO/4, para 9). These involve negative obligations. The HRC has applied General Comment No 36 (n 24) and the functional model to positive obligations, too. See United Nations Human Rights Committee, 'A.S., D.I., O.I. and G.D. v Italy' (n 118).

120 Note how the HRC refers to the rule as laid down in ASR (n 19) Article 16 as an *obligation under international law*, instead of a *mode of* (or basis for) *responsibility*. Also note the wording of the heading under which the cited paragraph is included: 'Relationship of article 6 with other articles of the Covenant *and other legal regimes*' (emphasis added).

121 Milanovic also draws our attention to this: 'We can therefore reasonably assume that the Committee thought that State assistance to a third party that directly and reasonably foreseeably contributes to the third party's violation of the right to life would be within the extraterritorial scope of the Covenant – in essence, that the assisting State *also* has power or control over the victim's enjoyment of the right to life, a power that it can exercise by refraining from providing the assistance.' See Milanovic (n 118) 1355.

122 *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) paras 101–103; African Commission on Human and Peoples' Rights (n 24) para 14.

123 See Y Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 71(1) *Law & Ethics of Human Rights* 47; Moreno-Lax (n 113), taking a slightly different approach to Shany; A Pijnenburg, *At the Frontiers of State Responsibility – Socio-Economic Rights and Cooperation on Migration*

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some of the Court's Judges in separate opinions,[124] but to date, the ECtHR has remained silent on General Comment No 36 and the functional approach.[125] The Grand Chamber's recent admissibility decision in the case of *Ukraine and the Netherlands v Russia* has also not included it,[126] despite the groundwork being laid in an earlier Chamber judgment in the case of *Carter v Russia*, which concerned breaches of the negative and procedural obligations under the right to life.[127] In *Carter*, the Chamber held that 'the administration of poison to Mr Litvinenko by [the two Russian agents] amounted to the exercise of physical power and control over his life in a situation of proximate targeting'.[128] In its decision in *Ukraine and the Netherlands v Russia*, the Court could have developed this further, but instead included this under the heading of the

(Intersentia 2021) 152–158; and M Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality Before the European Court of Human Rights' (2021) *Questions of International Law, Zoom-in 82*, 68–77, and 79. See also the submissions of the intervening parties in *Hanan v Germany* [GC] 4871/16 (ECtHR, 16 February 2021) para 130.

124 See *Georgia* (n 114) Partly Dissenting Opinion of Judge Chanturia, paras 12–14; *Al-Skeini* (n 1) Concurring Opinion of Judge Bonello, paras 10–13. See also T De Boer, 'Closing Legal Black Holes' (2014) 28(1) *Journal of Refugee Studies* 118, 129.

125 See, however, *Hanan* (n 123) under the heading 'Relevant Legal Framework and Practice' para 87.

126 Some authors have identified an 'effects model' as a third ground for extraterritorial jurisdiction in the ECtHR's jurisprudence, pointing to case law where the Court either factually seems to have applied such an approach, or alluded to it in a more generic statement of the law. For an analysis of the effects model, see Pijnenburg (n 123) 149–152 and sources cited therein: n 52. In its decision in *Ukraine and the Netherlands v Russia*, the Grand Chamber has clarified this somewhat: under the heading of the principles for extraterritorial jurisdiction, the Court stated that '[a]s regards extraterritorial jurisdiction, it is well-established case-law that acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.' It then set out the three grounds for establishing jurisdiction extraterritorially, namely the spatial, personal, and 'special features' model for procedural obligations. See *Ukraine and the Netherlands* (n 105) paras 555 and 559–575. In sum, the use of the word 'effects' does not mean that the Court has adopted the 'effects model'.

127 *Carter v Russia* 20914/07 (ECtHR, 21 September 2021). It is worth noting that *Carter* would have also allowed the Court to rely on the model that negative obligations are territorially unbound. See V Tzevelekos and A Berkes, 'Turning Water into Wine – The Concealed Metamorphosis of the Effective Control Extraterritoriality Criterion in Carter v. Russia' (ECHR Blog, 9 November 2021): <https://www.echrblog.com/2021/11/guest-post-turning-water-into-wine.html>. See also M Milanovic, 'European Court Finds Russia Assassinated Alexander Litvinenko' (EJIL:Talk!, 23 September 2021): <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/>.

128 *Carter* (n 127) para 161.

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personal model.[129] The step from the personal model to a functional model is not necessarily so great, but it is one that the Court is clearly not ready to take.

Another paragraph in General Comment No 36 that must be mentioned relates to the duty to protect life in relation to the conduct of corporate entities. According to the HRC, state parties 'must also take appropriate legislative and other measures to ensure that all activities taking place [...] within their territory and [...] jurisdiction, *but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory*, [...]' are consistent with the right to life.[130] This echoes the functional approach to jurisdiction.[131] However, this paragraph concerns an obligation, namely the duty to regulate as part of the duty to protect, and not the notion of jurisdiction. While I agree with the functional approach to jurisdiction in general and as a matter of principle, its basis in the HRC's output prior to this General Comment is not entirely clear.[132] As for the purported duty to regulate corporate conduct, its origins are even more sparse,[133] and I am not convinced that 'home states'

129 *Ukraine and the Netherlands* (n 105) para 570.

130 General Comment No 36 (n 24) para 22 (emphasis added).

131 This is also a point of criticism. On this, see A Ollino, according to who the functional approach to jurisdiction essentially 'conflates the crucial question of [positive human rights obligations'] *content* with the (separate) issue of their *applicability* in a given context,' making the concept of jurisdiction 'fundamentally meaningless'. See A Ollino, 'The 'Capacity-Impact' Model of Jurisdiction and its Implications for States' Positive Human Rights Obligations' (2021) *Questions of International Law, Zoom-in 82*, 82.

132 See n 119. In an interview with Yuval Shany and the late Christof Heyns published on *Just Security*, the former HRC members and authors of General Comment No 36 (n 24) added that the functional approach to jurisdiction had also been applied in the context of reviewing foreign surveillance programmes. See R Goodman, C Heyns, and Y Shany, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36' (Just Security, 4 February 2019): <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/>.

133 General Comment No 36 (n 24) cites United Nations Human Rights Committee, 'Yassin and Others v Canada' (7 December 2017) CCPR/C/120/D/2285/2013, para 6.5; United Nations Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Canada' (13 August 2015) CCPR/C/CAN/CO/6, para 6; United Nations Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Germany, Adopted by the Committee at its 106th Session (15 October – 2 November 2012' (12 November 2012) CCPR/C/DEU/CO/6, para 16; United Nations Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' (3 December 2015) CCPR/C/KOR/CO/4, para 10; UNGPS (n 26) Principle 2. As noted in n 26, however, the Commentary to Principle 2 adds that '[s]tates are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.' This may have changed since

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have this duty as a matter of international human rights law.[134] It is also for this reason that I have not attempted to draw a parallel between the duty to regulate corporate conduct at home and the rules relevant to the export of goods used for torture.[135]

There is an essential difference between agreeing that a state exercises jurisdiction and therefore owes (certain) human rights, and concluding that these rights include a duty to regulate corporate conduct at home vis-à-vis people located abroad. As for the former, in my view, the functional approach is here to stay, and applicants and intervening parties will increasingly rely on it.[136] If we imagine that the ECtHR would adopt it, the next question is if and how it would apply to torture and ill-treatment. There is no apparent reason why the functional approach as articulated by the HRC would *not* apply to torture and ill-treatment, given that this right is just as important as the right to life. Applying it to the scenario of a decision to allow the export of inherently or potentially abusive goods, one could argue that the exporting state has control over the right to integrity of a person if the impact of the export on the torture or ill-treatment of an individual is direct and reasonably foreseeable. However, as the Court does not seem willing to engage with the functional approach for jurisdiction, let alone embrace it, this leaves us with the last possible basis for extraterritorial jurisdiction, namely one that the Court has adopted in relation to procedural obligations.

2011 (when the UNGPs (n 26) were adopted) or 2018 (when General Comment No 36 (n 24) was adopted), but I have not identified any other sources.

134 For why this is so, see O'Brien (n 102) 65 and thereafter. As for the existence of such a duty under ECHR law, see *Ben El Mahi v Denmark* 5853/06 (ECtHR, dec, 11 December 2006). The application was declared inadmissible due to lack of Article 1 jurisdiction. It should, however, be noted that this is an admissibility decision from 2006 relating to Article 9 in conjunction with Article 14 ECHR and also to Articles 10 and 17 ECHR.

135 Hence why I have not discussed it under section 3, above. Note, however, that the CoM's and the PACE's Recommendations do seem to include this duty.

136 See, in particular, *SS and Others v Italy* 21660/18 (ECtHR), in which Moreno-Lax is lead counsel for the applicant. See also Giuffré (n 123) 68–71. Note, however, that in the case of *HF and Others v France,* a case concerning the repatriation of nationals and their children from camps in north-eastern Syria, the Grand Chamber did not adopt a functional approach to jurisdiction. See *HF and Others v France* [GC] 24384/19 and 44234/20 (ECtHR, 14 September 2022). See also A Pijnenburg, 'HF and Others v France: Extraterritorial Jurisdiction Without Duty to Repatriate IS-Children and their Mothers' (EJIL:Talk!, 14 October 2022): <https://www.ejiltalk.org/hf-and-others-v-france-extraterritorial-jurisdiction-without-duty-to-repatriate-is-children-and-their-mothers/>.

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4.4 *A Jurisdictional Link for Procedural Obligations*

The Grand Chamber developed a novel approach to jurisdiction for the procedural limb of Article 2 ECHR in the case of *Hanan v Germany*.[137] This case concerned an airstrike carried out in Afghanistan by two US Air Force aircraft following the order of a German colonel which killed the applicant's two sons.[138] Mr Hanan claimed that Germany had breached its procedural obligation under Article 2 ECHR to effectively investigate their death. Regarding Germany's jurisdiction, he argued that a jurisdictional link existed on the basis of so-called 'special features': Germany was obliged under international humanitarian law and domestic law to conduct a criminal investigation, and had retained exclusive criminal jurisdiction over its personnel, pursuant to the ISAF Status of Forces Agreement.[139] The Court agreed, carefully stating that the *combination* of these 'special features' had triggered a jurisdictional link for the purposes of Article 1 ECHR in relation to the procedural limb of Article 2 ECHR.[140] The Court also emphasised that 'it does not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act falls within the jurisdiction of the Contracting State […].'[141] To avoid overturning *Banković*[142] or grappling with

137 *Hanan* (n 123). See also *Ukraine and the Netherlands* (n 105) paras 559 and 573–575.

138 *Hanan* (n 123) paras 21–25.

139 Ibid paras 117–118.

140 Ibid paras 137–139 and 142. Already in *Güzelyurtlu and Others v Cyprus and Turkey* [GC] 36925/07 (ECtHR, 29 January 2019), the Grand Chamber held that a jurisdictional link between the contracting state and the victim could exist with respect to the procedural duty to investigate a death which had occurred outside its jurisdiction if and when the contracting state had already instituted a criminal investigation or proceedings or, alternatively, based on certain 'special features'. The Court did not consider that 'it ha[d] to define *in abstracto* which "special features" trigger the existence of a jurisdictional link […], since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other.' See paras 188–190, with reference to *Rantsev v Cyprus and Russia* 25965/04 (ECtHR, 7 January 2010) paras 243–244. In *Hanan*, the Court agreed with the respondent and intervening states' concerns that grounding a jurisdictional link merely on the fact that a criminal investigation was ongoing would have a chilling effect and would also excessively broaden the Convention's scope of application; therefore, the 'special features' alone were decisive. See *Hanan* (n 123) para 135. Compare, *Carter* (n 127) para 133.

141 *Hanan* (n 123) para 143.

142 See also Milanovic (n 97) 215–219, illustrating how 'prophylactic and procedural obligations', i.e., procedural duties to investigate a violation, could apply alongside negative obligations of restraint in an extraterritorial context.

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the functional approach,[143] the Court used these 'special features' to construct a jurisdictional link for the procedural limb of Article 2 ECHR.[144]

In *Al-Skeini v the United Kingdom* and *Jaloud v the Netherlands*, the applicants had also complained of violations of their procedural rights, yet the Court still established the respective states' jurisdiction on the basis of the two established control tests, namely effective control over an area where the victim is located or state agent authority and control over the victim.[145] This makes *Hanan* a new development. In *Georgia v Russia* (*II*), the Court also relied on this 'special features' approach, holding that Russia was required to investigate the alleged crimes based on rules of international humanitarian law and domestic law, but it also took into consideration the fact that all the potential suspects were physically located within Russia's jurisdiction *and* that Russia had established effective control over the territories in question shortly after the events which occurred during the active phase of the hostilities.[146] As the domestic and customary law rules were not the only 'special features' in *Georgia v Russia* (*II*) and *Hanan*, we cannot be sure that the Court would reach the same conclusion if an applicant would rely solely on *other legal rules* for the purpose of establishing jurisdiction for Article 2's procedural limb.[147] Yet this is not unlikely: the Court takes the 'particular factual context and relevant rules of international law'[148] into account in establishing jurisdiction.

This is also consistent with the rule of systemic integration stipulated in Article 31(3)(c) VCLT.[149] As stated in section 1, the Court has often made explicit use of this method in order to interpret the Convention in light of and in harmony with other 'relevant rules of international law'.[150] The Court's

143 The applicant referred to this. See *Hanan* (n 123) para 120, connecting the functional model to the notion of 'public powers'.

144 See, for a critique, L Raible, 'Extraterritoriality Between a Rock and Hard Place' (2021) *Questions of International Law, Zoom-in 82*, 25: 'a pronouncement [by the Court] on the operative distinction and its reasons would also have taken care of potential criticisms that it is illogical for (positive) procedural obligations to carry a seemingly lower jurisdictional threshold than negative ones, when the opposite is more intuitive'.

145 See *Al-Skeini* (n 1); *Jaloud v the Netherlands* [GC] 47708/08 (ECtHR, 20 November 2014).

146 *Georgia* (n 114) para 331.

147 *Carter* (n 127) para 134.

148 *Jaloud* (n 145) para 141.

149 Note that the Court mentions VCLT (n 15) Article 31 under Relevant Legal Framework and Practice in *Hanan* (n 123) para 76. See also Giuffré (n 123) 62; E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 *German Law Journal* 417, 420.

150 *Al-Adsani* (n 16) paras 55–61; *Rantsev* (n 140) paras 273–282; *Hassan v the United Kingdom* [GC] 29750/09 (ECtHR, 16 September 2014) paras 100 and 102–111.

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reference to Article 3 CAT – the prohibition of *refoulement* – in *Soering* can also be seen as adherence to this method, even if the Court did not make this explicit in its reasoning.[151] Strictly speaking, the term 'rules' in Article 31(3)(c) VCLT designates norms in legally binding instruments,[152] but the Court's jurisprudence shows that non-binding documents, including Council of Europe Recommendations, can also play a role.[153] This is particularly important given that the 'rules' that are taken into account for interpretation of the treaty in question must be 'applicable in the relations between the parties.'[154] While the CAT and customary international law will so apply, the same cannot necessarily be said for EU law, including EU Regulations, as not all Council of Europe member states are also a member of the EU. Nonetheless, especially where the respondent state is bound by EU law, the Court still includes it under the relevant legal framework.[155]

The 'special features' approach has been developed in the case law on Article 2 ECHR in a transnational context and in the context of armed conflict, but the Court has found that the procedural duty to investigate allegations of cross-border abduction and ill-treatment can also be triggered by 'special features', meaning that this approach also applies to the procedural limb of Article 3 and Article 5 ECHR.[156] As with Article 2, Article 3 ECHR requires a state to conduct an effective criminal investigation into alleged ill-treatment. Similar to *Hanan*, the state authorising or otherwise allowing the export of goods used for torture would not be the primary actor, but would still causally contribute to the harm.[157] Could the procedural duty in Article 3 ECHR require the state to investigate a natural or legal person domiciled in the contracting

151 *Soering* (n 3) para 88. See also Tzevelekos (n 17) 651–652. On this, see also *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin), [2015] 3 WLR 503 [276].

152 Dörr (n 17) 608.

153 See, for example, *Demir and Baykara v Turkey* [GC] 34503/97 (ECtHR, 12 November 2008) para 74; *Bayatyan v Armenia* [GC] 23459/03 (ECtHR, 7 July 2011) para 107. More recently, see *Kurt v Austria* [GC] 62903/15 (ECtHR, 15 June 2021) paras 73–74; *HF and Others* (n 136) paras 129–132. See more generally Tzevelekos (n 17).

154 *Al-Adsani* (n 16) para 55.

155 See, for example, *HF and Others* (n 136) para 133.

156 See *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia* 75734/12, 2695/15, and 55325/15 (ECtHR, 19 November 2019) para 157. Compare, C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) *Questions of International Law, Zoom-in 82*, 46. Note that the other two existing models of extraterritorial jurisdiction established by the ECtHR (i.e., the spatial and the personal model) have also predominantly been developed in cases concerning military operations abroad.

157 Germany provided information and the German Colonel gave the order for the airstrike.

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state's jurisdiction that has exported goods used for torture? Arguably, yes, as Article 3 ECHR's procedural limb, understood in light of the penalty provision in the ATR and the duty to prosecute and punish in the CAT, requires this. A next step could be for this duty to extend to the state's *own decision* to authorise or otherwise allow such an export.[158]

5 Applying Article 3 ECHR to the Export of Goods Used for Torture

Having analysed the rules relevant to the export of goods used for torture in the EU Anti-Torture Regulation and the UN Torture Convention, and after identifying and examining certain rules or concepts that already exist under Article 3 ECHR that could be relevant in this context, this section tackles the question as to how Article 3 ECHR could accommodate the measures foreseen by the CoM Recommendation, by making use of the alternative models for extraterritorial jurisdiction explored in the previous section. As stated in section 1 and throughout, this is not a reflection of how Article 3 ECHR is currently interpreted, and some of the jurisdictional models discussed have not been adopted by the ECtHR. Nonetheless, recalling once again that the Convention does not operate in a vacuum, I explore here how the Convention might operate when contracting states authorise or otherwise allow the export of goods used for torture abroad.

First, if we frame the prohibition of *refoulement* as a negative obligation and, by analogy, also qualify the obligation not to authorise the export of goods that could be used for torture or ill-treatment in a third state as a duty to refrain, then Pollard's and Milanovic's proposed third model for negative obligations could apply. This would mean that contracting states have obligations vis-à-vis individuals abroad. In theory, this approach would not expand the scope of Article 1 ECHR, but of Article 3 ECHR, which might be more acceptable in terms of policy. Rather confusingly, the ECtHR's recent Guide on Article 3 ECHR has added the notion of a state's acquiescence or connivance under the heading of the negative obligation, too, but as explained above, the case law indicates that the formula is used to assess the alleged violations of the state's positive substantive and procedural obligations. In addition, maybe it has been added as part of the definition of torture, instead of a specific, substantive obligation (or basis for attribution). Besides the fact that the Court has never referred to – let alone adopted – the idea that negative obligations are territorially unbound, this theory's main drawback is that it is very hard to

158 See also Milanovic (n 118) 1356 and sources cited therein: n 330.

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neatly distinguish between negative and positive obligations. Particularly in the case of export authorisations, the competent authorities will be required to do more than simply *not act*. Indeed, the state tasked with authorising an export must conduct a risk assessment prior to taking a decision whether or not to do so.

Second, if we employ the functional model for jurisdiction as articulated by the HRC, then a state's jurisdiction could be triggered if the decision to authorise the export impacts the rights of a person abroad in a direct and reasonably foreseeable manner, regardless of how we qualify the obligation not to allow the export of goods that could be used for torture or ill-treatment in a third state. The functional model is gaining momentum, and it might be hard for the Court to preserve its credibility as a human rights court if it refuses to resort to – let alone engage with – this model. There is currently a complaint pending in Strasbourg that would allow the Court to do so.[159] It must be noted that in this case, the state's conduct is rather overt and direct. As the Court already seems averse to adopting the functional approach in cases where the causal connection between the state's conduct and the ultimate harm is relatively strong, it is questionable whether the Court would go so far as to apply this approach in cases where that connection is more remote, namely when the state does not directly inflict the torture or ill-treatment, but still contributes to it. This remains to be seen.

Third, if we take the Court's 'special features' approach as a starting point, then the relevant obligation to be read into Article 3 ECHR, which would also be relevant for establishing the jurisdictional link, must be procedural in nature. As this jurisdictional model has been firmly established by the Court,[160] basing a contracting state's jurisdiction on this model seems the most promising. As explained above, the Court currently accepts that when other legal rules require a state to investigate a death outside its territory, that state might have this obligation under the Convention, too. It is very likely that this approach also applies to the duty to investigate allegations of torture and ill-treatment. As the Court has not (yet) found a jurisdictional link to exist based on other legal rules exclusively, it remains uncertain if procedural obligations in other instruments alone would be enough to interpret Article 3 ECHR in such a way so as to trigger a jurisdictional link for the purpose of Article 1 ECHR. Applicants and their lawyers, as well as intervening parties, could force the Court to tackle this question by basing a contracting state's jurisdiction with

159 *SS and Others* (n 136).
160 *Ukraine and the Netherlands* (n 105).

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respect to the procedural limb of the prohibition of torture (or another right) on other legal norms. It seems that not only rights can be 'divided and tailored', but also obligations attached to such rights. As was the case in *Hanan*, it would be perfectly possible for the procedural limb (i.e., the duty to investigate) to apply where the substantive limb would not.

Applying this to export of goods used for torture, the ATR and the CAT both include positive obligations on enforcement. The ATR includes a penalty provision that requires states to 'lay down rules on penalties applicable to infringements'[161] and to 'take all measures necessary to ensure that they are implemented'.[162] The penalties must be 'effective, proportionate and dissuasive',[163] and can also be penal. If a company registered in Europe exports goods used for torture in contravention with the ATR (and the CoM Recommendation), the state in question can investigate, prosecute, and punish. This is mirrored in the CoM Recommendation.[164] More generally, the CAT requires states to criminalise acts of torture, including complicity and participation in torture. This duty to criminalise is not limited by any notion of jurisdiction, and the duties to investigate, prosecute, and punish, are not dependent on the location of the victim. If we qualify the export by a legal (or natural) person as complicity or participation in torture, then the state from which the export takes place will have the aforementioned procedural duties, regardless of where the torture ultimately occurs. Reading Article 3 ECHR in light of these procedural duties, Article 3 ECHR could also be understood to require a state to investigate when a company exports goods used for torture.

As mentioned at the end of section 4, this could arguably also extend to the state's duty to investigate its *own decision* to authorise or otherwise allow an export. As noted in sub-section 3.2.2, the Court has on occasion found a failure to effectively investigate to amount to official acquiescence or even connivance in the crimes committed. I should stress again that the Court has only used this language in cases concerning breaches of Articles 2 and 3 ECHR in conjunction with Article 14 ECHR. I do not wish to make an analogy between a state's failure to investigate discriminatory hate crimes committed by private actors within its territory and a state's failure to investigate an export connected to (potential future) acts of torture or ill-treatment committed abroad. However, if it were proven that the competent authorities allowed the export of inherently abusive goods to a state that is known to use torture or the death penalty

161 ATR (n 10) Article 33 (1) and Recital (53).
162 Ibid Article 33(1).
163 Ibid.
164 See section 2, above.

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and subsequently failed to investigate, the exporting state might be deemed liable for that failure. More concretely, the failure to prohibit or control, and then to investigate could possibly even amount to official acquiescence in the company's trade in abusive goods in general.

This goes quite far. Another avenue I have not explored here, but one that I am interested in, is the question of what this would mean for a state's *responsibility* under international law and under the ECHR specifically. As mentioned in section 1, responsibility for aid or assistance is outside the scope of this paper. Instead, the focus is on the question as to whether Article 3 ECHR could accommodate any duties relevant to the matter of the export of goods used for torture. As I have sought to demonstrate, it largely depends on how we frame the state's conduct and corresponding duty, and which jurisdictional model we employ. This has mainly been an exploration exercise. However, as the ATR, the CAT, and Article 3 ECHR all contain certain obligations that require states not to contribute to torture and ill-treatment, and to investigate, prosecute, and punish those who do, I can conclude that Article 3 ECHR could very well be interpreted to include, at a minimum, the duty to investigate companies that export goods used for torture abroad. The contracting state would have jurisdiction for this specific procedural obligation, and if it failed to fulfil this duty, it could be responsible under the Convention on this basis.

6 Conclusion

The problem how and to what extent the ECHR applies when states act extraterritorially is yet to be coherently solved. An extra layer of complexity is added when states act (or fail to act) territorially and thereby contribute to human rights violations abroad. Given the importance of the prohibition of torture and ill-treatment, states are expected to do more than just refrain from committing acts of torture and ill-treatment themselves. Article 3 ECHR has therefore evolved to accommodate a wide range of obligations, namely the prohibition of *refoulement*, the duty to have in place effective legislation, the duty to take effective measures of protection, and the duty to investigate allegations of torture, and subsequently to prosecute and punish. One current gap in the legal framework applicable in the Council of Europe concerns the trade in goods used for torture, the death penalty, and other forms of ill-treatment. The Council of Europe has recognised this problem, and the CoM has called on states to take measures against the trade in goods that could be used for torture and ill-treatment following the rules laid down in the EU ATR, the only legally binding instrument relevant to this issue to date. Section

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2 briefly discussed the CoM's Recommendation, and section 3 presented an analysis of the relevant rules in the ATR, the CAT, and those already well-established in Article 3 ECHR. As the rules in Article 3 ECHR will only apply if the state exercises jurisdiction over the victim, section 4 examined three alternative models for extraterritorial jurisdiction.

The HRC's adoption of the functional approach to jurisdiction, which has continuously been advocated for by academics, is here to stay. The Court has yet to take a position on it – even if to reject it – but if it were to follow this approach, this could have real consequences for the interpretation of many (if not all) Convention rights, including Article 3 ECHR. If the decision to authorise an export is considered to amount to control over the rights of the person at risk of suffering torture or ill-treatment abroad, then the exporting state's jurisdiction would be triggered. It would then be a small step to interpret Article 3 ECHR to accommodate a duty not to export or to prohibit the export of inherently abusive goods, and to control the export of potentially abusive goods. Often, states will be aware of the end-use and the end-user in situations where a company applies for an export licence, especially in the case of a drug used for the death penalty abroad. If states still authorise or otherwise allow an export to take place despite the risk of harm, this could amount to a failure to prevent, and even to official acquiescence. The function of state 'acquiescence and connivance' in the Court's case law is rather elusive, but it appears that the Court uses it as a basis for a state's responsibility for a failure to protect as well as a failure to investigate where grounding the state's responsibility on a failure to intervene and investigate alone would have been unsatisfactory. While the question of the state's eventual responsibility fell outside the scope of this paper, this notion was still central to the analysis of Article 3 ECHR, as it appears frequently in cases where states contribute to or even facilitate torture.

Given how conservative the Court has been in its interpretation of jurisdiction, the third model adopted by the Court in relation to procedural duties seems the most realistic. To construct this approach for the export of goods used for torture, there would need to be other legal rules obliging the exporting state to investigate. These rules exist: the ATR includes a penalty provision and the CAT requires states to criminalise, investigate, prosecute, and punish acts of torture, including complicity or participation in torture, even when those acts did not take place within the state's jurisdiction. If we agree that corporations selling goods to repressive regimes and/or retentionist states which are used for torture or ill-treatment amounts to complicity in torture or – at least – an infringement of the ATR, states are required to take action. This duty to investigate already exists under the positive procedural limb of Article

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3 ECHR, and could simultaneously be used to construct a jurisdictional link between the exporting state and the victim abroad. This duty, and relatedly, the state's jurisdiction, would then only arise *ex post facto*. The act of torture or the imposition of the death penalty, which every one of the rules examined seeks to prevent, would have taken place. A more risk-based and preventive interpretation of Article 3 ECHR's procedural limb would be to include the duty to conduct a risk assessment prior to authorising an export. There is no precedent for this, but it could perhaps be argued. Article 3 ECHR's simple iteration that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment' allows many additional duties to be read into the text. The Court has also demonstrated that it takes other legal rules and societal developments into account when interpreting the Convention. If the Court is willing to confront the need to develop the notion of jurisdiction in Article 1 ECHR, it could also expand its interpretation of Article 3 ECHR to give effect to the absolute prohibition of torture and the goals of the CoM's Recommendation on Measures Against the Trade in Goods Used for Torture.

Besides going beyond the Court's current understanding of Article 1 ECHR, this paper has proposed an extension of Article 3 ECHR that may pose problems for other fields of law, namely international trade law. This has not been explored in the paper and is left for future research by international trade law scholars, other international human rights law scholars, or those at the intersection of and involved in the ongoing business and human rights debate. The CoM's Recommendation is evidence of a political will to address the problem of trade in goods that could be used for torture, the death penalty, and other ill-treatment. A legal framework, most importantly the EU's Anti-Torture Regulation but also the UN Torture Convention, is already in place. Instead of adopting a treaty, I have suggested how the ECHR could be used to address export authorisations of goods used for torture and incorporate at least some of the rules in the ATR. One day, the Court may be seized of a complaint concerning the export of goods by a contracting state, which lead to grave and irreparable harm in a third state.[165] The Court could then show that the ECHR really is a living instrument, adaptable to present-day issues. I would welcome such a case being heard in Strasbourg.

165 The only decision related to this issue to date is *Rasheed Haje Tugar v Italy* 22869/93 (ECmHR, dec, 8 October 1995).

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