

the
power of
humanity



Doing Responsible Business in Armed Conflict

Risks, Rights and Responsibilities

What every Australian business needs to know
about international humanitarian law

Content

Introduction	4
1. International Humanitarian Law in the Private Sector	7
How is the law relevant to business?	7
Existing business and human rights initiatives	8
Managing security operations in conflict zones	11
<hr/>	
2. IHL: A Brief Explainer	12
What is international humanitarian law?	12
International humanitarian law and human rights law: similar but different	13
Principles of international humanitarian law	14
Where and when does international humanitarian law apply?	16
War crimes and violations of international humanitarian law	17
<hr/>	
3. Your Business: Risks and Responsibilities	18
Pillaging of assets and property	18
Forced displacement	19
Military occupation	20
The environment	21
Workforce conditions	22
The manufacture and trade of weapons	23
Liability risks for businesses failing to uphold international humanitarian law	24
<hr/>	
4. Your Business: Rights and Protections	26
Protections for business personnel	26
Protection of business assets	27
<hr/>	
5. Improving respect for IHL	29
How can Australian Red Cross help?	29
<hr/>	
6. Tools and Resources	31
<hr/>	

Front cover photo:
Luwowo Coltan mine
near Rubaya, North
Kivu, MONUSCO/
Sylvain Liechti



Preface

The International Red Cross Red Crescent Movement - the world's largest humanitarian network - comprises 193 National Red Cross and Red Crescent Societies, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC). As a National Society in this network, Australian Red Cross has a responsibility to ensure that international humanitarian law is understood and respected in times of war and peace. The prevention and alleviation of human suffering during armed conflict is inextricably linked to the understanding and respect for these laws by States, armed groups, businesses and individuals.

Any organisation or business with operations in conflict-affected regions should understand its responsibilities, and the protections afforded to it, under all relevant international law. We want to ensure that businesses in Australia, who do operate in these environments, are equipped with the knowledge and tools they need to align their internal policies, processes and practices with international humanitarian law.

We are committed to working with any Australian business to help them improve their understanding of, and compliance with, international humanitarian law. Not only will this help businesses mitigate the operational, reputational and legal risks associated with conducting activities in conflict zones, but also as a means of protecting life and human dignity of local populations.

An introduction to the risks, rights and responsibilities of global businesses under international humanitarian law, was first published by the ICRC in 2006. We are pleased to be partnering with RMIT University to bring you this updated edition, which builds upon the earlier, global publication but which has been developed specifically for managers and businesses in the Australian corporate sector. We are grateful to the ICRC for their assistance and support throughout the development of this special edition.

Yvette Zegenhagen
Head of International Humanitarian Law
Australian Red Cross

RMIT is proud to partner with Australian Red Cross on this significant project. At RMIT we view a business' social, legal and ethical responsibilities as integral considerations for contemporary business – and for business education. Corporate respect for human rights and humanitarian law are topics that rightly belong in the curricula of business and law schools, as well as corporate boardrooms, across Australia and beyond. We hope that this publication and associated online resources provide useful tools for the Australian corporate community, and those that advise it, to ensure companies act responsibly when doing business in conflict-affected countries. Too many countries around the world are impacted by war and conflict, including many in which Australian companies have operations, clients, investments or supply chains. International humanitarian law provides the minimum standards of “humane” conduct in conflict-affected countries, and it behoves our companies to be mindful of those standards. From the mining or apparel sector to the financial and technology sectors, the information provided in this publication is relevant to a broad range of corporate actors. On behalf of RMIT's Graduate School of Business and Law, I commend this publication to you. Finally, I would like to thank Dr Jonathan Kolieb for spearheading this collaboration with Australian Red Cross from the RMIT side. Long may it continue.

Professor Mark Leenders
Deputy Dean, Research and Innovation
Graduate School of Business and Law, RMIT University

Introduction

Globalisation continues to offer new opportunities for businesses to expand operations and value-chains into new territories around the world. These include unstable and insecure environments and countries affected by, or prone to, armed conflict. As a result, the corporate sector faces new and unfamiliar risks.

Today, businesses are more aware of their human rights responsibilities than ever before. Some businesses have adopted corporate policies that align with initiatives like the UN Global Compact and the UN Guiding Principles on Business and Human Rights, to ensure their operations respect human rights and

reduce the likelihood of contributing to human rights abuses. Although businesses have started to refine their approach to working in conflict prone regions, a growing familiarity with human rights law does not equate to a commitment to conduct activities and operations in a manner that is compliant with the law of armed conflict – international humanitarian law (“IHL”).

Businesses are generally less familiar with their responsibilities, and the protections afforded to them, under IHL. This lack of knowledge is problematic, as there are important implications for doing business in regions experiencing or at risk of armed conflict.



Photo: Open-Pit Mine -
Flickr-MG Vaughan

Aim of this publication

This publication aims to assist Australian businesses in understanding their risks, rights and responsibilities under IHL. It has been specifically designed to provide an overview for managers and executives, and supplements existing human rights-oriented guidance documents.

As a minimum, businesses should know that IHL grants protections to civilians and civilian property that must be respected by all parties to an armed conflict. These protections include company personnel and physical assets. In addition, businesses ought to be aware of their responsibilities under the law. For example, personnel must avoid taking a direct part in the fighting and contributing to violations of IHL. Failure to do this or aiding other people, governments or businesses to violate the law may expose the company, its directors and employees to civil and even criminal liability. In recent times, a number of prominent companies have been accused of committing or aiding and abetting war

crimes and pursued through courts around the world, including in Europe and the United States.

While the notion that your business could be involved in a breach of IHL may seem remote, it would be prudent to proactively manage these risks, particularly if your business's activities are connected or exposed to armed conflict. It may be that your company already has in place a corporate social responsibility framework that seeks to 'do no harm,' and which is underpinned by policies and processes that ensure operations are legally and ethically responsible. However, in order for those responsibilities to be taken seriously, IHL must also be considered. To do this will help to ensure the lives and human dignity of local communities living amidst armed conflict are protected.



Photo: Pixabay

Who is this publication for?

We recommend this publication in particular to country managers and security managers who face the daily challenge of running business operations in conflict prone regions. It should also serve as a useful reference for financial, insurance and trading companies not directly operating in areas of armed conflict themselves but whose clients and suppliers may be. Finally, it should offer assistance to legal and professional services firms that advise clients with operations in these environments.

This publication will give businesses a better understanding of the relevance of IHL and the risks of non-compliance and will enable businesses to plan and execute operations that respect international standards. However, this is simply an introduction to these issues. This document does not provide a comprehensive legal analysis. Readers of this publication wanting more information, or tailored guidance relevant to their specific needs or business interests, should seek professional legal advice.



Photo: Pixabay

┌ This publication will give businesses a better understanding of the relevance of IHL and the risks of non-compliance and will enable businesses to plan and execute operations that respect international standards. └

1 IHL in the Private Sector

How is the law relevant to business?

IHL binds States, organised armed groups and soldiers; it also binds the personnel of private businesses in certain circumstances.

Unlike human rights initiatives, which businesses may adopt or enter into voluntarily, IHL is already binding on anyone whose activities are closely linked to an armed conflict.

Determining which corporate activities are “closely linked to an armed conflict” can be a complex task. Businesses carry out a wide range of activities that could be perceived as directly or indirectly connected to armed conflict. A business providing direct support – be it military, logistical or financial assistance – to one warring party may find its activities are ‘closely linked’.

Moreover, business activities may be considered ‘closely linked to an armed conflict’ even if they do not take place during actual fighting or on the physical battlefield and even if the business did not actually intend to support a party to the hostilities. Given the difficulty in determining which business activities are or are not ‘closely linked to an armed conflict’, prudent corporate risk management would suggest a cautious



ICRC President, Peter Maurer, addresses representatives of Chinese business community ICRC/Yongato Xiang

approach be taken. Part III discusses some of these instances in more detail.

In addition to responsibilities, IHL provides a range of legal protections to affected businesses. As long as entities maintain their civilian status, all personnel, facilities and assets will be entitled to various protections against attack and misappropriation. This is further addressed in Part IV.

PROSECUTION FOR ALLEGED PAYMENTS TO SYRIAN ARMED GROUPS

In 2018, an international company was charged with complicity in crimes against humanity and financing terrorism after a court found the company’s subsidiary had made payments to extremist groups that were active in the Syrian conflict, including the Islamic State. Estimated payments of €13m were made as an unofficial ‘tax’ to keep the company’s factory operating in northern Syria. Eight of the company’s former executives were charged with financing

terrorism and endangering staff. The company was forced to issue a statement apologising for “unacceptable practices” of its subsidiary.



Existing business and human rights initiatives

A number of major global, multi-stakeholder initiatives that deal with business and human rights issues also call on companies in conflict zones to abide by IHL. Because of this, your business's existing human rights policies and commitments, for example on risk management and training, may already include requirements to respect and adhere to IHL.



Photo: Inaugural CEO Roundtable Organized by UN Global Compact - UN Photo/Ariana Lindquist

UN Guiding Principles on Business and Human Rights

The UN Guiding Principles were unanimously endorsed by the United Nations in 2011. They are widely accepted in the corporate community as establishing a universal benchmark for corporate respect for human rights. The UN Guiding Principles highlight the heightened risk of gross human rights abuses in conflict-affected areas (Principle 7) and call on businesses not only to respect major international human rights treaties, but also to 'respect the standards of international humanitarian law' when operating in such situations (Commentary, Principle 12).



UN Global Compact

The world's largest voluntary corporate sustainability initiative is a network of over 10,000 entities that commit to abiding fundamental principles of protecting human rights and the environment, ending corruption and building a better, more equitable world for all. The UN Global Compact has acknowledged the importance of respecting these principles even in conflict-affected areas. It has published several reference tools for responsible business practice in conflict-affected areas and, included in their guidelines, is respect for IHL. The Global Compact also established the "Business for Peace" initiative which seeks to facilitate and expand companies' contributions to security and stability in communities impacted by armed conflict.



OECD Guidelines for Multinational Enterprises

Over four decades ago, the governments of leading economies – members of the Organisation for Economic Co-operation and Development (OECD) – outlined guidance and recommendations to large companies on responsible business conduct. Last updated in 2011 to incorporate the UN Guiding Principles on Business and Human Rights, the OECD Guidelines suggest companies respect IHL as part of their corporate respect for human rights more generally. In addition, the OECD has produced tool kits and other guidance materials to facilitate conflict-sensitive corporate conduct including Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.



Voluntary Principles on Security and Human Rights

The Voluntary Principles were drafted by companies, civil society and governments. The principles are specifically (though not exclusively) aimed at oil, gas and mining companies. They provide advice and guidance on:

- how to carry out effective risk assessments;
- how to manage and regulate engagement with public and private security forces, and
- how to handle security operations and incidents.

As the name suggests, the principles prioritise references to human rights and human rights law. However, despite this, the principles do include explicit and direct reference to IHL. For example, the principles call on companies to respect IHL and include an expectation that any private and public security forces engaged by a member company are mindful of, and trained in, the rules of IHL.



UN Sustainable Development Goals

Finally, the UN Sustainable Development Goals, which encapsulate global development goals to 2030, have been embraced by the corporate sector. Many of these goals align with protections for people and communities in conflict zones under IHL. This includes Goal 16: Peace, justice and strong institutions, which calls for a significant reduction of violence and armed conflict and the 'promotion of peaceful and inclusive societies'. Respect for IHL by all societal actors – including businesses – is vital to meet this objective.



VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS

The Voluntary Principles are a leading multi-stakeholder initiative for managing and regulating engagement with public and private security forces. Although the principles prioritise references to human rights they also include explicit references to IHL. These references provide companies with legal and ethical frameworks to apply in conflict-affected areas, which are distinct and separate from human rights law.

Australian Red Cross would encourage businesses to consider three references, in particular, when assessing and managing the risks associated with conducting security operations in a conflict:

1. The *Voluntary Principles* place emphasis on safeguarding company personnel, property and local communities by asking companies to honour their commitment to the laws of the countries in which they have a presence. In a country experiencing armed conflict, this includes IHL and of course any relevant domestic laws.
2. The *Voluntary Principles* place emphasis on accurate and comprehensive risk assessments. Businesses are expected to account for all foreseeable threats in their operating environments. This is to ensure risk mitigation measures can be developed to ensure the security of its personnel, assets and the local community. To do this effectively, businesses must ensure risk assessments include a genuine consideration of IHL – such as patterns of violence, the root causes and nature of local conflicts, and the potential for future conflicts. For example, companies supplying equipment to public or private security forces should assess the risk of these transfers through a human rights lens and an IHL lens. This is especially so, with respect to the company's ability to mitigate foreseeable consequences, such as the use of this equipment to violate those laws.
3. The *Voluntary Principles* include an expectation that security personnel engaged by business, comply with IHL. This obligation rests not only with public security forces but also private security forces, who are expected to observe the policies of the contracting company regarding ethical conduct and human rights as well as promote upholding IHL. ┘

QUESTIONS TO CONSIDER

Is your business affiliated with any of these governance initiatives?

Has your business implemented adequate policies, due diligence processes, risk management frameworks and training, which specifically reference the international humanitarian law risks and responsibilities cited in these initiatives?

Have you considered opportunities to contribute to improving respect for international humanitarian law in support of these initiatives?

Managing security operations in conflict zones

When operating in countries plagued by conflict, businesses are often compelled to set up security systems. These can take many forms:

- Contracted public security services from the government;
- Private security companies; or
- Protection from local and non-state armed groups.

These forces rely on their right to use self-defence to carry out their contractual obligations effectively, meaning use of force is an expected aspect of the services they provide. Problematically, given the nature of these operations, contracted security forces may find themselves taking a direct part in surrounding conflicts, thereby risking violations of IHL in the process.

If security forces, contracted to protect a business's facility, use that facility to launch or defend against military actions they must comply with IHL guidance on targeting and ensure they are proportionate in the response. This includes upholding the principle of distinction.

If guards or security personnel do engage militarily, that business's assets, facilities and personnel may become legitimate military targets, on account of them having taken a direct part in the hostilities. If that happens, they risk attack from opposing forces. However, it is important to note the difference between this and the act of self-defence or defending the property from illegal attacks not associated with an armed conflict, such as terrorist acts.

Businesses are limited in the type of weapons that can be employed for security purposes in times of conflict. Certain weapons, such as anti-personnel landmines, are explicitly banned in times of peace and in times of conflict because of their indiscriminate effect on civilians. Weapons with the potential to cause superfluous injury or unnecessary suffering are also banned.



Photo: Private security guard
ICRC/Marko Kokic

QUESTIONS TO CONSIDER

Have your security personnel received training in international humanitarian law, specifically in relation to what constitutes "direct participation in hostilities".

Do your policies and process concerning security management account for references to international humanitarian law in the Voluntary Principles?

Did you know Australian Red Cross has developed online training for those responsible for managing security personnel and those working with public security forces supporting company security arrangements?

*Visit the website for details:
<https://www.redcross.org.au/ihl-hub>*

2 IHL: A Brief Explainer

What is international humanitarian law?

Throughout history, most (if not all) cultures have restricted the way wars are waged. IHL is a modern-day extension of this notion. At its heart is the premise that, even in war, basic human dignity must be respected and protected.

IHL is a set of rules that aims to limit suffering during times of armed conflict. Specifically, the law provides protections to people who are not involved or no longer participating in the fighting, such as civilians, wounded soldiers and prisoners of war. It also places limits on the types of weapons and military tactics permitted on the battlefield.

A treaty is a binding, formally concluded agreement between countries. The first IHL treaties date back to the 1800s. Since then, numerous treaties have been introduced to define and develop the humanitarian protections relevant during conflict. The most significant sources of IHL are the four Geneva Conventions of 1949 and their Additional Protocols of 1977.

As a testament to the accepted nature of these laws, all countries have ratified the Geneva Conventions, and the vast majority are parties to the 1977 Additional Protocols.



Photo: Bangui, Bimbo women's prison. An ICRC delegate talks to a detainee - ICRC/Marko Kocic

International humanitarian law and human rights law: similar but different

International humanitarian law is not the same as international human rights law. While they are complementary bodies of law with a number of fundamental goals in common, such as the protection of life, health and dignity, these complex legal frameworks are not the same.

┌ The outbreak of armed conflict, and therefore the triggering of international humanitarian law, introduces additional rules and protections that relevant stakeholders should be aware of. ┐

As discussed already, IHL is the specialist body of law that applies during armed conflict and military occupation, whereas human rights law applies in times of peace and conflict. The outbreak of armed conflict, and therefore the triggering of IHL, introduces additional rules and protections that relevant stakeholders should be aware of.

Each of these legal frameworks has distinct characteristics. Perhaps the most fundamental of these is that human rights are traditionally only binding on governments, while IHL binds State and non-State actors, including individuals. This can include companies, as well as individual managers and staff of businesses whose activities are closely linked to an armed conflict.

In situations of armed conflict, human rights law is often interpreted through the lens of IHL standards. In some cases, during states of emergency and armed conflict, certain human rights may be temporarily displaced. For example, the right to life is fundamentally protected by human rights law, but during armed conflict IHL will permit fatal attacks against combatants.

The same cannot be done with the rules of IHL, which can never be suspended. During armed conflict, parties must ensure they maintain an ongoing commitment to these laws.

Photo: UN Human Rights Council UN Photo/Elma Okic



Principles of international humanitarian law

IHL is based on several core principles, through which specific rules have been developed and interpreted. The main principles to be aware of are:

Humanity

People not taking a direct part in hostilities are entitled to respect for their lives and wellbeing and must be treated humanely. Killing or wounding civilians or an adversary who surrenders, or is no longer able to take part in hostilities, is also prohibited.

The sick and wounded must be cared for humanely and without distinction. Medical personnel, hospitals and ambulances must never be targeted. They must be respected and protected. The distinctive red cross, red crescent and red crystal emblems and other officially-recognised symbols indicate that the building displaying the emblem, or the person wearing it, must not be attacked.



Photo: North East Syria, Al Hassakeh Governorate, Al Hol camp for internally displaced persons - ICRC/Ali Yousef



Photo: A patient with a firearm injury undergoes surgery in this hospital supported by the ICRC - ICRC/Florian Serieux

Distinction

At all times, a distinction must be made between military objectives and civilians. This means distinguishing between combatants and legitimate targets on the one hand and civilians and civilian property and objects on the other. Deliberately targeting civilians and civilian objects is a war crime.



Photo: Rural Damascus, Mouadamieh ICRC/Ali Yousef

Proportionality

Attacks that may cause excessive harm or death to civilians or destruction to civilian objects are prohibited. This includes attacks on legitimate military objectives. Indiscriminate attacks that fail to distinguish between military objectives and civilian objects are also forbidden.

Prohibition of unnecessary suffering

Parties to an armed conflict are forbidden to use weapons or methods of warfare likely to cause superfluous injury or unnecessary suffering. Weapons or tactics of war that risk widespread, long-term or severe damage to the environment are also prohibited.

Military necessity

Military force is not an end in itself – the only legitimate military purpose in an armed conflict is to weaken the military capacity of the other parties to the conflict. Parties do not have unfettered access to war tactics and weapons. Only means and methods that are necessary to accomplish a legitimate military purpose, and are not prohibited by IHL, are permitted.



Photo: A war-wounded patient has been taken out of an ICRC-plane after been evacuated by a medical team - ICRC/Jacob Zocherman

Where and when does international humanitarian law apply?

IHL regulates all situations of armed conflict.

Both:

- International armed conflict, occurring between two or more States; and
- Non-international armed conflict, occurring between a State and non-State armed group(s), or between only non-State armed groups. These are often referred to as civil wars

It is important to note that regardless of where combat actually takes place in a country, IHL may still apply to the whole territory (and airspace and seas) of that country. Therefore, even if your business operates in a city or region of a country not directly impacted by conflict, but which is experiencing conflict elsewhere in its territory, IHL may still be relevant to you, particularly if your operations or actions are somehow connected to the conflict.

IHL does not apply in countries experiencing riots or sporadic acts of violence and criminality. However, there is always a risk such situations may escalate into armed conflict, in turn invoking IHL.

A business that claims to observe best practice in respecting human rights should understand when and where the rules and principles of IHL apply, not only when conducting operations in a conflict zone, but also to sufficiently prepare yourself should the environment change.



Photo: Protestors, Tahrir Square ICRC/
Nadia Shira Cohen

┌ IHL does not apply to riots or sporadic acts of violence. However, there is always a risk such situations may escalate into armed conflict. └

QUESTIONS TO CONSIDER

Do you know which countries are currently experiencing, or at risk of experiencing, armed conflict? And do you maintain an accurate and comprehensive conflict register for risk management purposes?

Are your business's operations (including exploration), personnel, supply chains or controlled entities exposed to any conflict zones where international humanitarian law applies?

Would your business be prepared, and your personnel effectively trained, for a conflict environment should armed conflict break out in a place of operation?

War crimes and violations of international humanitarian law

War crimes are particularly egregious violations of IHL. They include grave breaches of the Geneva Conventions and serious violations of other laws and customs of war.

This list includes, but is not limited to torture or inhumane treatment; disproportionate, unnecessary or indiscriminate attacks against civilians; extensive destruction and appropriation of property; unlawful deportation or transfer or unlawful confinement, and taking hostages.

Importantly for businesses, complicity – or aiding and abetting the commission of a war crime – is itself a war crime. Examples of violations most relevant to businesses are discussed in Part II below.

War crimes are violations of international law but in many countries they may also be violations of domestic law, depending on that country's national criminal legislation. As a result, accused war criminals could face prosecution at the International Criminal Court or in domestic courts.

In Australia, for example, persons or companies suspected of committing war crimes can be tried under the Criminal Code Act 1995 (Cth). They can be



Photo: Permanent Premises of the International Criminal Court. UN Photo/Rick Bajornas

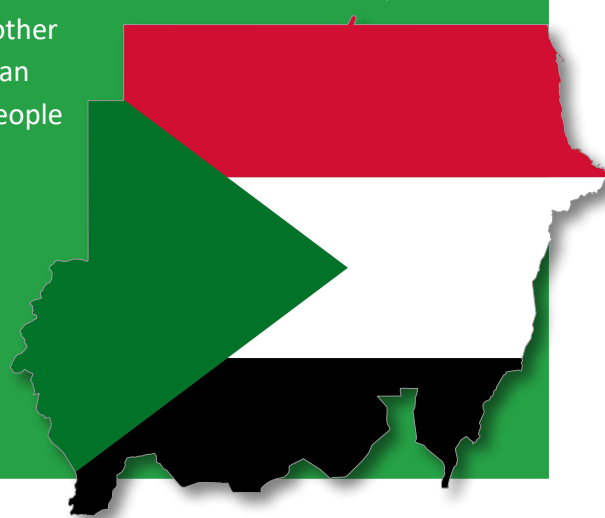
prosecuted irrespective of where the crimes were committed, who committed them, or whether the crimes were committed against Australian citizens or property. Victims of war crimes may also pursue civil claims in domestic courts, including claims for financial compensation.

OIL COMPANY'S CEO AND CHAIRMAN FACE CHARGES OF AIDING AND ABETTING WAR CRIMES

In 1997, an oil company signed an agreement with the Government of Sudan for the exploration and production of oil in the south of the country, now the independent State of South Sudan. During this time, a civil war was being fought in Sudan. Within the context of this conflict, it was alleged the company paid the Sudanese army and other non-state armed groups to forcibly displace the local civilian population from exploration sites. An estimated 12,000 people died and 160,000 people were displaced during this time.

In late 2018, after a preliminary investigation, the CEO and Chairman were indicted and charged with aiding and abetting war crimes and crimes against humanity, which carry sentences of life imprisonment.

The company also faces a multi-million dollar fine.



3 Your Business: Risks and Responsibilities

The potential for exposure to violations of IHL is broader than you may think, particularly when it is alleged that the company or individual is complicit in the violation. The following are examples of IHL violations that businesses ought to be especially aware of.

Pillaging of assets and property

IHL prohibits the intentional and unlawful appropriation of property for personal or private use. This is considered the war crime of pillaging. The definition of property in this context also extends to natural resources, meaning a business found to be illegally exploiting such resources can also be held accountable under this war crime.

An act of pillaging is likely to take place through military operations, or by force, but it is not limited to these means. An unlawful acquisition of assets can also include agreements based on threats, intimidation or a position of power derived from the armed conflict.

A business operating in a conflict zone must use extreme caution to ensure that it, and its personnel, do not acquire resources or property without the freely given consent of the owner. This might raise questions about which authorities have effective control over a particular region.



Photo: Julien Harnais

QUESTIONS TO CONSIDER

Do you have a clear sense of which authorities have effective control over the region in which your business is operating? Is this type of assessment embedded into your business's relevant internal processes and policies?

If you acquire resources from a third party do you know if these supply chain partners are aware of the responsibilities they hold under international humanitarian law?

Forced displacement

In situations of armed conflict or occupation, civilians cannot be forcibly relocated, except on a temporary basis when required for their security or imperative military reasons.

Business operations in conflict zones may affect a civilian population's residential or agricultural land, sometimes in order to obtain access to resources or establish transport routes. In the past, examples of securing such access has involved an intervention of armed groups and government armed forces to evict residents by force.

If this takes place in the context of an armed conflict, the forced displacement of residents and landholders can amount to a war crime. The expulsion of civilians by armed groups acting on behalf of a business cannot be justified, and could give rise to significant criminal and civil liability.

“During my visit I gathered further evidence that oil exploitation leads to an exacerbation of the conflict ... More specifically, I received information whereby the Government is resorting to forced evictions of the local populations and destruction of villages to depopulate areas and allow for oil operations to proceed unimpeded.”

Gerhart Baum, Special Rapporteur on Human Rights in Sudan, Geneva, March 2001

Photo: ICRC/Sheikh Mehedi Morshed



Military occupation



Photo: ICRC/Thierry Gassmann

The rules of IHL not only apply to active fighting, but also to situations in which one party occupies the territory of another.

Occupation of territory should be temporary. Yet, there are territories around the world long considered by many international lawyers to be “occupied” or “disputed” territories. For instance, Israeli-occupied Palestinian territories.

Businesses operating, or with settlements, in an occupied territory must take account of the rules that apply in these territories under IHL. These include:

- A ban on the forcible removal or transfer of populations in or out of these occupied territories;
- A ban on the taking of private property; and
- A requirement to ensure any use of resources of the territory benefits the local population.

A business directly contravening these responsibilities, or aiding governments or other entities to do so, may be exposed to legal, operational and reputational risks, including war crimes allegations.

Actions that may amount to war crimes, or complicity in war crimes, include participating or assisting in settling civilians in occupied territory; maintaining, developing or expanding settlements; appropriating resources; and damaging or enabling the destruction of land and property.

The environment

Armed conflict often has an impact on the environment, which can negatively impact civilian populations relying on it for food, water and livelihoods. IHL contains a number of rules intended to limit a conflict's damage in this respect.

The natural environment consists of protected objects and property and must not be attacked. In particular, attacks that may be expected to cause widespread, long-term or severe environmental damage are prohibited, as is damage to the environment that risks the health and survival of civilian populations.

Business operations can have an impact on the environment in many ways. For instance, in exacerbating existing environmental and climate vulnerabilities, or in violating international humanitarian rules by supplying armed forces (either government or non-government) with the means for carrying out attacks

leading to widespread environmental destruction. Such behaviour may expose the business and its personnel.

Businesses providing advice and professional services to parties to armed conflicts must also exercise caution in their work, as that advice may amount to complicity in environmental destruction and trigger liability. Providing engineering advice on how to create massive oil spills or hydro-electric dams in a conflict zone, or sharing scientific knowledge on how to develop weapons that cause long-term environmental harm, can potentially trigger liability for businesses and personnel.

Photo: UN/Albert Gonzalez Farran



Workforce conditions



Photo: ICRC/Thierry Gassmann

IHL regulates business operations in armed conflict in relation to the labour conditions of the workforce. In the past, businesses have been held accountable for benefiting from the labour of civilians, prisoners of war or concentration camp detainees in conditions that failed to meet minimum standards.

IHL also prevents uncompensated or abusive labour, establishes minimum working conditions and limits the types of work these individuals can be asked to carry out. Prohibited work includes work connected to the conflict, and unhealthy or dangerous work. The law also sets out provisions dealing with working conditions, the duration of labour and pay.

In situations where businesses operate in conflict-affected areas, business managers should apply heightened managerial care to identify risks and prevent workforce abuses.

In situations where businesses operate in conflict-affected areas, business managers should apply heightened managerial care to identify risks and prevent workforce abuses.

The manufacture and trade of weapons

The manufacture and trade of weapons is a very special and distinct case among issues that businesses operating in conflict settings may be confronted with.

IHL prohibits the development, production and transfer of specific weapons, such as anti-personnel landmines or biological and chemical weapons. Some treaties also call on States to ensure that individuals who engage in illegal trading or transfer, are criminally prosecuted.

Manufacturers or suppliers of such weapons may be held liable for trading prohibited weapons. Businesses may also face legal liability for producing and trading in weapons not explicitly prohibited under IHL, but which are supplied to and used by parties who use to commit violations of IHL. For example, a business supplying an armed group with devices known to be a component of weapons used to commit war crimes, may be subject to legal liability.

In addition, businesses ought to consider the IHL implications of their development and supply of technologies. This not only applies to weapons-related technology, but also civilian products and services, or other military technologies that may be ultimately used by parties to a conflict in such a way as to contravene IHL standards. Such technologies may include, for example, surveillance and telecommunications equipment or cyber-security software.

It is essential that manufacturers and suppliers have an understanding of the rules and regulations relating to the means and methods of warfare that exist under IHL. Businesses must exercise due diligence and enquire as to the conduct of potential purchasers and the use of supplied products or services.

Photo: ICRC/Teun Anthony Voeten



Liability risks for businesses failing to uphold international humanitarian law

Businesses should be aware that companies have been accused of, and charged with, war crimes in past and ongoing armed conflicts. Multi-million dollar lawsuits have also been filed on behalf of victims of alleged corporate wrongdoing and individuals have been prosecuted, fined and even jailed for misconduct in conflict-zones.

Personnel, products or services present in a conflict zone risk becoming part of that conflict. Certain involvement, such as providing support to warring parties or relocating local populations, may lead to violations of IHL and allegations of war crimes, which can have operational, financial, reputational and, of course, legal implications.

Criminal liability

Businesses risk criminal liability for violations of IHL if they directly breach the law or if they are complicit in the commission of a breach carried out by another, such as security contractors.

'Complicity' involves assisting, supporting or encouraging the commission of a war crime, with knowledge that assistance or support would facilitate the crime. Under IHL, superiors and accomplices – not only perpetrators of war crimes – can be held criminally responsible. For example, an arms dealer who sells weapons to a member of an armed group, with knowledge that those weapons will be used to commit war crimes, is complicit in those crimes. Similarly, the directors of a company providing logistical support to an armed group that commits IHL violations also risk legal liability.

It is important to note that complex corporate structures may not immunise a parent company from IHL abuses committed by a subsidiary company.



Photo: Pixabay

Civil liability

Businesses and employees also face the risk of civil liability. As civil cases can be brought directly by individual victims and carry a lower standard of proof, civil litigation is increasingly perceived as a viable means of redress for victims of IHL violations.

Civil claims have been launched in the United States and Europe, including against major Australian companies.

The substantial risk of liability arises not only for businesses carrying out regular or sustained operations in conflict zones, but also businesses providing goods or services to conflict-facing operators. The same applies to those who partner with third party entities linked to an armed conflict.

QUESTIONS TO CONSIDER

Do you know who in your business should be aware of the legal protections and responsibilities under international humanitarian law and who may be held accountable for violations?

Does the risk of corporate and individual criminal responsibility for crimes perpetrated in the context of an armed conflict form part of your business's risk assessment of its activities during that conflict?

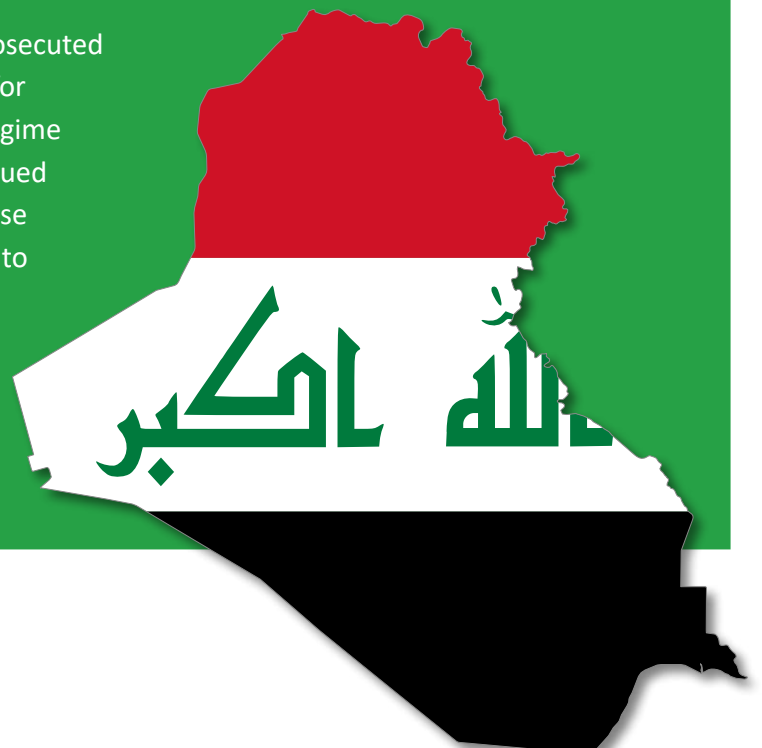
PRESIDENT OF TIMBER COMPANY GUILTY OF AIDING AND ABETTING WAR CRIMES IN LIBERIA

In 2017, the president and director of a timber company operating in Liberia during a period of armed conflict was convicted of aiding and abetting war crimes committed by former Liberian President Charles Taylor. It was argued that the individual had been using his company to import, store and distribute weapons to Taylor and his forces, as well as allowing the armed forces to use trucks, materials, personnel and other resources belonging to his company in military attacks against rebel groups. The court found the individual knew that the armed forces used these weapons and resources to commit war crimes and held that he had made an active and conscious contribution to the commission of war crimes. He was held criminally responsible and sentenced to 20 years imprisonment.



BUSINESSMAN JAILED FOR HELPING SADDAM HUSSEIN DEVELOP CHEMICAL WEAPONS

In 2005, an individual businessman was prosecuted for genocide and complicity in war crimes for selling chemicals to the Saddam Hussein regime in Iraq during the 1980s and 90s. It was argued that he knew (or ought to have known) these chemicals were being turned into gas used to murder thousands of Kurdish citizens of Iraq. He was found guilty of complicity in war crimes and was sentenced to 15 years in prison.



4 Your Business: Rights and Protections

Protections for business personnel

The personnel of businesses operating in conflict zones may face serious threats to their physical safety as a result of surrounding armed conflict.

Employees, including local and expatriate personnel as well as contractors and consultants, are deemed to be civilians while performing their roles – including in situations of armed conflict. As such, they benefit from a series of protections for civilians enshrined within IHL. These include protection against violence to their life, health, physical or mental well-being. Business personnel are civilians and therefore protected against deliberate and indiscriminate attacks by militaries or armed groups.

Business personnel should note they will not be protected if they directly participate in hostilities.

Murder, torture, corporal punishment, rape and mutilation are all strictly prohibited and personnel may not be taken hostage by parties to a conflict. Employees

are also entitled to various guarantees and standards of treatment should they be charged with a criminal offence or deprived of their liberty.

However, IHL also stipulates that civilians who directly participate in hostilities lose their protection from attack for the period of time they are carrying out these activities. Business personnel should note they will not be protected if they directly participate in hostilities.

Exactly what amounts to “direct participation in hostilities” is not clearly defined in IHL. It is generally understood that acts intended to cause actual harm to enemy personnel and property will amount to direct participation in hostilities. Therefore, an employee of a business who participates in the planning or facilitation of a military operation would likely lose their civilian protection. On the other hand, an employee of a business that supplies food or shelter to a combatant would likely not be deemed to be directly participating in the hostilities.

Making these determinations on the ground carries an inherent degree of difficulty. Legal advice should be sought when making these decisions. In cases of doubt, IHL says a person ought to be considered a civilian.



Photo: © Sudanese oil worker - Enough Project

Protections of business assets

The facilities and assets of businesses, including factories, offices, vehicles and land are considered civilian objects. They benefit from the prohibition on seizure of property (i.e. pillage).

Seizure of company assets in times of conflict

Another risk faced by businesses in times of armed conflict is the misappropriation or looting of assets and investments.

IHL maintains that private property must be respected. Confiscation of such property is forbidden. The property and investments of businesses are therefore covered by this protection, as is any privately-owned housing for their personnel.

Under limited circumstances, IHL permits an occupying power to seize the property of a business. This can only be done on condition that it is returned at the end of the armed conflict, and compensation paid. Beyond this limitation, unlawfully seizing business assets during a conflict amounts to pillage, which is, as mentioned above, a war crime.

Civilian businesses are not legitimate targets of attack

Business facilities and assets are also protected from deliberate and indiscriminate attacks, unless a business's property is used for a military purpose. In that instance, it may become a military target that can be legitimately attacked by parties to the conflict. For business assets to become military targets, the facilities or resources must be used in a way that effectively contributes to military action.

For example, if a business operates manufacturing facilities that produce ammunition used by a local armed group during a conflict, this munitions factory is a legitimate military objective. Trucks or planes belonging to an oil company that carry and transfer oil to a party to the conflict for use in its military operations constitute legitimate targets.

Photo: ICRC/Marko Kovic



On the other hand, a business manufacturing or selling products or services unrelated to military activities, is not a legitimate target. But, if its premises or facilities are used by a party to the conflict for military operations, even only partially, those facilities will be converted to legitimate targets.

Depending on the manner in which it is used, any civilian object can become a military target.

Business facilities and assets are protected from deliberate and indiscriminate attacks, unless a business's property is used for a military purpose.

It is important to note that legitimate attacks against military objectives can cause civilian “collateral damage”. However, under IHL, the principle of proportionality says that military targets must not be attacked when the likely consequences for civilians and civilian objects are excessive. For example, the use of a missile to kill one combatant in a crowded marketplace would likely be prohibited.

In contrast, causing minor damage to a civilian factory that is closely located to a major military barracks could be justified as proportionate. Similarly, civilians working in a military target, such as an ammunition factory, would be at risk of legitimate attack.

Businesses should therefore consider these factors when making decisions about where their premises and operations should be situated within conflict zones, as well as decisions about potential relocation in the face of shifting conflict dynamics.

QUESTIONS TO CONSIDER

Does your business regularly assess the areas in which you operate for all conflict and military targeting-related risks?

Do your managers and staff know the law provides protections when operating in conflict zones?

Do your managers and staff know they may lose their civilian protection if they participate, or assist, in the fighting in an armed conflict?

5 Improving respect for IHL

How can Australian Red Cross help?

For many businesses, engagement with the laws and principles of IHL will start with a simple self-assessment:

Are we operating, or doing business, in a country that is experiencing armed conflict or at risk of doing so?

If the answer is yes, you have a responsibility to ensure your people understand all the relevant rules and principles of IHL – not only the protections these laws afford, but also the responsibilities they bestow. However, even if the answer is no and you are not operating or doing business in a country that is experiencing armed conflict, a business that is striving to be a good corporate citizen, and that wants

to observe best practice in respecting human rights, should familiarise itself with the relevant rules and principles.

Throughout this document we have posed a number of questions to help identify and clarify the relevance of IHL to Australian businesses. For businesses operating in conflict-affected countries or countries at risk of conflict, it would be prudent to work through these questions to assess your level of preparedness.

Photo: ICRC/SN



Seven indicators of corporate best practice in international humanitarian law

Australian Red Cross has developed seven indicators of best practice as a guide for the Australian corporate sector. These indicators aim to assist businesses in effectively integrating IHL, not by establishing new rules and standards, but by supplementing existing policies.

We encourage you to review these principles and adapt, adopt or look to them for guidance on responsible business conduct when operating in conflict-affected areas. Taking this action will enhance your ability to assess and manage the risks associated with IHL and improve your employees' understanding of the

obligations and protections afforded to them under the laws.

These should be used as a guide only; to evaluate whether your policies, processes and practices sufficiently address the rules of IHL, the risks posed by conflict environments and the obligations under relevant global initiatives. Experiences in applying IHL will differ, depending on the context and on the individual company's capabilities.



6 Tools and Resources

For companies seeking to take a proactive stance on understanding, honouring and promoting IHL, Australian Red Cross and RMIT University have developed this guide on doing responsible business in conflict-affected areas. This training, in particular, is aimed at managers of security personnel, as well as those working with the private and public security forces that support company security arrangements. For more information, or to get in touch with one of our Legal Advisers, please visit our online IHL Hub at: <https://www.redcross.org.au/ihl-hub>.

The Geneva Centre for Security Sector Governance (DCAF) and the International Committee of the Red Cross (ICRC), with the support of the Human Security Division of the Swiss Federal Department of Foreign Affairs, are leading a joint project to address security and human rights challenges faced by companies operating in complex environments. To this end, two main products have been developed: a Knowledge Hub and a Toolkit of good practices. These products support companies operating in complex environments to manage their security in a way that is effective and respects human rights and IHL. For further information please visit: <http://www.securityhumanrightshub.org/>

The following websites also contain valuable resources, tools and information:

Australian Red Cross IHL Best Practice Hub <https://www.redcross.org.au/ihl-hub>

International Committee of the Red Cross (ICRC) <https://www.icrc.org/>

Democratic Control of Armed Forces (DCAF) <https://www.dcaf.ch/resources>

DCAF-ICRC Knowledge Hub <http://www.securityhumanrightshub.org/>

Business and Human Rights Resource Centre <https://www.business-humanrights.org/>

The Geneva Academy of International Humanitarian Law and Human Rights – Rule of Law in Armed Conflicts Project <http://www.rulac.org/>

International Humanitarian Law Treaty Database, ICRC <https://internationalhumanitarianlaw-databases.icrc.org/internationalhumanitarianlaw>

Voluntary Principles on Security and Human Rights <http://www.voluntaryprinciples.org/>



Editors

Ms Fauve Kurnadi Australian Red Cross
Dr Jonathan Kolieb RMIT University

The editors would like to thank Claude Voillat, Economic Adviser at the International Committee of the Red Cross, and his team for their ongoing guidance and advice. Thanks also goes to Ms Georgia Greville for her research assistance.

Visit our International Humanitarian Law Hub here:
<https://www.redcross.org.au/ihl-hub>

Visit the RMIT Business and Human Rights Centre here:
<https://www.rmit.edu.au/about/schools-colleges/graduate-school-of-business-and-law>

the
power of
humanity



 **RMIT**
UNIVERSITY