

## **ANNEX I**

### **Maritime Transport of Military Materiel and Dual-Use Components Used For Genocide, Apartheid and Other Atrocity Crimes**

(Guidelines for Operationalising States' Obligations Under the Law of the Sea)

#### **1. Background**

This document serves as a practical reference tool for operationalising State obligations under the international law of the sea, particularly the United Nations Convention on the Law of the Sea (UNCLOS), regarding the maritime transport of military materiel and dual-use items<sup>1</sup> to countries that use them in the commission of genocide, apartheid, and other serious violations of international law, including war crimes and crimes against humanity. It draws upon the findings of the ASCOMARE Legal Opinion (11 March 2025), developed by a team of law of the sea experts coordinated by ASCOMARE. The research and documentation has been prepared at the request of the Palestinian BDS National Committee.

The Opinion addresses two core legal questions:

- o The rights and duties of coastal States regarding vessels transiting their territorial sea; and
- o The due diligence obligations of flag States over vessels flying their flag.

The Opinion concludes that coastal States may be obligated to suspend or deny passage where vessels are complicit in violations of human rights or peremptory norms, and that flag States must prevent their vessels from facilitating such violations, or risk international responsibility.

These obligations reflect customary international law, as codified in UNCLOS and earlier treaties such as the 1958 Geneva Conventions, and are binding on all States, including non-parties to UNCLOS.

This document translates the Opinion's findings into a practical checklist to support State compliance. While the Opinion does not explicitly address port State jurisdiction, several conclusions apply and are addressed in the sections that follow.

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<sup>1</sup> For the purposes of this document, the term “dual-use items” shall be understood in accordance with the definition set out in Article 2(1) of Regulation (EU) 2021/821, which establishes a Union regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items, as listed in Annex I to the same Regulation.

## 2. Port State

States shall employ all reasonably available means to ensure that their territory is not used in a manner inconsistent with their obligations under international law, including the duties to prevent, prohibit, and not be complicit in serious violations of peremptory norms (*jus cogens*), including genocide, war crimes, and crimes against humanity (e.g., apartheid).

### 2.1 *Due diligence*

- States should adopt a due diligence-based approach to identify, prevent, and mitigate actual or potential instances of non-compliance with their international legal obligations, including by:
  - assessing the risk of non-compliance with relevant obligations;
  - establishing, implementing, and enforcing an adequate legal and administrative framework to monitor and ensure compliance;
  - taking appropriate action where there are reasonable grounds to believe that a risk of non-compliance exists; and
  - adopting a precautionary approach where the potential consequences of non-compliance could result in irreparable harm or disproportionate damage to the protected legal interest.

### 2.2 *Risk assessment*

- Port States should have in place and implement a risk assessment methodology to identify vessels bound for their ports that present a serious risk of non-compliance with international legal obligations incumbent upon them.
  - port States should require all/certain vessels (based on length, type, or cargo) to provide prior notification of entry into port (for example, 24 hours in advance), including the submission of information relevant for risk assessment.
  - prior notifications for vessels transporting dual-use items should be accompanied by a document (certification) signed by the vessel's flag State certifying that the products will not be used for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes.
  - port States may use electronic databases for the collection of information, cross-checking, and automatic classification of vessels based on their risk level.
- The risk assessment methodology should establish risk categories (*low, standard, high*), based on non-discriminatory parameters that contribute to the State authorities' knowledge of the serious risk of non-compliance. These parameters may include:
  - type and size of the vessel;
  - nature of the cargo, including documentation regarding its origin, nature, and destination (e.g., conflict-affected areas);
  - flag of the vessel, including evidence of poor flag State performance or flag-hopping;
  - vessel performance, including any history of non-compliance by the vessel, owner, operator, or charterer with applicable national or international standards, such as those adopted under the auspices of the International Maritime Organization (IMO);

- records of prior at-sea or in-port inspections, including findings from other States or international inspection/audit mechanisms, where available;
- previous denial of port entry at ports of call;
- inclusion of the vessel in any relevant high risk/standard risk list;
- other relevant sources of information, including findings of national or international courts or tribunals, UN data, expert opinions, and reliable information provided by civil society organisations or governmental bodies.
- Certain available or collected information should constitute “overriding factors” automatically triggering a *high risk* qualification. For instance:
  - vessel failing or refusing to provide all the relevant information requested through the prior notification within the relevant deadline for port entry;
  - missing or incomplete certification from the flag State confirming that dual-use items will not be used for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes;
  - evidence that dual-use items were ultimately used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes, despite prior certification by the flag State to the contrary;
  - owner (including beneficial owner), operator or charterer conducting a substantial part of its business with countries presenting a credible risk of committing genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes;
  - denial of port entry within the previous 3-5 months for violations related to the maritime transport of military materiel or dual-use items used for committing genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes;
  - detention within the previous 3-5 months for violations related to the maritime transport of military materiel or dual-use items used for committing genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes;
  - transport of conventional arms listed in Article 2 of the UN Arms Trade Treaty (2013), as well as any related ammunition, munitions, parts, or components, where the destination country presents a credible risk that such arms will be used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes.
- The vessel’s risk profile (*low, standard, high*) should inform both the nature and urgency (e.g., *Priority I, Priority II, Priority III*) of action by the competent authorities of the port State, with priority given to high risk vessels.
  - States may cooperate to draw up a list of vessels either confirmed (high risk) or suspected (standard risk) of transporting products used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes. Such a list should take into account other available lists, including those compiled by civil society institutions (e.g., the No Harbour for Genocide list) and UN bodies, where supported by sufficient evidence.

## ***2.3 Request of information***

- Where data or information necessary to exclude the classification of a vessel as high risk are missing, incomplete, or appear inaccurate, port States should require vessels bound for their ports (including when entering internal waters) and/or the competent authorities of their flag States to provide the relevant data or information prior to port entry.
  - a lack of responsiveness or cooperation by the vessel or its flag State should be considered a risk-enhancing factor and may justify precautionary measures or denial of entry, consistent with applicable law.
- Port States may also request relevant information from previous port States of call.

## ***2.4 Entry into port and use of port services***

- Unless otherwise required by international law (e.g., distress, force majeure) or by agreement, high risk vessels, or vessels for which a full risk assessment could not be completed prior to port entry should either:
  - be denied entry into port or anchorage within internal waters; or
  - be permitted entry subject to the conditions set forth in 2.5, without access to port services (e.g., refuelling, resupplying, maintenance). In such cases, vessels should be notified in advance of the applicable restrictions and the legal consequences of port entry.
- If, following entry into port, new data or information obtained by the competent authorities leads to a determination or reasonable grounds to believe that a vessel previously assessed as low or standard risk poses a high risk of non-compliance, such authorities should:
  - immediately suspend access to port services; and
  - apply the conditions set forth in 2.5.
- Flag States should be informed of decisions to deny access to port or port services, along with the underlying reasons, in order to enable them to take appropriate measures to ensure compliance by their vessels, including any necessary follow-up action or investigations.

## ***2.5 Inspection and enforcement***

- Port States shall conduct inspections of all vessels assessed as presenting a high risk profile and permitted entry into port. Routine or random inspections may also be undertaken for vessels with standard or low risk profiles, as appropriate.
- Where inspections confirm or substantiate the high risk of non-compliance with applicable international legal obligations, the competent authorities of the port State shall promptly notify the flag State of the vessel and may take one of the following measures, as appropriate:
  - detain the vessel and its cargo;
  - permit the vessel to depart after confiscating the cargo; or
  - permit the vessel to depart with the cargo upon receiving verifiable assurances from the flag State that the cargo shall not be delivered to any destination where it may be used to

commit atrocity crimes, including genocide, apartheid, or other crimes against humanity.

- If inspections do not confirm or reveal a high risk of non-compliance, the port State authorities may determine the appropriate course of action in light of the specific circumstances of the case.

### **3. Coastal State**

States shall employ all reasonably available means to ensure that their waters are not used in a manner inconsistent with their obligations under international law, including the duties to prevent, prohibit, and not be complicit in serious violations of peremptory norms (*jus cogens*), including genocide, crimes against humanity (e.g., apartheid), and war crimes.

#### **3.1 *Due diligence***

- States should adopt a due diligence-based approach to identify, prevent, and mitigate actual or potential instances of non-compliance with their international legal obligations, including by:
  - assessing the risk of non-compliance with relevant obligations;
  - establishing, implementing, and enforcing an adequate legal and administrative framework to monitor and ensure compliance;
  - taking appropriate action where there are reasonable grounds to believe that a risk of non-compliance exists;
  - adopting a precautionary approach where the potential consequences of non-compliance could result in irreparable harm or disproportionate damage to the protected legal interest.

#### **3.2 *Monitoring system***

- Coastal States should establish and maintain an effective monitoring system to oversee the passage of vessels through their territorial sea, in order to determine whether such vessels are engaged in activities that render their passage non-innocent.
  - This could entail the use of GPS and VHF technology and the development of a risk assessment methodology, in line with the one referred to in 2.2.
- In particular, a vessel's conduct may be deemed prejudicial to the peace, good order, or security of the coastal State where it involves:
  - complicity in the threat or use of force in a manner inconsistent with the principles of the UN Charter, including the transport of arms, military equipment, or dual-use items intended to facilitate acts of genocide, apartheid, or other crimes against humanity, or otherwise in violation of peremptory norms of international law (*jus cogens*), such as the principles of sovereign equality and self-determination of peoples. For the “threat of force”, a real and credible risk of its future use—substantiated by a declaration of intent, conduct, or other objective indicators—may suffice. Complicity under international law requires active conduct, including facilitation, contribution, or support with knowledge of the intended unlawful use.

- o passage not in conformity with binding rules of international law applicable to the coastal State, including obligations concerning State responsibility for aiding or assisting in wrongful acts, especially those involving jus cogens violations, may also be deemed prejudicial.

### ***3.3 Request of information***

- Where a coastal State has reasonable grounds to suspect that a vessel transiting its territorial sea may be engaged in activities prejudicial to its peace, good order, or security, it should request relevant data or information from the vessel and/or the competent authorities of its flag State.
  - o a lack of responsiveness or cooperation by the vessel or its flag State should be considered a risk-enhancing factor and may justify precautionary measures or further action, consistent with applicable law.
- Coastal States may also request relevant information from previous port States of call.

### ***3.4 Vessels in non-innocent passage***

- Where a coastal State has evidence that a vessel navigating through its territorial sea is engaging in activities that render the passage non-innocent, it should:
  - o notify the vessel of the nature of the conduct prejudicial to the coastal State's peace, good order, or security; and
  - o either request the vessel to immediately leave the territorial sea; or
  - o take necessary and proportionate enforcement measures, consistent with international law, including the possibility of boarding, inspection, or re-routing to port.
- Coastal States should consider relevant sources of information, including findings of national or international courts or tribunals, UN data, expert opinions, and reliable information provided by civil society organisations or governmental bodies.
- Flag States should be informed of decisions to interrupt the passage of their flagged-vessels, along with the underlying reasons, in order to enable them to take appropriate measures to ensure compliance by their vessels, including any necessary follow-up action or investigations.

## **4. Flag State**

States shall employ all reasonably available means to ensure that vessels flying their flag are not used in a manner inconsistent with their obligations under international law, including the duties to prevent, prohibit, and not be complicit in serious violations of peremptory norms (jus cogens) including genocide, crimes against humanity (e.g., apartheid), and war crimes.

### ***4.1 Due diligence***

- States should adopt a due diligence-based approach to identify, prevent, and mitigate actual or potential instances of non-compliance with their international legal obligations, including

by:

- o assessing the risk of non-compliance with relevant obligations;
- o establishing, implementing, and enforcing an adequate legal and administrative framework to monitor and ensure compliance;
- o setting up a certification mechanism for vessels transporting dual-use items, in order to ensure that such items are not used for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes;
- o taking appropriate action where there are reasonable grounds to believe that a risk of non-compliance exists;
- o adopting a precautionary approach where the potential consequences of non-compliance could result in irreparable harm or disproportionate damage to the protected legal interest.

## **4.2 Risk assessment**

- Flag States should have in place and implement a risk assessment methodology to identify vessels flying their flag that present a serious risk of non-compliance with international legal obligations incumbent upon them.
- The risk assessment methodology should establish risk categories (e.g., *low*, *standard*, *high*), based on non-discriminatory parameters that contribute to the State authorities' knowledge of the serious risk of non-compliance. These parameters may include:
  - o type and size of the vessel;
  - o nature of the cargo, including documentation regarding its origin, nature, and destination (e.g., conflict-affected areas);
  - o vessel performance, including any history of non-compliance by the vessel, owner, operator, or charterer with applicable national or international standards, such as those adopted under the auspices of the International Maritime Organization (IMO);
  - o records of prior at-sea or in-port inspections, including findings from other States or international inspection/audit mechanisms, where available;
  - o previous denial of port entry at ports of call;
  - o inclusion of the vessel in any relevant high risk/standard risk list;
  - o other relevant sources of information, including findings of national or international courts or tribunals, UN data, expert opinions, and reliable information provided by civil society organisations or governmental bodies.
- Where relevant, the 'overriding factors' referred to in 2.2 should also apply, taking into account any available information (e.g., acting as port State) as well as the inclusion of vessels in existing high risk or standard risk lists.
- The vessel's risk profile (*low*, *standard*, *high*) should inform both the nature and urgency (e.g., *Priority I*, *Priority II*, *Priority III*) of action by the competent authorities of the flag State, with priority given to high risk vessels.

### ***4.3 Vessel nationality***

- Flag States should ensure that nationality to vessels registered under their jurisdiction is subject to compliance with international legal obligations binding upon them, including the duty to prevent and refrain from supporting acts of genocide, apartheid, and other crimes against humanity.
  - vessels engaged in conduct amounting to a breach of such obligations shall be subject to effective, proportionate, and non-discriminatory sanctions and remedial measures, which may include, where warranted, the suspension or revocation of the right to fly the flag of the State concerned.

### ***4.4 Effective jurisdiction and control***

- Flag States shall exercise effective jurisdiction and control over vessels flying their flag, whether operating in areas under their own jurisdiction, within the maritime zones of other States, or on the high seas, including by:
  - monitoring vessel movements at regular intervals;
  - maintaining live or near real-time communication with vessels;
  - establishing reporting requirements regarding key operational activities (e.g., loading, unloading, transshipment);
  - verifying the accuracy, completeness, and validity of on-board documentation and records.
- Upon receiving credible information, whether from its own authorities or from another State acting in a port or coastal capacity or from civil society, indicating suspected or confirmed non-compliance by a vessel flying its flag, the flag State shall, as appropriate:
  - initiate a prompt and thorough investigation into the alleged non-compliance, including by requesting from the vessel's master, operator, or owner all relevant data or documentation; and/or
  - adopt all necessary and proportionate measures to remedy the situation and prevent further violations, including, where appropriate, requesting cooperation or assistance from other States. Such cooperation may involve a request for the boarding, inspection, or arrest of the vessel concerned, or the confiscation of its cargo, in accordance with international law.
- Flag States should not issue certifications, such as those referred to in points 2.2 and 4.1 above, unless vessels can provide substantive evidence that any transported materiel or dual-use items are not destined for countries that would use them to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks against civilians or civilian objects, or other war crimes, notwithstanding any prior certification by the flag State to the contrary.