Thank you for the opportunity to speak here today. I am the Associate Director of the International Human Rights Clinic at Harvard Law School, where I am also a lecturer on law. My intervention today will focus on: first, the options to establish common international standards; and second, whether the death penalty should be addressed on an equal footing with torture and other ill treatment.

To establish common international standards, states should negotiate a treaty, rather than guidance or standards that are not legally binding, because treaties offer advantages in terms of precision, obligation, and delegation.

First, precision. Clear rules and expectations facilitate international trade and the Arms Trade Treaty offers an example of a widely ratified binding agreement that establishes clear legal standards, embedding human rights considerations in arms transfer decision-making and putting states parties on a level playing field. States joining that treaty can anticipate what its obligations require through its provisions, its information-sharing mechanisms, and the practice of other states parties. A torture trade treaty would likewise create a transparent common international framework.

The second and perhaps most obvious advantage of a treaty is that it establishes binding obligations that states parties must comply with as a matter of international law and not political preference. International human rights law already requires states to prevent torture and other ill treatment, but there is not consensus that this obligation extends to requiring trade control measures on goods that are used for torture or ill treatment. A treaty would establish that, for states parties, this is an obligation, and provide a pathway to the universalization of this obligation. While there are examples of non-binding transnational export control regimes – the Wassenaar Arrangement and the Nuclear Suppliers Group being obvious examples – these regimes are typically outside the UN system, contain complex and detailed guidance akin to domestic regulations, restrict membership to a subset of states, and have acknowledged challenges with transparency and information-sharing.

The third advantage of a treaty is delegation, by which I mean here that international law requires states to take measures to effect their treaty obligations domestically. The effectiveness of any instrument ultimately lies in its implementation, and based on the precedent of the Arms Trade Treaty, I consider that it is more likely that a treaty would result in tangible changes to national laws, policies, and practices that would help prevent torture internationally than non-binding guidance would. Institutionalizing changes at the bureaucratic level is crucial for trade regimes and a clear legal mandate, alongside political will, provides a strong impetus for that institutionalization. In addition, once a treaty becomes part of domestic law, national courts and other actors gain domestic legal tools to help enforce implementation. States parties to a treaty also play a role in holding each other to account.

None of this is to deny that non-binding international guidance can be influential. But for the torture trade, a binding instrument – a treaty – would be the right choice. I should also mention that while there are examples of non-binding guidance subsequently leading to the negotiation of a treaty, this is far from an inevitable progression.

On the question of whether the death penalty should be addressed on an equal footing with torture and other ill treatment, the answer is yes. There are persuasive arguments that the death penalty constitutes a form of ill treatment in international law and consequently, excluding death penalty goods (a category distinct from law enforcement equipment) from discussions on a torture trade treaty would represent a step backwards from a human rights standpoint.

However, recognizing that some states retain the death penalty, the GGE could point to different approaches in international law that would ensure a torture trade treaty was open to those states to join, while also establishing international regulation of the trade in death penalty goods. One approach would be for states to negotiate a main treaty that covers only law enforcement equipment and a separate, optional, protocol regulating death penalty goods. International human rights law includes several examples of this type of arrangement, such as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Alternatively, the treaty could include the goods and equipment it covers in annexes, making the annex covering law enforcement equipment mandatory, and the annex covering death penalty goods optional. The International Convention for the Prevention of Pollution from Ships (MARPOL) offers a precedent for this approach. Another, similar, approach could be for a treaty to include annexes that incorporate opt-out provisions or different trade controls for different categories. The contents of these annexes could be determined through conferences of states parties or other mechanisms. The Convention on the International Trade in Endangered Species (CITES) is an example of that type of approach.

There are other approaches that negotiating states could explore, of course, but these examples illustrate that the question of incorporating death penalty goods in this exercise isn’t a binary choice of in or out.

I thank you for your time and welcome further engagement on these topics.