



GUIDANCE

Conducting business during armed conflict

*How can the shipping industry comply with International
Humanitarian Law?*



Armed conflict brings about not only risks for companies, but also gives rise to responsibilities to act in compliance with the laws of war. The shipping industry needs to carefully assess its operations in areas of armed conflict to:

- a) avoid causing or contributing to human rights and International Humanitarian Law (“IHL”) violations;**
- b) minimise risk to employees, contractors and seafarers; and**
- c) prevent facilities or vessels being classified as military targets, and therefore losing protection from attack.**

In areas of armed conflict, civilian ships, ports and terminals, which would normally be classified as civilian objects (and therefore protected in armed conflict), may constitute dual use objects or military objectives under customary IHL.



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What is IHL and when does it apply?

IHL, sometimes known as the “law of war”, is the body of law that governs the conduct of armed conflict. It serves two functions:

1. **protects persons who are not or are no longer participating in hostilities; and**
2. **restricts the means and methods of warfare.**

The majority of IHL is contained in the four Geneva Conventions of 1949 which have received almost universal ratification by states. War crimes include the grave breaches of these Conventions, serious violations of the laws and customs applicable in armed conflict, and crimes listed in Article 8 of the Rome Statute of the International Criminal Court. International Criminal Law exists to prosecute and criminalise these specific violations of IHL.

The key principle in IHL is the **principle of distinction** (between military and civilians), namely that civilians, including former combatants or prisoners of war, and civilian objects (hospitals, schools, etc.) may never be deliberately attacked and such targeting may cross the threshold into war crimes. The rule of **proportionality** requires that an attack which is expected to cause incidental loss of life and damage to civilian objects should not be excessive in relation to the concrete and direct military advantage anticipated.¹ Similarly, **all feasible precautions** must be taken to avoid (and in any event to minimise) incidental loss of civilian life injury or damage to civilian objects.² Failure to abide by these principles can constitute a war crime.



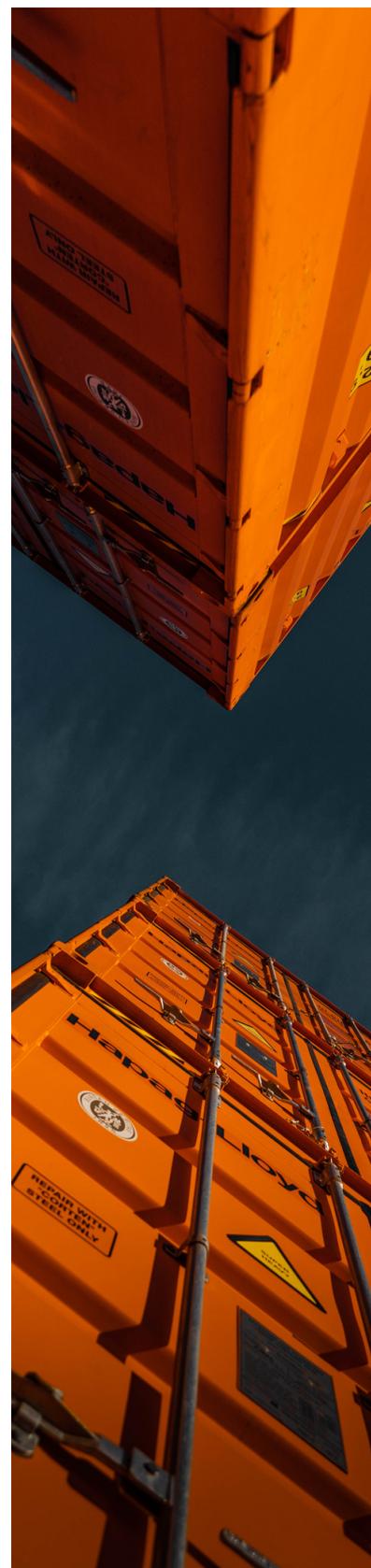
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Civilian objects (such as civilian ports or ships) may temporarily lose their protection from attack during armed conflict for such time as they are classified as military objectives. The definition of a military objectives is outlined in customary international law:

“military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.³

Ports and ships may fall into this classification if they are used for the **benefit of the army or non-state armed group**, in the host country or another state, for example, when used to supply the military with arms, fuel or ammunition. This is important as the nature of the activity may render the port or vessel a military objective.

Conducting **heightened human rights due diligence** on the nature of operations within the port, or the goods transported on a vessel, are key to both minimising the effect of the company’s activity on human rights and IHL and protecting the asset from attack.. Companies can risk **legal liability** for any breach of IHL obligations – both **criminal responsibility** for the commission of, or complicity in, war crimes and **civil liability** for compensation and damages, on top of reputational risks. Moreover, the managers and staff of the company may face prosecution and civil liability in a personal capacity.





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Assessing the nature of operations

To establish whether an asset can be classified as a military objective, a company needs to assess whether the asset meets the criteria set out by international law.

The first criterion refers to objects that “*by their nature, location, purpose or use make an effective contribution to military action*”. This includes four different criteria: nature, location, purpose, and use.

- **Nature:** Objects that by their nature contribute to the military action are those used by the armed forces e.g. weapons, equipment, transports, fortifications, etc.
- **Location:** Objects – such as a bridge - which, by their nature, perform no military function, but nonetheless make an effective contribution to military action due to their location.⁴
- **Purpose and use:** the intention of its future use.⁵ Some objects can serve both a civilian and military purpose. Objects such as a school or hotel which, if used to accommodate troops or military staff, may become a military objective by its purpose or use.





The ICRC has recognised that “[o]ther establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military”.⁶

Examples of dual use objects include:

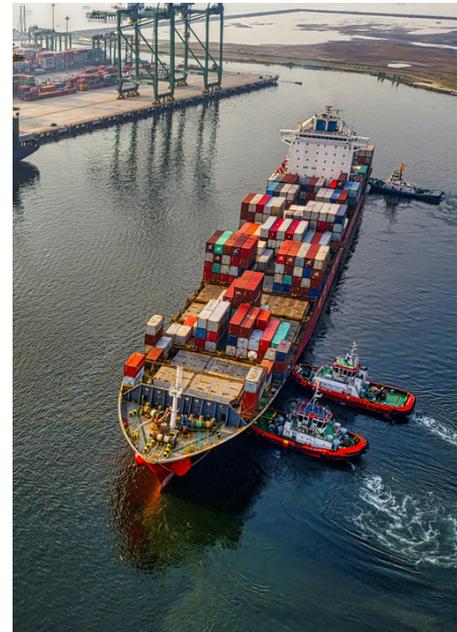
- *transport systems,*
- *roads,*
- *bridges,*
- *railways,*
- *a power station supplying a military base and a hospital.*



Practical Guidance

Conducting business activity in areas of armed conflict in compliance with IHL

The following guidance deals with heightened human rights due diligence in relation to **assets the company is currently owning and operating** and is applicable to a wide number of conflicts. Investment into new assets requires different considerations and is not covered below. The steps which need to be taken will vary depending on both the local context, the level of control over activities and structure of operations.



IDENTIFY AND ASSESS

Conduct a conflict analysis: ensure an understanding of the root causes, triggers and parties driving the conflict and the impact of the company's business activities on the conflict by asking the following questions:

1. Who are the parties to the conflict?
2. What are their motivations and capabilities?
3. What areas are affected by the conflict?
4. What are the causes of the conflict?
5. What are the current trends of the conflict?
6. Are there reports of war crimes or other international crimes being committed?
7. What are the effects of the conflict on the population (e.g. forced displacement)?

Understand the company's relationship to parties to the armed conflict

- Does the company have any existing agreements with one of the parties to the conflict or companies owned by them? What is the nature of those agreements?
- Is port or vessel security provided by state or private security forces?
 - Where security is provided by one of the conflict parties or a company with links to one of the conflict parties there is a significant legal and reputational risk attached (*Lafarge* and *Lundin* cases are both examples of this scenario).
- What is the contribution of the port to the war economy of the conflict parties?
- Are there any shipments of military equipment onboard vessels or unloaded at the port?



- Consider the impact where there are reports of violations of international humanitarian law committed with those weapons.
- Consider also whether this changes the nature of the port or ship to a military target.
- Are shipments of fuel unloaded at the terminal supplied to the military of one of the armed forces? If so, how may this activity contribute to the conflict?
- What is the likelihood of the facility being used to launch attacks?
- What is the likelihood of the facility being targeted as part of the armed conflict?
- Is the vessel or facility essential for the delivery of humanitarian aid or goods indispensable to the survival of the civilian population?

Understand the risk to employees and contractors

- What are the risks of continuing operating the shipping route for seafarers?
- Are the activities placing employees at risk i.e. by changing the nature of the port or vessel from a civilian to a military target?
- Does continuation of activities place employees or contractors at risk?

ACT

It is not always possible for companies to address all negative human rights impacts simultaneously. Therefore, it is imperative to prioritise and address those violations which are “*most severe or where delayed response would make them irremediable*”.⁷

As a minimum the company should put in place the following measures:

- Establish protection measures for employees and contractors – put in place evacuation plans, alerts, re-route ships and consider sending employees' home.
- Ensure as far as possible that through its use the facility or vessel does not become a military target. If there is a risk that it is a military target, consider pausing operations whilst hostilities are ongoing.
- Whenever possible use a security service provider who is a member of the [International Code of Conduct Association](#).
- Update or create a publicly available human rights policy that guides operations in conflict. Is there an existing obligation to carry out additional due diligence and compliance checks on all partners or suppliers as well as on product use or misuse?
- Put in place a functioning grievance mechanism.
- Collaborate with local and international humanitarian organisations to conduct periodic assessments of the facility's vulnerability to becoming a military target or contributing to conflict dynamics, implementing preventive measures based on the findings.
- Where applicable, put in measures to ensure continued access for humanitarian aid or goods indispensable to the survival of the civilian population.

Where there are risks of being involved in international crimes, the company must consider how it can continue operating with integrity in such circumstances.

MONITOR

Monitor the effectiveness of the policies and measures

The company should continue to conduct heightened human rights due diligence, assessing whether the situation has changed or could be changing, recognising that few situations are static. At the same time, the company will also need to monitor the conduct of the conflict carefully, whether international crimes are being committed and whether it is linked to any of those crimes.

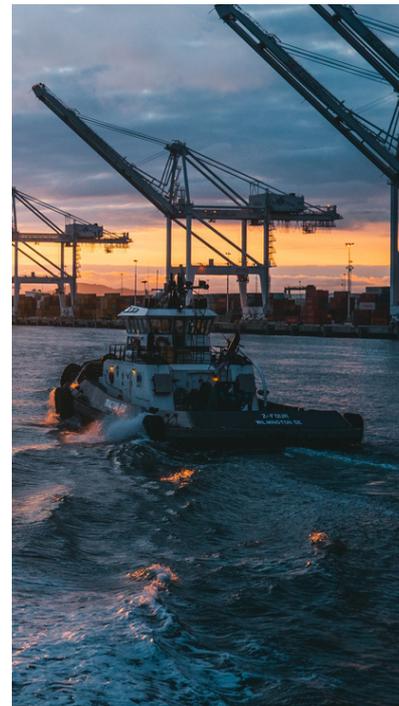
It should also undertake periodic assessments to evaluate the effects of measures taken and track future needs.

COMMUNICATE

Business enterprises should be as transparent as possible about their ongoing efforts to mitigate adverse impacts, so that affected stakeholders, civil society organisations and others can know about their motivations and the sincerity of their efforts. Without communication, stakeholders may presume, and articulate their view, that the company has not taken any action. The company should report on the ways in which it is addressing severe human rights impacts to interested parties including suppliers, employees and the general public. Exercising caution, a certain level of discretion and conflict-sensitivity when communicating to stakeholders is crucial to avoid undermining peace efforts. Instead, companies should use their leverage to stress the importance of the rule of law and compliance with IHL.

Maintaining impartiality and avoidance of public statements that could be interpreted as endorsing a party to a conflict is crucial. As an example, part of the indictment against Alexandre Schneider in the Lundin proceedings alleges that he "*expressed his appreciation for the way in which the government of Sudan created the conditions for Sudan Ltd's operations in Block 5A*" and thus, it is alleged, endorsed the commitment of attacks against civilians by the Sudanese military.

If the company decides to stay or exit it should be transparent with stakeholders and the public at large about the decision-making process used to arrive at that determination and the criteria used, which should be objectively reasonable.





WHEN TO CONSIDER A RESPONSIBLE EXIT?

It must be stressed that termination of a business relationship is a last resort measure. The UNGPs make clear that, where there are adverse human rights impacts taking place, two key considerations are: (i) the nature of the business enterprise's involvement in the relevant impacts, and (ii) the ability of the enterprise to address those adverse impacts with which they are involved.

Key factors to consider are:

- the company's leverage over the entity concerned,
- how crucial the relationship is to the enterprise,
- the severity of the abuse, and
- whether terminating the relationship with the entity itself would have adverse human rights consequences⁸ (by for example, cutting access to deliveries of humanitarian aid).

The assessment should seek to understand *"whether exiting could exacerbate tensions within a conflict-affected setting and whether the adverse impacts of the decision to exit or suspend the operations outweigh the benefits"*.⁹

CASE STUDY: PUMA ENERGY

in October 2022, Puma energy (which owned Thilawa port terminal and was responsible for handling and storing aviation fuel delivered to it) ceased operations in Myanmar after allegations by Amnesty International that it was supplying fuel to the Myanmar military.¹⁰

The company should consult with all relevant stakeholders, including employees and contractors prior to any decision being made.





Some of the **key questions** which must be answered prior to a decision to exit include:

- What will be the effect of the exit on the livelihoods of workers as well as their health and safety?
- To what extent do the livelihoods of communities and workers depend on the business continuing operations?
- Has the business assessed and addressed the potential impact of termination on workers?
- Is the business causing or contributing to adverse human rights impacts or violations of IHL?
- Is the business essential to delivery of humanitarian aid or essential goods to the civilian population?
- Is there any leverage that the business can place on the parties to the armed conflict? Can it become part of the solution?
- Are there any legal prohibitions to termination of the relationship i.e. notice periods, transition arrangements etc.? Can those be addressed e.g. through compensation?
- Can a transitional approach be followed i.e. by suspending operations prior to termination?

In situations in which the local government may have an active role in violating human rights, businesses should be careful to avoid turning over shares or assets to the government upon departure if possible.¹¹

Where workers or local communities may have few other sources of livelihoods or access to the goods and services a business provides, such rights holders may prefer businesses to stay, even if conditions are worsening because of the changing context. For example, if the port is the main employer supporting the livelihoods of entire communities, the impact will be far greater than in areas where there are other income opportunities available.

Where a state is committing gross violations of human rights or IHL, a business may have no leverage over the actions of a government. Where this is the case, a company at risk of being involved in gross human rights abuses will need to rapidly come to a decision about whether and how to exit, and the necessary mitigation measures that will need to be put in place.



References

1. IHL Customary Law Rule 14 available [here](#).
 2. IHL Customary Law Rule 15 available [here](#).
 3. IHL Customary Law Rule 8 available [here](#).
 4. ICRC, Commentary to the Additional Protocols (1987), para. 2021.
 5. Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed, CUP 2016), pp. 113-114; Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims (2005), 45 *ILM* 396, p. 419.
 6. ICRC, Commentary to the Additional Protocols (1987), para. 2023.
 7. UN Guiding Principle 24
 8. UN Guiding Principle 19
 9. OHCHR *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting*, p.9.
 10. Amnesty International, *Myanmar: New shipments of aviation fuel revealed despite the military's war crimes* available [here](#).
 11. OHCHR *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting*, p.17.
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