

OVERLOOKED AND UNDERMINED

Communities affected by jade mining operations in Myanmar,
and the responsibilities of companies providing machinery.

Report #91



Swedwatch is an independent not-for-profit organisation that conducts in-depth research on the impacts of businesses on human rights and the environment. The aim of the organisation is to contribute towards reduced poverty and sustainable social and environmental development through research, encouraging best practice, knowledge-sharing and dialogue. Swedwatch has six member organisations: Afrikagrupperna, the Church of Sweden, Diakonia, Fair Action, Solidarity Sweden-Latin America and the Swedish Society for Nature Conservation.

The Church of Sweden stands behind the report and has participated in developing its recommendations.



Church of Sweden 

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Executive summary

Since early 2000s, the dramatically increased use of heavy mining machinery in Myanmar has enabled the extraction of minerals at an unprecedented speed. Impacts on local communities in the country's jade extraction area, where mining plays a key role in what observers have called "the world's longest running civil war", have been widespread.¹ This report presents findings of research conducted on Myanmar's mining sector and its impacts on local communities. It also examines the extent of companies' responsibilities regarding their customers and end users of their products based on international norms on business and human rights - specifically as regards the sale of mining machinery to high-risk contexts such as Myanmar.

Jade, a gemstone used mainly in jewellery, is a multi-billion-dollar industry for Myanmar and is mainly mined in Kachin state, home to the world's largest and most valuable jade deposits. Control over revenues from Kachin's jade mines is a strategic priority for both sides in the ongoing armed conflict that has marred Kachin for nearly six decades, in which the Myanmar army and an ethnic armed group, the Kachin Independence Army (KIA),² dispute the territory.

Swedwatch investigation in Myanmar's jade area indicates that possibly thousands of foreign heavy mining machines are used in the highly problematic mining projects that overlap with areas of armed conflict where local populations are severely impacted. Since 2011, over 100,000 persons have been displaced due to the armed conflict in Kachin state. (See Chapter 2. Background, page 24.)

Rights holders in Kachin's jade epicentre – an area around the town of Hpakant – have also paid a high price for the rapid expansion and irresponsible business practices of jade mining companies: seemingly thousands of people have lost land and livelihoods, and up to hundreds die every year in landslides and flooding caused by negligent jade mining practices. Local communities also suffer from endemic heroin abuse, the commercial sexual abuse of women and girls, a high rate of HIV and AIDS, and lethal traffic accidents involving mining trucks. Swedwatch also found that several of the impacts from mining machinery used in the copper extraction area were similar to those in the jade mining area. (See Chapter 3. Swedwatch's investigation in Myanmar, page 39.)

Apart from the many direct human rights violations linked to Myanmar's jade extraction, the irregularities that tarnish the trade mean that fortunes are lost in tax. Estimations from industry sources gathered by the organisation Global Witness suggested that around 2014, 50-80 percent of the jade extracted in Hpakant was smuggled straight over the border into China,³ and that many of the largest jade companies are secretly controlled by some of the most notorious names of the military junta era, including former senior army generals.⁴ (See Chapter 2. Background, page 34.)

Based on the United Nations Guiding Principles for Business and Human Rights (UNGPs), businesses that provide mining equipment, such as drills, excavators, dump trucks and backhoes, have a responsibility to seek to prevent or mitigate the adverse human rights impacts of their products - even when the impacts are caused by a third

party - including through the use of leverage. The UNGPs clearly state that high-risk circumstances should be the highest priority for company action since they present the greatest risks to individuals.⁵ From a human rights perspective, both the mining sector and Myanmar qualify as high risk. Any business activities related to mining in Myanmar are therefore associated with significant risks. (See Chapter 1. Introduction, page 16, and Chapter 4. Leverage -the key to responsible provider conduct?, page 56.)

By applying the UNGPs and other international frameworks on business and human rights, including the UN Global Compact, on the case examined in this report, Swedwatch discusses how companies that, by their omission to respond to well-known human rights abuses linked to their products, can become considered to “contribute to” such abuses (as defined by the UNGPs), and risk being considered complicit (as defined by the UN Global Compact Principle 2) to the abuses. Drawing on the findings presented in this report, it is necessary that the three companies examined in this report demonstrate that these concepts are not applicable in relation to them and their products in Myanmar. (See Chapter 6. Analysis and conclusions, page 76.)

Swedwatch’s dialogue with three of the world’s largest mining machinery companies – Caterpillar Inc. (USA), Komatsu Ltd. (Japan), and Volvo Construction Equipment (including its fully owned brand Terex Trucks⁶, Sweden) – indicate that their implementation of applicable frameworks, particularly those related to human rights due diligence (HRDD) in Myanmar, is low. None could demonstrate, in their dialogue with Swedwatch, adequate efforts to identify, mitigate or prevent potential adverse human rights impacts of their products sold in Myanmar. This is not in alignment with the UNGPs or the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. (See Chapter 5. International mining machinery companies, page 59.)

Although mining machinery companies experience that they lack possibilities to control sold equipment throughout its life-cycle, the replies from the three companies indicate that none of the companies has attempted to monitor the end-use of their products. Nor could they demonstrate that they have fulfilled their responsibility under the UNGPs to use or increase their leverage over their business partners in Myanmar. Instead, they seemingly rely on their distributor’s/dealer’s assurance that the equipment is used in accordance with laws and regulations. (See Chapter 5. International mining machinery companies, page 59.)

Experts consider that unless regulations on jade are changed to more clearly benefit local communities, and at the same time stop harmful actors from benefitting from the jade trade, it will negatively impact the outlook for peace talks between the Myanmar military and the KIA.⁷

If governed responsibly, Myanmar’s valuable mineral assets could play an important role in helping the country meet the Sustainable Development Goals (SDGs). With this report, Swedwatch identifies concrete steps that are urgently required to ensure respect for human rights in Myanmar’s mining areas. Governments and companies must act to ensure that the communities affected by the social and environmental costs of jade extraction also stand to benefit from the wealth that natural resources can provide.

Recommendations

To Caterpillar, Komatsu, Volvo Group/Volvo Construction Equipment, and other companies providing mining equipment to Myanmar's mining sector:

- Conduct HRDD to assess and address the risks and impacts of customers' operations in the Myanmar mining sector. The HRDD should be conducted with a gender perspective, and should follow the OECD Due Diligence Guidance for Responsible Business Conduct or an equally recognized guidance. Any gaps identified should be addressed, based on consultation with impacted communities and in cooperation with organisations or other actors that are true representatives of affected rights holders.
- Enhance communication of the activities and results of companies' HRDD processes in accordance with the concept of "know and show" as outlined in the UNGPs.
- Use leverage to encourage customers to address adverse human rights and environmental impacts related to the use of products in high risk contexts. Leverage can be increased by forging partnerships with relevant parties in order to contribute to approaches that are in the local communities' best interest.
- Embed human rights commitments as contractual provisions in sales and services agreements. This should also include a requirement for distributors/dealers to disclose their customers.
- Implement processes that enable ongoing evaluation of local business partners in relation to their performance in respecting human rights.
- Dedicate resources to finding technological solutions and other ways to increase the traceability of machinery throughout its life cycle, and thereby enhance companies' control and influence over the end use of their products.
- Companies should jointly explore means of limiting the smuggling of equipment across borders and into mine sites, which has significant negative impacts on communities and the environment.
- Implement processes that allow the recall of products that, for example, are found to be used in illegal mining activities; activities that significantly benefit state or non-state armed groups; or activities that have a significant negative impact on communities, the local environment or human rights. Such processes should be complemented by a system that enables ongoing monitoring of where the mining products are employed.
- Jointly explore how to access the jade mines in Hpakant (as well as the copper mines in Monywa) to verify the number of new and second-hand mining equipment used in the mine sites.
- Design and implement a monitoring framework covering the sale of spare parts at local service offices, particularly in areas of high risk and weak governance such as

Kachin State, that identifies the scope of sales and the end use of its spare parts. Sales of spare parts should halt until the vendor can demonstrate that the machinery is not used in the illicit jade supply chain and that minerals mined enter the formal supply chain.

- Ensure that affected rights holders are informed of, and have access to, an effective and meaningful grievance mechanism by encouraging customers in the mining sector to make sure that their mechanisms are well advertised and trusted within the local communities. Companies can also update and advertise their own grievance mechanisms and support effective independent grievance mechanisms.

To the Government of Myanmar:

- Enact policies or legislative measures to require mining companies to carry out ongoing environmental impact assessments that include or complement human rights impact assessments that meet the highest international standards.
- Actively protect human rights that may be impacted as a result of mining, including implementing an adequate framework for land acquisition that is based on international standards on the right to land, adequate housing, water, livelihood and the prohibition of forced evictions.
- Protect women and girls from sexual exploitation in the jade mining area and in other mining regions throughout Myanmar. Ensure that medical treatment and psychosocial support are available to victims of sexual abuse and are tailored to young victims.
- Enforce requirements on mining companies to regularly provide lists on the number and nature of mining machinery that is employed at each mine site.
- Align Myanmar's National Action Plan on Business and Human Rights with the language of the UNGPs, and make sure it provides effective guidance to companies on how to address human rights risks and impacts.
- Implement mechanisms to support safe artisanal jade mining that preserve miners' right to livelihood; they should not impose onerous administrative or financial requirements.
- Explore legal arrangements that allow mining equipment companies to recall their products if the products are found to be used in circumstances that have severe negative impacts on human rights and the environment.

To the Governments of the United States, Japan and Sweden:

- Ensure that companies conduct HRDD on their operations, value chains and investments, especially in sectors and countries with a high risk of human rights violations (for example in the mining industry and conflict-affected countries).

- Align National Action Plans on Business and Human Rights to the language of the UNGPs and provide effective guidance to companies on how to address human rights risks and impacts to which they are linked or contribute to through customer or client relationships.⁸
- Actively pursue further measures to prevent human rights impacts resulting from the activities of companies domiciled in the territory and/or jurisdiction of concern as well as their business partners. This is especially vital in sectors with well-known risks of adverse human rights impacts, such as the mining industry.
- Through their embassies, facilitate dialogue and cooperation between relevant stakeholders in high-risk countries and sectors in which US/Japanese/Swedish companies operate, and strengthen civil society by enabling representatives of affected parties and communities to be a part of such dialogue.

FACT

List of abbreviations

CSR	Corporate Social Responsibility
CESCR	UN Committee on Economic, Social and Cultural Rights
EIA	Environmental Impact Assessment
HRDD	Human Rights Due Diligence
KIA	Kachin Independence Army
KIO	Kachin Independence Organisation
MEC	Myanmar Economic Corporation
MGE	Myanmar Gems Enterprise
NGO	Non-Governmental Organisation
NLD	National League for Democracy
OECD	Organisation for Economic Co-operation and Development
SDG	Sustainable Development Goals
UMEHL	Union of Myanmar Economic Holdings Limited
UNGPs	The United Nations Guiding Principles on Business and Human Rights
OHCHR	United Nations Office for the High Commissioner for Human Rights
UN	The United Nations
UWSA	United Wa State Army

1. Introduction

Myanmar is abundant in natural resources and holds vast deposits of metallic minerals and precious stones. Almost every state and region is home to extractive activity and the sector is a major contributor to government revenues.⁹ In addition to significant exports of tin, copper and gold,¹⁰ Myanmar accounts for approximately 90 percent of global jade production.¹¹ The world's biggest jade mine complex lies in Kachin state in northern Myanmar, which for the past nearly 60 years has been the site of fluctuating armed conflict between the country's military and an ethnic armed group, the Kachin Independence Army (KIA).

The conflict, which since 2011 has claimed the lives of thousands and displaced around 100,000 people,¹² intensified again in 2017. In early 2018, a UN fact finding mission on Myanmar expressed concerns over the spike in violations of international humanitarian law in Kachin state which further exacerbated the longstanding humanitarian crisis.¹³ Over 7,000 people fled the intensified fighting¹⁴. Although there are many root causes of the fighting in Kachin, it is widely recognized that Myanmar's multi-billion-dollar trade in jade is a significant economic driver of this conflict.¹⁵

Jade mining in Kachin expanded at unprecedented rates as the use of heavy machinery increased in the early 2000's.¹⁶ The rapid expansion had – and continues to have – detrimental impacts on the local environment. According to community members interviewed by Swedwatch, a site which used to take months to work can now, with the use of the machines, be mined in only a few days.¹⁷ The mining projects have long been subject to protests from local communities because of their negative impacts on human rights and the environment. While many make their living digging for and selling jade, seemingly thousands of people in the jade mining area have lost their land and livelihoods due to the rapidly expanding mines. The heart of the country's jade mining – Hpakant township in Kachin state – is experiencing endemic drug abuse, commercial sexual exploitation of women and girls, a high rate of persons living with HIV and persons with AIDS diagnosis, lethal traffic accidents involving mining trucks, landslides and flooding caused by irresponsible mining, and a general increase in violence.

According to the UN Guiding Principles on Business and Human Rights (UNGPs), mining companies have a responsibility to address human rights risks that arise as a result of their business operations. Businesses that provide mining equipment, such as drills, excavators, dump trucks, and backhoes, have a responsibility to seek to prevent or mitigate the adverse human rights impacts that are directly linked to their products or services, even if such impacts are caused by a third party (i.e. customers).¹⁸ The UNGPs clearly state that high-risk circumstances should be the highest priority for company action, since they present the greatest risks to individuals.¹⁹

In large parts of Kachin state, the Myanmar government forbids international aid delivery and denies virtually all access to the United Nations (UN) and international humanitarian groups.²⁰ With the rare exception of Chinese jade traders, Hpakant township is also closed off to foreign visitors, including humanitarian and UN staff.

At the top of the slope, Volvo excavators dump debris from a government-licensed jade mining company. Small-scale freelance jade miners at the base go through the waste, searching for jade stones.





Official documentation from the area is therefore limited, but according to Swedwatch's interviews conducted in Kachin state in 2017, there are around 600 officially licenced jade mines in Hpakant; most are owned by a mix of army companies and former military figures, many backed by Chinese funding.²¹

Possibly thousands of mining machines operate in these mines,²² including three of the world's largest mining equipment companies, the US Caterpillar Inc., Japanese Komatsu Ltd, Swedish Volvo Construction Equipment and its fully owned Terex Trucks²³ (referred to hereafter as Caterpillar, Komatsu, Volvo CE and Terex Trucks respectively). Chapter 5 in this report outlines these companies' replies to Swedwatch's inquiries about their respective sales of mining machinery in Myanmar.

According to a General Comment by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2017, governments are required to take "necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction". CESCR states that governments should require corporations to conduct due diligence in order to deploy their best efforts to ensure that their business partners respect the rights set out in the International Covenant on Economic, Social and Cultural Rights.²⁴

Therefore, the governments of the United States, Japan and Sweden should take necessary steps to prevent that the three mining equipment companies examined here – through malpractices by their customers' – from becoming linked to, or even contribute to, violations of the rights defined in the International Covenant on Economic, Social and Cultural Rights. This report also points to the need for companies and governments to fulfil the Sustainable Development Goals (SDGs), established in 2015 with the goals of ending poverty, protecting the planet and ensuring prosperity for all.²⁵ Above all, the examination of armed conflict and jade extraction in Myanmar in this report stresses the need for joint efforts towards fulfilling SDG Goal 16, which is dedicated to promoting peaceful and inclusive societies for sustainable development and facilitating access to justice for all.

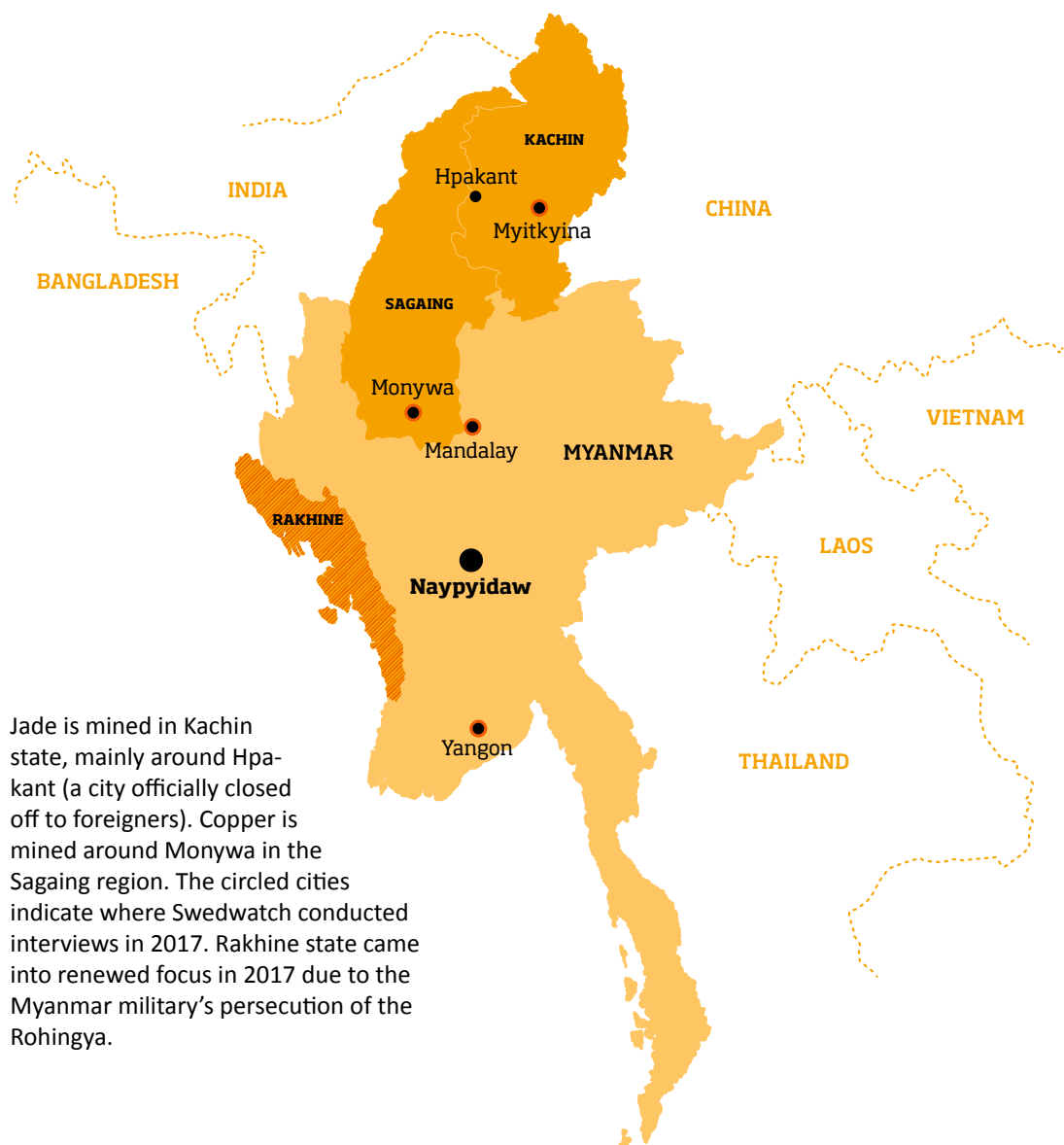
The focus of this report is twofold. First, it explores business enterprises' responsibility when selling mining machinery through local distributors/dealers in a high-risk context. It draws on findings from Swedwatch's investigations in two of Myanmar's mining areas (primarily in the jade mining area but also in the country's copper belt), and the companies' answers to Swedwatch's questions about their efforts to avoid and mitigate potential contributions to adverse impacts in Myanmar through the use of their products. Second, by applying the UNGPs and the UN Global Compact to the case examined, the report reviews if companies that, by their omission to respond to well-known human rights abuses that are linked to their products, can become considered to "contribute to" such abuses, and risk being considered complicit (as defined by the UN Global Compact Principle 2) to the abuses.

Methodology

This report is the result of research on Myanmar and the impacts of mining on communities and the environment. Research has also been conducted on the provider-customer relationship and the responsibilities therein. The report focuses on providers in order to explore and increase awareness of the possibilities that exist to prevent and mitigate adverse human rights impacts of their products.

Swedwatch researchers visited two areas engaged in mineral extraction in Myanmar, one jade and one copper mining area in Kachin state and Sagaing region, respectively, in 2017. These constitute two of Myanmar's most lucrative mining areas.²⁶

As Myanmar's government formally prohibits foreigners from entering most mining areas, particularly when they overlap with armed conflict zones, Swedwatch was unable to make on-site visits to the jade mines in Hpakant township. Due to the ongoing armed power struggle between the Myanmar army and the KIA throughout



Kachin state, and since both parties have major interests in the jade trade, community members in the jade mining areas are unable to voice their concerns without fear of retaliation from either the Myanmar army or the KIA. Swedwatch therefore arranged interviews with community members from Hpakant elsewhere after consultation with interviewees regarding security.

Local protests against the Monywa copper mine (with its adjacent mines, Letpadaung and S&K) coincided with Swedwatch's visit. The social unrest created a security obstacle to visiting the mine sites, and Swedwatch therefore arranged interviews with members of several communities affected by the mining operations in the nearby area. Findings from the copper project are briefly presented in this report in order to further exemplify how mining in areas of weak governance in Myanmar can have severe adverse impacts on local communities.

A total of 40 interviews were conducted with community members, formal and informal mine workers, non-governmental organisations, academic researchers, jade traders, community-based leaders, church leaders, medical staff and a senior UN official. The interviews took place in Myitkyina (Kachin state), Mandalay and Monywa (Sagaing region) and in Yangon. Additional expert interviews were conducted in Bangkok, Thailand.

FACT

Myanmar

Population: around 55 million

Ethnic groups by percent: Burman (68), Shan (9), Karen (7), Rakhine (4), Chinese (3), Indian (2), Mon (2)

Literacy rate: 75.6 percent

School life expectancy: 8 years

UNDP Human Development ranking: 145 (of 185)

Corruption Perception Index ranking: 130 (of 180)

Internally displaced people within Myanmar: Over 240 000 (mainly in Rakhine, Kachin and Shan state)

Number of ethnic armed groups: around 20 (in addition to dozens of paramilitary groups and armed militias)

Member of the Extractive Industries Transparency Initiative: Yes, since 2014

Percentage of gemstones produced in Myanmar that are not declared, and therefore bypass the formal system: 70–80

Sources: Central Intelligence Agency, United Nations Development Programme, Transparency International, United Nations High Commissioner for Refugees, United Nations Security Council, Extractive Industries Transparency Initiative



A Buddhist monk, pointing into the huge hole created by a jade-mining company, stresses his worries that the mining operation is endangering his monastery which is located just next to this mine.

In line with best practice on conducting research in environments with enhanced security risks, Swedwatch offered interviewees the choice to remain anonymous. All interviewees but one chose this option.

As the scope of this report is limited to exploring the responsibilities of mining equipment providers in regard to the end use and impacts of their products, Swedwatch did not interview Myanmar government representatives or mining companies. Although important, these actors fall outside the scope of this report.

Interviews were conducted in a semi-structured manner, and most of them were carried out with individuals rather than in groups. Two interviews with community members were conducted in focus groups that lasted three and six hours, respectively.

Based on research findings from Myanmar, Swedwatch sent questionnaires to three of the world's largest mining machinery companies, Caterpillar, Komatsu and Volvo CE, all of which sell their products in Myanmar via distributors or dealers located in the country. The companies received a set of similar questions about their efforts

to avoid and mitigate potential contributions to adverse impacts in Myanmar. They replied in writing. In its capacity as owner of Terex Trucks, Volvo CE also replied on behalf of Terex Trucks. In addition, Swedwatch reviewed public information about the companies prior to the publication of this report, the companies were offered a chance to comment on sections of the report that focus on their respective businesses, and then were offered the opportunity to comment on the full report.

While this study is limited to three companies, it would be relevant for future studies to investigate their peers – particularly Hyundai (Hyundai Heavy Industries, South Korea), Doosan (Doosan Infracore Construction Equipment, South Korea), and Sumitomo (Sumitomo (S.H.I) Construction Machinery Co., Ltd., part of Sumitomo Group, Japan). Swedish Atlas Copco and Sandvik would also be relevant to approach, since interviewees referred to the two brands on several occasions.

Another important topic for further investigation concerns the abuse and sexual exploitation of women and young girls in Myanmar's mining areas. The problem was referred to by interviewees in Myanmar, but both female and male interviewees found it an uncomfortable topic to discuss. Swedwatch deemed it necessary to not press interviewees on the issue but noted that it is an urgent matter for further study. Swedwatch encourages researchers to investigate this specific topic in Myanmar, particularly in mining areas.

Responsibilities in the provider-customer relationship

While the mining industry can generate a significant number of jobs, potentially lift communities out of poverty and underpin national economic growth, there are social and environmental issues inherently associated with mining operations that may lead to human rights violations and environmental degradation.

There are several international guidelines that stipulate how companies should take human rights into account in their operations. The 31 principles of the UNGPs set the international standard for preventing and addressing the risk of adverse impacts on human rights associated with business activities. The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011, and serve as the most widely referenced business and human rights framework.

The United Nations Guiding Principles on Business and Human Rights (UNGPs)

The UNGPs elaborate on all states' duty to protect the human rights of their citizens, and outline how all business enterprises – regardless of national legislation – should respect human rights in all of their operations. As a minimum requirement, all rights under the International Bill of Human Rights²⁷ and the International Labour Organization's (ILO) core conventions should be included.²⁸

Depending on factors such as a company's operations, context and size, different types of human rights can be at risk in different situations, but the framework makes it clear that all companies should safeguard all human rights, irrespective of their size or industry.

According to the UNGPs, businesses must take measures to address adverse human right impacts. These measures include prevention, mitigation and, when needed, remediation. "Activities" are understood to include both actions and omissions.²⁹ Principle 13 is particularly relevant to the focus of this report as it states that "the responsibility to respect human rights requires that business enterprises seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".³⁰

Under the UNGPs, a company may be involved with human rights impacts in three different ways:

1. At the highest level of responsibility, a company is **causing** the human rights abuse when it is the principal actor in the breach of human rights – either by its actions, or lack thereof;
2. A company may **contribute** to the impact through its own activities—either directly or through a third party (e.g. a business partner such as a customer);
3. A company may be neither causing nor contributing to human rights abuses, but the abuses may be directly **linked** to its operations, products, and services by means of a business relationship.³¹

According to Principle 19, companies that cause or may cause an adverse human rights impact, should take the necessary steps to cease or prevent the impact. Where a company contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution. When a company is linked to the impact, it should use its leverage to mitigate the impact to the greatest extent possible.

Notably, the UNGPs state that "when looking at business relationships, the focus is not on the risks the related party poses to human rights in general, but on the risks that it may harm human rights in connection with the enterprise's own operations, products or services".³²

Human Rights Due Diligence (HRDD) is at the core of the UNGPs and represents a fundamental tool that enables companies to respect human rights, including in relation to the use of their products.³³ According to the UNGPs, a HRDD should also cover human rights impacts that may be directly linked to a company's products.³⁴

Source: United Nations Human Rights Office of the High Commissioner. 2011 and 2012

HUMAN RIGHTS DUE DILIGENCE - UN GUIDING PRINCIPLE 17

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out HRDD. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

HRDD:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The focus of HRDD is on identifying and addressing the relevant impact on human rights, i.e., that which is connected to the enterprise's own activities and to its business relationships.³⁵

The OECD Due Diligence Guidance for Responsible Business Conduct³⁶, published in 2018, provides practical guidance around HRDD, and stresses the need for tailoring approaches for specific risks and taking into account how these risks affect different groups, such as applying a gender perspective.

How can an enterprise integrate gender issues into its due diligence?

"Applying a gender perspective to due diligence means thinking through how real or potential adverse impacts may differ for or may be specific to women.

For example, it is important to be aware of gender issues and women's human rights in situations where women may be disproportionately impacted:

- In contexts where women face severe discrimination.
- In contexts where the enterprise's activities significantly affect the local economy, environment and access to land and livelihoods.
- In conflict and post-conflict areas.
- In sectors and global supply chains in which large numbers of women are employed, such as apparel, electronics, tourism, health and social care, domestic work, agriculture and fresh cut flowers."

*Source: United Nations Human Rights Office of the High Commissioner. 2011 and 2012
OECD Due Diligence Guidance for Responsible Business Conduct. 2018*

A key concept of the UNGPs is “leverage”, which refers to a company’s ability to effect change when its business partner is causing or contributing to an adverse human rights impact.³⁷ If the company has leverage to prevent or mitigate such impacts it should exercise this leverage – or find ways to increase its leverage, for example by collaborating with other actors.³⁸ If there are no other alternatives, and efforts to efficiently exercise leverage have been exhausted, a company can consider terminating the business relationship after considering the human rights consequences of doing so.³⁹ The concept of leverage is discussed further in Chapter 4.

FACT

What should enterprises do if they are at risk of involvement in adverse human rights impacts?

“If an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.”

Source: UNGP Interpretative Guide, Question 11

When companies work to ensure respect for human rights, different approaches may be needed when working towards suppliers compared to working towards customers or clients. However, both undertakings can introduce similar challenges since the efforts are made increasingly difficult when adverse human rights impacts are several steps removed in the value chain.⁴⁰ Companies working towards customers often have a close business relationship with the other party, such as a dealer or distributor. Through these contacts, a company may be able to create and exercise leverage early in the relationship, such as during contract negotiations.⁴¹

The UNGPs also formulate the concept of “know and show”, which means that companies have a responsibility to be aware of and report on how their operations impact human rights at all stages.⁴²

The UNGPs are complemented by other international frameworks on business and human rights. For example, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, which outline principles and standards for responsible business conduct in a global context. These Guidelines reiterate the importance of HRDD and state that companies must seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services.⁴³ HRDD is also a central component of the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector⁴⁴, according to which the extensive social, economic and environ-

mental impacts of mining make meaningful stakeholder dialogue particularly important in this sector.⁴⁵

One important tool for identifying and addressing human rights impacts is an effective grievance mechanism that allows adversely affected rights holders and communities to communicate with the company responsible.⁴⁶ Many mining companies have such a mechanism in place, and providers of mining equipment may also allow community members and other affected parties to express their grievances.

However, a grievance mechanism can only serve its purpose if the people it is intended to serve are informed of it, trust it and are able to use it. Such a mechanism cannot serve as a substitute for wider stakeholder engagement.⁴⁷ A grievance mechanism that is introduced but not used may provide only the illusion of redress.⁴⁸

FACT

When does “linked to” become “contribute”?

According to the United Nations Office for the High Commissioner for Human Rights (OHCHR), there can be a continuum between “contributing to” and having a “direct link” to an adverse human rights impact.

In a statement regarding the UNGP from 2017⁴⁹, the OHCHR clarified that a business involvement with an impact may shift over time, depending on its own actions and omissions. For example, if a business⁵⁰ identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a business relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact, it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of “contributing”.⁵¹

The UN Global Compact - the world’s largest sustainability initiative (and of which two of the companies examined in this report are participants) - elaborates on the concept of “complicity” which is another way, beyond their own direct business activities, that businesses risk interfering with the enjoyment of human rights. According to Principle 2 of the compact, complicity is generally comprised of two elements:

- An act or omission (failure to act) by a company, or individual representing a company, that “helps” (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and
- The knowledge by the company that its act or omission could provide such help.

Principle 2 of the UN Global Compact further states that accusations of complicity can arise in a number of contexts:

- **Direct complicity** — when a company provides goods or services that it knows will be used to carry out the abuse
- **Beneficial complicity** — when a company benefits from human rights abuses even if it did not positively assist or cause them
- **Silent complicity** — when the company is silent or inactive in the face of systematic or continuous human rights abuse. (This is the most controversial type of complicity and is least likely to result in legal liability.)⁵²

According to the same principle, “The risk of an allegation of complicity is reduced (though not eliminated) if a company has a systematic management approach to human rights, including due diligence processes that cover the entity’s business relationships. Such processes should identify and prevent or mitigate the human rights risks with which the company may be involved through links to its products, operations or services.”⁵³

Based on these internationally recognized principles, Swedwatch concludes that if a company can demonstrate that it has conducted an adequate HRDD process and has used/increased its leverage to address concerns identified in the HRDD, but there is an unforeseen human rights impact by a third party, the company could be considered to have taken sufficient efforts in alignment with the UNGPs. Such mitigation actions would also be relevant for claims of complicity against the company as referred to in the UN Global Compact. However, the burden of proof remains on the company to show that its HRDD complied with the UNGPs, and that it has taken action to avoid being complicit; not taking action could result in silent complicity (as defined in Principle 2 of the UN Global Compact).

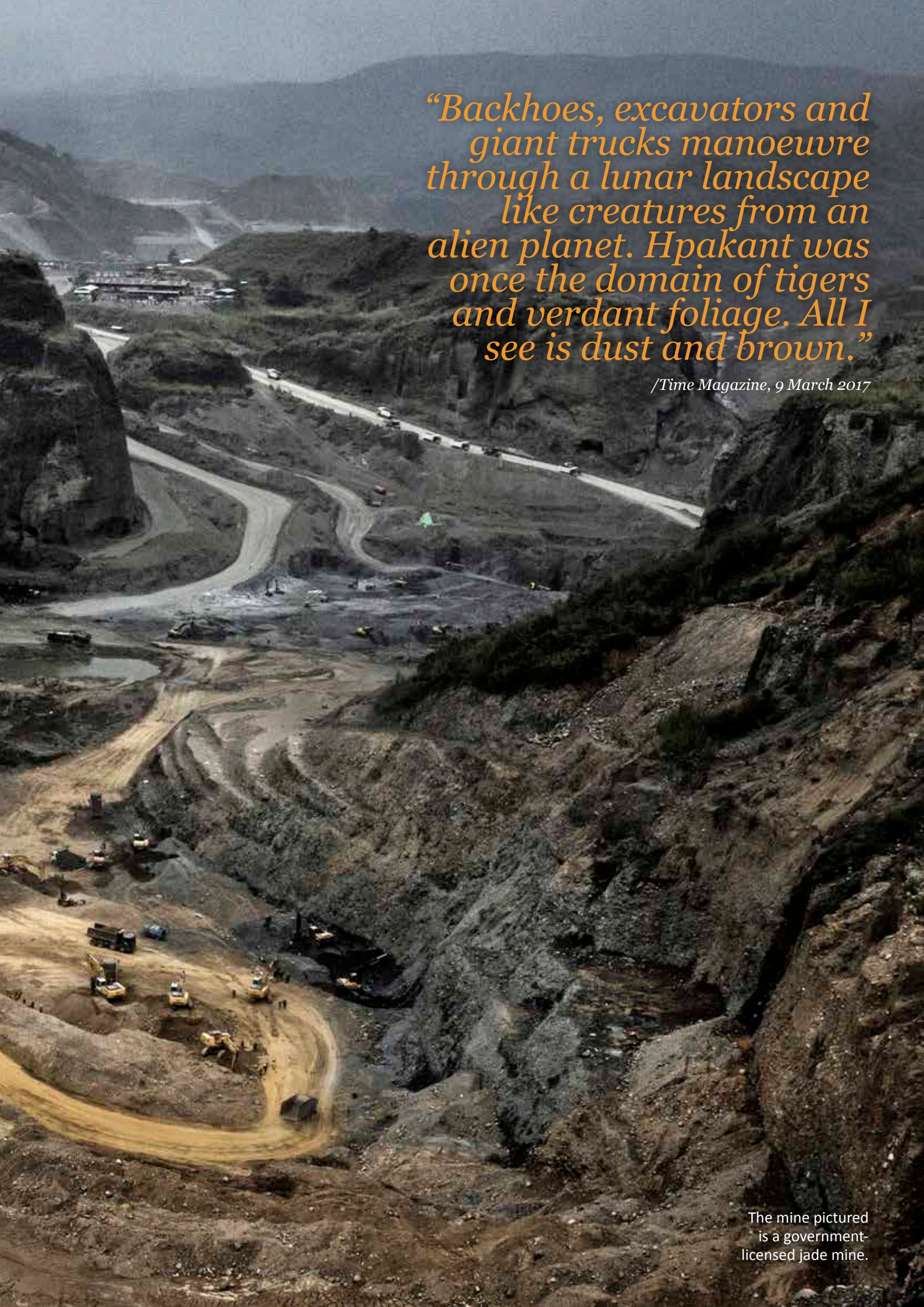
FACT

What about smuggling?

When there is evidence that equipment has been smuggled into a problematic operation by other parties without the knowledge of the machinery producer, the argument for “contribute to” becomes weaker, but it does not mean that the producing company is freed from responsibility; the “linked to” argument remains.

Once the producer is made aware of the smuggling of its products, or that its products have been sold by third parties with the risk of ending up in high risk operations, the producer has a responsibility to use its leverage to prevent negative impacts from occurring. If, over time, the producer has not made efforts to address the smuggling, the producer can be considered as “contributing to”.⁵⁴





“Backhoes, excavators and giant trucks manoeuvre through a lunar landscape like creatures from an alien planet. Hpakant was once the domain of tigers and verdant foliage. All I see is dust and brown.”

/Time Magazine, 9 March 2017

The mine pictured is a government-licensed jade mine.

2. Background

One of the largest countries in South-East Asia, Myanmar is by most measures also one of the poorest, ranked 150 out of 187 countries on the Human Development Index.⁵⁵ The country's current problems, which include several protracted armed conflicts and the presence of over 20 non-state ethnic armed groups⁵⁶ within its borders, stem from a turbulent history with centuries of power struggles between ethnic groups and against foreign powers. The armed conflicts were originally triggered largely by competing local demands for control of territory and access to resources.⁵⁷ Other underlying factors to the ongoing conflict include historical grievances, social exclusion and military domination.⁵⁸ According to the Index for Risk Management, Myanmar has the highest risk of humanitarian crises in Southeast Asia and ranks 12th worldwide.⁵⁹

Armed conflicts and Myanmar's military

Myanmar (formerly known as Burma) was under British rule from the late 1800s until it gained independence in 1948. The country underwent a military coup in 1962 and over the next five decades was ruled by a military junta responsible for widespread human rights violations.⁶⁰ The junta's generals clamped down on any opposition and were accused of land grabbing, severe corruption, torture, rape, forced labour and the killing of thousands of protestors. In response, OECD countries and the United States imposed comprehensive sanctions on Myanmar in 2003, most of which were lifted in 2016.⁶¹

When the junta stepped down in 2011, a slow transition towards a quasi-civilian-led government began and included the gradual introduction of political and economic reforms as well as rocketing foreign investment going into Myanmar. A wave of crony privatisations of state assets took place during the transition that largely benefitted generals and enterprises with close ties to the military. Today, military officials and military-owned companies still control much of the private sector and trade, as well as the mechanisms for allocating mining permits, according to experts.⁶² Myanmar's business sector has over the years created headlines in international media, described as being made up of complex, ambiguous structures, where many companies regularly change names and management to avoid scrutiny.⁶³

As economic sanctions have gradually lifted, foreign investments in Myanmar have increased dramatically. Knowingly or unknowingly, foreign investors in various sectors have engaged with former and current military generals – some of whom have become tycoons, cronies and drug lords.⁶⁴ The Myanmar mining sector – known to be “as opaque as it is profitable”⁶⁵ – attracts a significant portion of the investments.⁶⁶

In 2015, the National League for Democracy (NLD), led by the Nobel laureate Aung San Suu Kyi, won a landslide victory in the country's first democratic election since the 1962 coup. Although the NLD has a majority in both chambers of parliament, the military continues to dominate important ministries.⁶⁷ In accordance with the constitution, 25 percent of the seats in parliament are reserved for serving military officers.⁶⁸

In 2017, the research organisation Human Rights Watch concluded that Myanmar government forces continued to be responsible for serious abuses in Kachin state,⁶⁹ including extrajudicial killings, torture, sexual violence and property destruction. Government shelling and airstrikes were found to have been conducted against ethnic areas, in violation of the laws of war. The organisation implicated both the Myanmar government and armed ethnic groups in the use of anti-personnel landmines and forced recruitment, including of children.⁷⁰

Myanmar's Rakhine state was the subject of intense media focus in 2017 as the international community criticised the Myanmar military for persecuting the Rohingya, and heavily criticised State Counsellor Aung San Suu Kyi for failing to take action. The UN High Commissioner for Human Rights referred to the military's actions as ethnic cleansing⁷¹ but the military has denied these allegations.

According to reporting in 2017 by the human rights organisation Amnesty International, the ongoing international human rights and humanitarian law violations in Kachin state are similar to the Myanmar army's tactics and targeting of minorities in Rakhine.⁷²

In her report from 2017, the UN Special Rapporteur on the situation of human rights in Myanmar stated that she was "extremely concerned at the ongoing escalation of conflict in Kachin" state, where affected community members testified that human rights violations were increasing, including killings, torture, and the use of human shields by the Myanmar military.⁷³ The Special Rapporteur concluded that Aung San Suu Kyi's civilian government had no authority in Kachin state, and that military commanders controlled all security-related issues. The Special Rapporteur called on the international community to "put more pressure on military commanders, and on China, to ensure that human rights were respected in the conflict" in Kachin.⁷⁴

Natural resources

Myanmar is abundant in natural resources; thousands of active mines, both officially registered and unofficial, are scattered throughout the country. It exports teak, coal, oil and gas, and is the world's third-largest tin producer, representing 10 percent of global production.⁷⁵ It also holds vast deposits of metallic minerals such as copper, tungsten, gold, silver, zinc, and lead, and produces gemstone minerals including rubies, sapphire, amber and diamonds. Above all, Myanmar produces jade, a gemstone used mainly for jewellery and ornamental use.⁷⁶ The world's largest and most valuable jade deposits are in Kachin State.⁷⁷

Myanmar's vast natural resources are widely considered key to its national development. However, due to the thriving illicit trade and non-transparent ownership structures behind these assets, the billions of dollars generated by the country's natural resources remain concentrated in the hands of a few⁷⁸ – principally the military and its crony associates. Several ethnic armed groups also benefit from control over mine sites and smuggling.⁷⁹

According to estimates by the Asia Foundation, most of Myanmar's mining operations (56 percent) are located in areas affected by armed conflict. In a report from

2017, the Asia Foundation concluded that “both small- and large-scale mining – for gems, gold, silver, iron, coal, tin, and many other resources – was occurring in two-thirds of townships affected by armed clashes in 2015 and 2016, including some of the most violently contested parts of the country”.⁸⁰

“In constant fighting with ethnic minorities, the [Myanmar military] has displaced millions of people while taking billions of dollars in profit from jade mines, teak forests and other natural resources.”⁸¹ /New York Times, 2018

Governance of the mining sector

Mineral exploration and mining are active throughout Myanmar but are under-reported, and the laws governing the country’s mining sector have been criticised for being inconsistent and unclear. The mining licensing process poorly aligns existing laws with current practices and suffers from widespread noncompliance with national policies.⁸² As of April 2016 there were more than 21,000 active gemstone mining licences, but enforcement of environmental and safety standards remains largely absent.⁸³

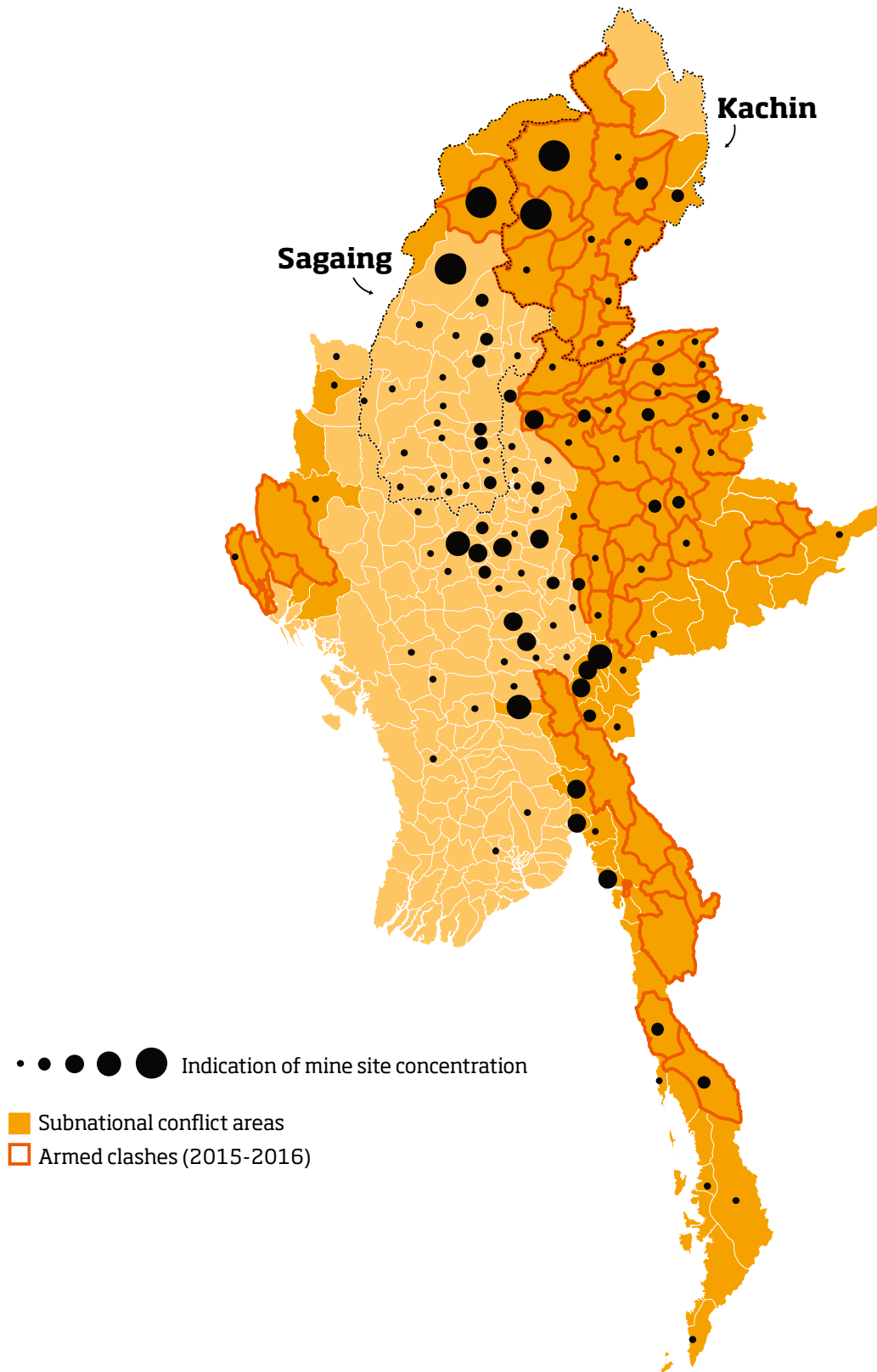
Since 2015, the Myanmar government has required companies to undertake environmental and social impact assessments on investment projects, and both aspects must be covered in an Environmental Impact Assessment (EIA).⁸⁴ However, government officials are said to lack the capacity to assess EIAs,⁸⁵ and arguably none of the thousands of active mining projects in Myanmar relies on an EIA that meets international standards.⁸⁶

The government body responsible for overseeing the gemstone sector is Myanmar Gems Enterprise (MGE).⁸⁷ Notably, its leadership is largely composed of former military personnel.⁸⁸ The MGE is involved in more than 300 joint projects with private companies.⁸⁹

In parallel to these challenges, a few encouraging developments are underway, including a government commitment to develop a National Action Plan for Business and Human Rights.⁹⁰ In 2015, Myanmar submitted its first report to the International Extractives Transparency Initiative.⁹¹ The government has also adopted new mining rules and regulations, and external experts have been hired to help manage the over 1,000 EIAs that were submitted in 2017.⁹²

Parliament is also redrafting the Myanmar Gemstone Law, which regulates the trade in jade and is therefore key to the outlook for peace in Kachin. According to critical voices however, such as the General Secretary of the Kachin Development Networking Group, which lobbies for the economic and political interests of ethnic Kachin people, the process of creating a new Gemstone Law has so far failed to include consultations with the Kachin people and may therefore contribute to a “re-escalation of the conflict in Kachin”.⁹³

Estimated mining operations and subnational conflict areas in Myanmar (2016)⁹⁴







Despite the political changes in Myanmar, the military remains solidly in control, and its books are still closed to public scrutiny. Military-affiliated companies are widely thought to occupy a central position in Myanmar's mining industry.

The government also took a positive step in 2017 by commissioning an Australian mining consultant company to develop an Environmental Management Plan across ten jade mining zones in Kachin state.⁹⁵ The company reported that in Hpakant, “decades of mining have occurred without effective management or regulation of the environmental and social impacts of mining”.⁹⁶ The plan is envisioned to take seven years to implement, by which time all mines in Hpakant are supposed to have reached full compliance with the sustainability standards. A researcher on Myanmar’s extractive industry governance interviewed by Swedwatch questioned the quality of the plan and noted that it will be highly difficult to implement.⁹⁷

In spite of a few positive examples, the general outlook presents many challenges. Overall, the weak and incoherent legal framework, combined with the failure to properly implement the EIA requirement and the dominant presence of non-transparent business owners, signal an urgent need to strengthen Myanmar’s national agenda for corporate responsibility, particularly as an increase in foreign investments is expected over the next few years.⁹⁸

“Mining companies in Myanmar usually have no knowledge about how to conduct EIAs, so they often hire consultants to perform them. But the consultants also lack expertise. The government officials in charge of approving the EIA know even less. This means that even the tiny number of mines operating with an officially approved EIA in Myanmar – and they are very few indeed – are doing so based on a seriously flawed assessment, which would not have been approved in any Western country.”⁹⁹ /A national resource management researcher, interviewed by Swedwatch

“There has been huge fraud around EIAs. Hundreds have been performed, but nobody knows how to really conduct them.”¹⁰⁰ /A foreign resource management expert, interviewed by Swedwatch

“There is not a single mining project in Myanmar that can be used as a positive example of responsible mining. International mining machinery companies should really encourage their Myanmar partners to become more responsible, both in regard to environmental and social issues.”¹⁰¹ /A researcher on extractive industry governance, interviewed by Swedwatch

The government's efforts to stem illegal import of mining machinery

Both the former and current government has made attempts to address concerns related to mining machinery, including irregularities related to imported machinery. For example, according to national media, large shipments of excavation equipment from China arrived at Hpakant's jade mines in late 2015 and early 2016, allegedly under irregular circumstances.¹⁰² Dozens of government officials were dismissed; some due to their alleged involvement in the illegal import, while others "had been caught illegally exporting jade produced at Hpakant".¹⁰³

In 2016, as another measure to stem illegal imports, a special fact-finding group led by the Ministry of Home Affairs did an inventory of all mining vehicles in the Hpakant area. Following the investigation, the government published a list in which 10,282 items of mining machinery in Hpakant Township were listed, of which 18 percent were unidentified.¹⁰⁴

Although the government's efforts are encouraging, it has to date not managed to address the problems, according to a researcher on extractive industry governance interviewed by Swedwatch. "The government should continue to require mining companies to list the machines that they have. Attempts to do so have been made, but they must be enforced more strictly," said the researcher.

The military's mining interests

Military-affiliated companies are widely thought to occupy a central position in Myanmar's mining industry, though their precise roles and activities remain unclear.¹⁰⁵ Two major conglomerates dominate the country's economy: the Union of Myanmar Economic Holdings Limited (UMEHL)¹⁰⁶ and the Myanmar Economic Corporation (MEC).¹⁰⁷ Both companies have large mining interests, including in jade,¹⁰⁸ and both were on the US economic sanctions list until late 2016.¹⁰⁹

According to research by the Natural Resource Governance Institute¹¹⁰ (NRGI) – a non-profit research organisation – military-affiliated companies such as UMEHL (one of the owners of the copper mine examined in this report) dominate the gems market in Myanmar, and are instrumental in allowing access by private companies.¹¹¹ They are also believed to play an important quasi-official role in allocating access to mining projects, and in distributing the benefits of extraction.¹¹²

The two businesses were originally founded by the Ministry of Defence to generate funds for the welfare of active duty and retired defence services personnel and their families.¹¹³ UMEHL and MEC are no longer state owned but appear to be largely owned and managed by military officers and other public officials.¹¹⁴ As of early 2017, according to Financial Times, all leaders of UMEHL remained men of military rank.¹¹⁵

“The transfer of control of [Myanmar’s private] businesses took place only recently, quickly, and without any transparency. Many of these businesses are located in strictly civilian spheres, for example breweries, precious stones, banking, and commodities, but profits accrue to departments within the military, as well as to senior military officers who own shares. In Myanmar, all military affairs – a concept that is in itself very broad – remain outside the control and scrutiny of the civilian authorities.”¹¹⁶ /Transparency International, 2015

FACT

What is a crony?

Cronyism in business: The act of showing partiality to one’s close friends, typically by appointing them to a position in a company or organisation regardless of their suitability.

Tycoon: A person who has succeeded in business or industry and has become very rich and powerful.*

Myanmar has a long and notorious history of crony capitalism. During its junta days, the military rulers relied on tycoons – known as “cronies” – to hold up the economy. Through generous rewards from the junta and by circumventing sanctions, the cronies were granted concessions ranging from forestry to car imports.¹¹⁷

* Cambridge Dictionary

Jade mining

In Chinese tradition, jade¹¹⁸ has for centuries been associated with royalty, prosperity and political power, and is believed to have healing powers. Today, jade is a status symbol among the wealthy and demand seems unquenchable.¹¹⁹ It has long been valued above gold, and 1 kg of jade can be sold for millions of dollars in foreign markets.¹²⁰ Myanmar accounts for approximately 90 percent of global jade production.¹²¹ The most highly prized kind of jade originates from Kachin state.

The world’s largest jade mine complex comprises 20,000–30,000 acres located near Hpakant township, in the midst of a war-ravaged part of Kachin state. Official figures from 2016 showed that the number of licenses awarded to jade companies in Kachin totalled 15,508.¹²² Around ten, mostly Chinese-backed ventures, are said to dominate the mining operations.¹²³ According to 2014 estimates, Hpakant was home to over 330,000 persons.¹²⁴ The number of inhabitants is likely considerably higher due to the large influx of unregistered jade diggers who migrate to Hpakant every year.

Kachin state is home to the ethnic Kachin group, which includes six different ethnic peoples, and a part of the Shan ethnic group. The Kachin consider themselves the rightful owners of Kachin territory and its jade deposits.¹²⁵ Very little revenue from the jade mining, however, benefits the local residents. To avoid taxes, mine owners (most of them Chinese-owned front companies in joint ventures with Burmese military-linked entities) may register the jade stones, but at deflated prices, before selling them on to shell companies.¹²⁶



Every day, thousands of traders visit the jade market in Mandalay, many of them are from China. The Chinese have prized jade for millennia for its beauty and symbolism. An old Chinese saying says that "Gold is valuable but jade is priceless".

FACT

Dangers faced by jade diggers

Hpakant is a magnet for tens of thousands of migrants from all over Myanmar who dream of finding a jade stone large enough to take them and their families out of poverty. According to one estimation, there are roughly 300,000 jade diggers in Hpakant.¹²⁷ Most of these small-scale jade miners, referred to locally as "scavengers", are men with low levels of education seeking their fortune. They commonly share cramped rooms in barracks, and work long shifts in hazardous conditions, digging through piles of mine waste dumped by large dump trucks. The moment in which a truck unloads the waste is dangerous as hundreds of jade diggers can be lined up, ready to rush onto the pile. Many accidents occur, where diggers may break their arms or legs, or injure their heads from falling rocks.¹²⁸

While mining companies often allow diggers to go through the mine waste, according to community members interviewed by Swedwatch, mine security staff sometimes kill diggers who trespass.¹²⁹

Landslides are a constant threat, and they are particularly frequent when monsoon rain destabilizes banks and slag heaps. Hundreds of diggers have been killed in landslides. As bodies are quickly buried and disappear in the sliding land masses, they are often not recovered.¹³⁰

Jade and the Myanmar military

In 2015, Global Witness, an anti-corruption organization that over several years has conducted investigations into Myanmar's jade business, exposed an enormous illicit economy developed around the country's jade business. Its reports, *Jade: Myanmar's Big State Secret* (2015) and *Lords of Jade* (2017), exposed how the jade sector is integrally tied to the military, drug lords and ethnic armed groups, and is tainted by widespread corruption, illegality and conflict.¹³¹

In its report from 2015, Global Witness describes how Myanmar's military junta in the early 1990s, "pushed the KIA/KIO out of Hpakant and then began parcelling the area into blocks which it handed out to companies it approved, as a means of consolidating control of Kachin State's most valuable resource". Since then, according to the report, "the small-scale miners who previously mined the area have been squeezed out by state-licensed companies, which have brought in heavy machinery to carry out large-scale jade extraction. Jade mining in Hpakant today is all about the biggest machines and the most rapid rate of extraction".¹³²

According to estimates by Global Witness, Myanmar's jade production was worth up to 31 billion USD in 2014, equaling nearly half the nation's GDP that year. To put it in perspective, said Global Witness, this figure equates to 48 percent of Myanmar's official GDP and 46 times government expenditure on health (for 2014-2015).¹³³

Global Witness concluded that the military held official stakes in the jade sector, primarily through its companies UMEHL and MEC. Global Witness' analysis of 2014 emporium data suggests these companies sold the highest-quality jade, commanding an average price of over 13,000 USD per kilogram. Between them, official emporium sales of army companies amounted to 180 million USD in 2014 and 100 million USD in 2013. According to Global Witness, these firms were regarded as an off-budget fund for the Commander-in-Chief.¹³⁴

By Global Witness account, Myanmar's jade industry may well be the biggest natural resource heist in modern history. "The sums of money involved are almost incomprehensibly high and the level of accountability is at rock bottom. As long as the ghosts of the military junta are allowed to dominate a business worth equivalent to almost half the country's GDP, it is difficult to envisage an end to the conflict in Kachin State"¹³⁵ said Global Witness in its report.

*"According to research by Global Witness, jade industry sources report that up to 80 percent of the jade from Hpakant continues to be smuggled to China. Mining machinery used in Hpakant's jade mines are therefore likely employed in mines from which a significant share of the jade is smuggled. Machinery that end up in this area is thus likely part of an illegal supply chain. Providers of mining machinery must recognize this."*¹³⁶ /Global Witness, interviewed by Swedwatch

Jade and the armed conflict

The intensity of fighting between the Myanmar military and the KIA in Kachin state has fluctuated for nearly 60 years, and reignited in 2011 after a 17-year ceasefire. Since then, over 100,000 people have been displaced from their homes in Kachin

by Myanmar military offensives against the KIA, and thousands of people have been killed.¹³⁷

Myanmar's jade is inseparably connected to the ongoing armed conflict, and the main players have seemingly few (if any) incentives to seek peace due to their income from the jade mines.¹³⁸ Generals from the junta days and army officials in Kachin state are making fortunes from the trade. Jade is also one of the main sources of income for the KIA and its political branch, the Kachin Independence Organisation (KIO).¹³⁹ Some of the profits are also believed to finance arms purchases for both the army and the KIA.¹⁴⁰ The Myanmar government has initiated peace talks with the KIA/KIO, but a successful end to the armed conflict is, according to several of the experts and community members interviewed by Swedwatch, considered unlikely without a change to the regulations around jade mining and trade.¹⁴¹ Although other factors also influence the outlook for a potential peace agreement, it is difficult to understate the role of jade mining in ending one of the world's longest-running armed conflicts.

FACT

The KIA/KIO

The KIA is the military wing of the KIO, a political group of ethnic Kachins. Large parts of Kachin state are controlled by the KIA/KIO, and the KIA controls much of the Myanmar-China border. The flow of refugees fleeing the intense fighting between the KIA and the Myanmar military has spilled over the border with China.¹⁴² Many are trapped in camps for internally displaced persons and are cut off from humanitarian assistance.¹⁴³

In May 2018, the Spokesperson for the UN High Commissioner for Human Rights expressed concerns that over 7,000 persons had been internally displaced in Kachin state since early April, and urged all sides in the conflict to fully respect human rights and international humanitarian law.¹⁴⁴

A third armed actor, the largest and most powerful of Myanmar's ethnic armed forces – the United Wa State Army (UWSA) – has about 30,000 members and controls an area along its border with China the size of Belgium. The UWSA is considered to be heavily influenced by China and to rely on arms supplied illicitly by the Chinese armed forces. The UWSA is another significant owner and beneficiary of the jade mines.¹⁴⁵ The same logic applies to several other conflict areas in Myanmar (such as the UWSA's control over tin mines in Wa state¹⁴⁶) which underscores the need for increasing the transparency in Myanmar's mining sector.

“Both the KIA and the Myanmar army commit serious human rights violations against civilians. Both sides profit from the war, and a very big part of the conflict is about natural resources such as jade. It is important to point out that the conflict in Kachin extends beyond Hpakant, but Hpakant, with its jade mining, is very much at the heart of the conflict.”¹⁴⁷ /A senior UN official, interviewed by Swedwatch

“There is no law in Hpakant. No human rights.”¹⁴⁸ /Woman from Hpakant, interviewed by Swedwatch



Freelance jade miners search a slag heap for rocks containing the precious stone. It is a perilous job especially when the heaps of loose earth are destabilised by monsoon rains. Hundreds of diggers have been killed in landslides. As bodies are quickly buried and disappear in the sliding land masses, they are often not recovered.



China's role in the outlook for peace in Kachin

Analysis published in 2017 by the United States Institute of Peace concludes that China, as Myanmar's largest neighbour, has been and will remain a critical player in the Myanmar peace process, particularly regarding the ethnic armed groups in the northern part of the country.¹⁴⁹

China has in recent decades extracted massive quantities of timber,¹⁵⁰ gold, jade and other resources from Kachin state — much of it illegally.¹⁵¹ Chinese special interest groups and individuals have offered direct financial support for ethnic armed organisations in Myanmar (although such support has not been sanctioned by Beijing).¹⁵² However, peace in the region would help China access Myanmar's markets, and above all, it would allow a land route between China and India.¹⁵³

According to the Institutes' analysis, the Chinese government has repeatedly emphasised the need for peace, but the KIA has so far resisted China's push for a ceasefire, fearing that China will expand its interest in mega projects in Kachin.¹⁵⁴ China is considered to play a role in the so far failed implementation of the Nationwide Ceasefire Agreement between the Myanmar government and the country's over 20 ethnic armed groups.¹⁵⁵

3. Swedwatch's investigation in Myanmar

The sale of heavy mining machinery in Myanmar has enabled the extraction of certain minerals to take place at an unprecedented speed. Up until the early 2000's, when the country's mine operations mainly relied on less advanced machinery, the speed of extraction was significantly slower. Today, the machinery is used to clear land and level out hills, excavate and drill deep open-pit mines, and to dump, pile up and transport large amounts of mine waste produced during the extraction process. Trucks are also used to carry jade out of the area. According to Swedwatch's findings, machinery used in the jade mines mainly appears to be dump trucks and haul trucks (dump trucks specifically engineered for heavy-duty environments), backhoes, excavators, and drills.

This section builds on testimonies collected by Swedwatch in Myanmar in 2017. It outlines the ways in which mining machinery has been used to irreversibly change Myanmar's landscape, and how machines used in the jade and copper mining sector impact the lives of several hundred thousand women, men and children, as well as the environment.

In order to explore the responsibility of the foreign mining machinery companies in this context, the section first provides an overview of how their products end up in the jade mine sites and reviews whether foreign companies stand any plausible chance of controlling the use of their mining machines.

“None of the jade mining companies take responsibility for the impacts or conduct anything in line with a risk analysis or due diligence. Foreign machine companies should be aware of this fact and recognise that their machines end up destroying our lands and our lives.”¹⁵⁶ /A community leader from Hpakant, interviewed by Swedwatch

“Here in Myanmar, we have all heard about Hpakant, but the reality is shocking: the lunar landscape, the fields of needles. When I entered the area myself and saw the mountains of mining waste and the huge trucks on the dirty roads – that’s when I realised that it is essential to document this world properly so that people in my country and around the world would understand.”¹⁵⁷ /Minzayar Oo, a Burmese photographer who has documented the heroin addiction among jade miners in Hpakant

Sales of mining machinery in Myanmar

According to Swedwatch’s interviews, mining machinery arrives at Myanmar’s mine sites both via official routes, through Yangon, and are also smuggled through unofficial routes via China. It is commonly believed that machines entering through China are older, bought on the second-hand market, and are therefore further removed from the producers’ sphere of control. Machines entering via Yangon tend to be new, sold via a local dealer – which gives the machinery providers greater potential control over the use of their products.

Several interviewees in Myanmar said that it is cheaper for mining companies to bring machinery via China to avoid registration fees. Some mining companies are believed to “mix” registered and unregistered machinery at the mine sites to create the impression that they are all official, and use number plates from a registered machine on unregistered machines going outside of the mining area to save costs.¹⁵⁸

Number of heavy mining machines

Although there are no reliable statistics on the number of active mining machinery in Myanmar, Swedwatch finds it plausible, based on the official fact-finding count from 2016¹⁵⁹ and Swedwatch’s interviews in Myanmar, that thousands of machines are currently active in Hpakant. Based on Swedwatch’s interviews, it appears that another couple of hundred are active in the copper mines of Monywa.

Komatsu, Caterpillar, and Volvo CE appear to be the dominant brands represented in the Hpakant jade mines. Terex Trucks is also present, along with South Korean brands such as Hyundai and Doosan.¹⁶⁰

Fear of new licensing regulations increased the pace of extraction

In 2016, the government suspended all extensions of jade and other gemstone licenses.¹⁶¹ The decision coincided with the forthcoming expiration dates of many of the mining licences in Hpakant. Fearing that the new government would create laws hindering the extension of licences, many mining companies simply increased the extraction pace by bringing in the most efficient heavy mining machinery available. Local community members describe the rush:

“The machines are up and running 24 hours per day. People work in shifts so that the extraction can go on all day and all night. The companies are in a real hurry.”¹⁶²

“Usually they stop mining during the rainy season, but this year they just kept on mining through the rains because they are so stressed that their licenses will expire before they have gotten the jade out of their concessions.”¹⁶³

Local comments on sales of mining machinery

Swedwatch was unable to verify the estimations by local community members regarding the quantities or dates of purchase of mining machinery; the numbers mentioned are approximations. Nevertheless, it is clear that considerable amounts of machinery used in the jade and copper mining regions have been purchased over the past few years, and that foreign companies continue to sell new machinery destined for the jade and copper mines.

“Most of the heavy machines [used in the jade mines around Hpakant] are new. Some are second-hand, but most are new. The largest machines arrive from Yangon. There are thousands of them in Hpakant. The largest mining companies own around 100 dump trucks each. Caterpillar, Volvo and Komatsu are the absolutely dominant brands. Terex [Trucks] is also there. The largest mining companies don’t use second-hand machinery, just new. They have hundreds of trucks and backhoes each./.../

/.../The largest machines arrive from Yangon. They need six trucks to transport one backhoe. That’s how large these machines are./.../

/.../Volvo machinery comes from both Yangon and China. To my understanding, most of them are new.”/The General Secretary of Kachin Development Networking Group, interviewed by Swedwatch



Two miners next to a Komatsu dump truck, carrying waste from a commercial jade mine.

“When official auditors from the capital come to visit Hpakant mine sites, a lot of machines are hidden. Once we saw hundreds of trucks hidden on the other side of the mountain, and they were brought back once the auditors had left. A lot of the machines were white. The mine workers waited, playing football, until the official visitors were gone.” /A community member from Hpakant, interviewed by Swedwatch

Impacts of heavy mining machinery employed in Myanmar’s jade mining area

The following section outlines the environmental and human rights impacts caused by the use of heavy mining machinery in Kachin’s jade mining area as conveyed to Swedwatch in 2017. It also describes societal changes in Hpakant since jade mining was gradually turned into large-scale and heavy machinery-dependent operations, starting in the early 2000s.

Land rights and loss of livelihood

If original residents are removed from their land without consultation or compensation, this constitutes a violation of human rights as described in Article 17 of the Universal Declaration of Human Rights, which states that everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his/her property.¹⁶⁴ Ensuring that no one is deprived of their private property and as a result loses their livelihood is an important step toward fulfilling SDG 1, which aims to end poverty everywhere.

Since mines and their infrastructure take up vast areas, conflicts over land ownership are not new in Myanmar. The country's legal and policy framework regarding land is fragmented, and policies, laws and practices still do not adequately protect land rights.¹⁶⁵ The government can carry out compulsory acquisitions in the state or public interest, which includes mining activities. Under the 1894 Land Acquisition Act, land acquisition for a company may be carried out where it is "likely to prove useful to the public".¹⁶⁶ In these cases the government is responsible for carrying out the acquisition and distributing the compensation. However, the company acquiring the land has to provide the compensation, which is based on the market value of the land as well as possible damage incurred by the private landowner, such as the loss of crops and firewood or the cost of changing residence and place of business.¹⁶⁷

SWEDWATCH'S FINDINGS

All the interviewees from Hpakant noted that the loss of land caused by mining projects was a key concern. The majority had either had land unlawfully confiscated from them or had been pressured by mining companies to sell their land for less than market value. They explained that when a mine site expands closer to a land plot, large cracks appear in the ground, which decreases the value of the plot. The closer the mine expands towards the plot, the less the mining company offers. Explosions and drilling in the mine cause houses nearby to crack, which further decreases their value.

A community leader from Hpakant described to Swedwatch his sentiment to Swedwatch: "The guest has become the owner of the land, and the owner has become the thief in his own land. This is how we feel, now that we have lost all our land to the mines."

Most families in Hpakant used to rely on farming for their livelihood. With the loss of farmland, hundreds of families have lost their main source of income. A man originally from Hpakant who works as a researcher on natural resources explained: *"The main source of income used to be farming, shifting cultivation and hunting. We used to live off the land, the mountains and the rivers. Now, with the mines, there are no possibilities to continue like we used to. When the [mining] companies come, they leave big holes in the ground and soil that no can longer be cultivated. Everything has changed. Some try their luck in jade because they don't have any other option."*

Another community leader from Hpakant said: "Since we have lost our farms to the mining, we now depend on food that is imported. It is much more expensive."



When a mine site expands closer to a land plot, large cracks appear in the ground, which decreases the value of the plot. “That house in the middle, with the blue wall, belongs to my family. My parents will soon have to move, but they will no longer be able to get a decent price for their land”, a community member from Hpakant explained to Swedwatch.

When asked by Swedwatch to describe what has changed since the small-scale jade mines were converted into large mechanised operations around Hpakant, a woman in her fifties answered: “When I was young we felt safe. There were so many things to live off, the land and the mountains. The children today will have to go to the mines or move away when they grow up, how else are they going to make a living? Nobody cultivates any more. It’s just impossible now.”

Environmental impacts and access to water

In order to comply with environmental laws and standards, the OECD Guidelines for Multinational Enterprises state that companies should assess and address the foreseeable environmental, health, and safety-related impacts associated with their goods and services over their full life cycle. Companies should also prepare an EIA if their activities may have significant environmental, health or safety impacts.¹⁶⁸

According to the UN General Assembly, access to clean water and sanitation is a human right and a precondition for the enjoyment of other human rights, such as the right to health.¹⁶⁹ Action in this area would help fulfil SDGs 6 and 15, which aim to ensure clean water and sanitation as well as prevent environmental degradation.

SDG 6 also recognises that sustainable access to water and sanitation, particularly for young women and girls, can help them regularly and safely participate in productive activities such as education.

SWEDWATCH'S FINDINGS

A dramatic increase in erosion, flooding, redirection of rivers, polluted groundwater, removal of natural mountains and the creation of new mountains of mining waste are a few of the environmental impacts that have occurred since the mining machines were employed in Hpakant. Loud explosions scare the wildlife, and new lakes have been created. Community members experience increases in temperature, which they attribute to the deforestation that is driven by mining. Many of the impacts are considered irreversible.

Irregular water flows in the rivers created by poor mining waste management lead to two kinds of risks that are new to residents of Hpakant – floods and water shortages. According to the news agency Reuters, at least a thousand people were killed when floodwaters inundated a jade mine in 2002.¹⁷⁰ As one community leader explained to Swedwatch when discussing the impacts of the use of heavy mining machinery: “The trucks dump mining waste upstream in the rivers, which raises the water level. Every rainy season, these rivers get flooded because the riverbed has been eroded by the waste. People now get killed by floods. In summer, on the other hand, the waste stops the water from running at all, so we don’t have any water.”

A practice that every year is proving lethal to community members and jade diggers also relates to the poor management of mining waste. According to interviewees from Hpakant, trucks frequently dump soil and gravel from the jade mines into large piles that can destabilise with rain. A community leader explained to Swedwatch: *“When it rains, the mining waste comes flowing down the hillside like a huge wave, and people can get killed in the landslide. It can happen any time of the day, sometimes it happens when people are asleep in their beds. The employees of the mining companies don’t have proper protection, and sometimes they also die in the landslides.”*

Women and children can be particularly exposed to the impacts of irresponsible mining waste management. As illustrated by the community leader: *“Women normally do the washing in ponds, and now they sometimes die doing it. Sudden landslides from the mines come rushing down into the ponds, creating huge waves that drown the women. Many children have also died from such waves.”*

A 21-year-old woman recounted how her neighbour and her children were recently overcome by a mining waste landslide rushing into a pond. *“She lost three of her children in a sudden wave created by a landslide. They were 18, 16 and 4 years old. They were playing in the pond when they died.”*

In 2015, around 120 people were reportedly killed in a single landslide from a mining waste dump. According to local witnesses, the actual death toll was much higher. A community leader from Hpakant helped in the rescue search and told Swedwatch “We managed to find 118 bodies, but we estimate that 400–500 people died that night. Many of them were migrant scavengers who are not registered as residents,

but they lived in the village that got buried under the land masses. After three days of digging for bodies, the smell was so bad that we had to stop.” The leader added that “Volvo and other trucks were brought in to help the search, but many Volvo trucks were already there, building the waste dump that collapsed that night.”

Interviewees also repeatedly referred to water pollution. Access to clean natural drinking water was said to have dramatically diminished in recent years due to the impacts from mining. Today, community members rely on buying bottled water. A middle-aged man from Hpakant explained to Swedwatch: “It used to be so beautiful here. These rivers used to be clean and see-through. We used to fish and swim. Now there is no water anymore, just a big slow river of mud [created by the mining waste]. Nobody dares to drink from them now.” According to the man, many mining machines dump mining waste in the rivers: “When they dump mining waste in the rivers, the natural currents are disrupted. The water stalls and gets polluted.”

The man concluded: *“It used to be green here. Now it looks like we live on the moon.”*

Hpakant is a mountainous area that used to be home to lush forests with rich fauna. Satellite images of Hpakant show how the landscape has changed dramatically as the use of mining machinery has enabled an extraordinary pace of jade extraction, and a study from 2017 established a record loss of intact forests in the area.¹⁷¹ A community member from Hpakant who works with natural resource management explained to Swedwatch: “Many, many mountains disappear. One day the mountain is there, but a few weeks later there is just a big hole. We don’t know the natural paths of the rivers anymore because the landscape changes whenever they find jade. We get erosion, landslides and flooding instead.”¹⁷²

According to the General Secretary of the Kachin Development Networking Group, EIAs have not been taken seriously in Hpakant. “Until some three years ago, nobody had heard about EIAs. Still today, not a single jade mine operates with an approved EIA,”¹⁷³ he told Swedwatch.

A natural resource governance expert interviewed in Yangon explained that “The mining companies must have a recovery plan and deposit money to clean up when they end a mine site, but very few do this, if any.”¹⁷⁴

Impacts on women

UN Security Council Resolution 1325 on Women, Peace and Security describe the special vulnerability of women and girls as well as their right to security and development. Resolution 1325 urges Member States to ensure the increased representation of women at all decision-making levels and calls on all actors to adopt measures to ensure the protection of, and respect for, the human rights of women and girls.¹⁷⁵

Working towards equal rights for men and women is also in line with SDG 5 (Gender equality) that aims to eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.

SWEDWATCH'S FINDINGS

In addition to landslides and flooding that can expose women (due to their traditional responsibility for washing clothes in natural ponds) to life-threatening risks, women are vulnerable to other severe safety and health risks in jade mining areas, including sexual exploitation.

Community members testified that the rapid increase in jade mining has created a socio-economic turbulence that on the one hand has created a rich and powerful group of mainly men, but on the other hand is leaving many community members, especially women and young women, without opportunities to pursue healthy livelihoods.

One woman explained: *“There are no jobs in Hpakant for women except for working as a maid or in a massage parlour. The parlours are fronts for brothels, and many, many women are sexually abused. Government officials and policemen go there, but they refuse to pay. ‘It’s free for us’, they say. These women earn very little money, and whatever they make goes to food and basic things like shampoo. The number of brothels has really increased over the past years. Some women die of AIDS or other sexually transmitted diseases. The government does nothing to help them. Many women use heroin to stand it all. Some of them become prostitutes when they are 14, 15 years old, and some when they are a little bit older.”*

Trafficking of women for sexual exploitation was brought up during Swedwatch’s interview with a group of community members. A young man from Hpakant explained “The brothels substitute the women every now and then, and bring in younger women from other parts of the country. We believe that it is organised trafficking of women, run by rings of prostitution.” The man added “Some women try to make money from jade trade in a decent way, but most are eventually forced to do it in dirty ways, for example by becoming a mistress to a big jade trader. The women have no options in the end.”

The topic of sexual exploitation proved sensitive among the interviewees. Swedwatch decided not to proceed in depth but noted that it is an urgent matter for further study. Swedwatch encourages further investigations into how women are abused in Myanmar’s mining settings.

Young people and heroin

Over a third of the 169 targets of the SDGs highlight the role of young people and the importance of their empowerment, participation and well-being.¹⁷⁶ For example, one target under Goal 4 (Quality education) is to build education facilities that provide safe and nonviolent learning environments for all. Responsibly engaging youth in sustainable agriculture is considered key to achieving Goals 1 (No poverty) and 2 (Zero hunger).¹⁷⁷

Action in this area would also help fulfil Goal 3 (Good health and wellbeing), which aims to strengthen the prevention and treatment of substance abuse, including narcotic drug abuse, and to end the AIDS epidemic by 2030.



Drug use is almost intrinsic to jade mining in Hpakant. Jade miners shoot heroin at “shooting galleries”, small stalls assembled from planks and plastic tarps where heroin is freely sold and shot up. One shot costs around 2 USD, but workers can also exchange lumps of jade for hits of heroin. Overdoses are common. Users often share needles, and the level of HIV among miners is notoriously high.

SWEDWATCH'S FINDINGS

Teenagers are undoubtedly paying a high price for the deteriorated safety situation and the social impacts brought about by the mining activities in Hpakant, along with the easy access to heavy drugs. The reduced farming opportunities have driven many young men to dig for jade in the mines, where they are exposed to extensive heroin abuse. Others seek work in larger cities. Young women have few options to find jobs that are free from risks to their health and wellbeing.

The youngest are also affected. A 25-year-old man from Hpakant explained how the day-to-day safety of very young children has been impacted: *“According to regulations, there must be at least 2 km between a school and a mine, but this is completely ignored in Hpakant. In my village, a mine has now been dug 10 feet away from a pre-school. The company did not even provide a fence for the children. It is steep, very steep, to the bottom of that mine.”*

Heroin has a long history in Myanmar, and its prevalence in Hpakant cannot be solely attributed to the presence of mining. However, the rampant use of heroin in Hpakant is widely considered to be a direct consequence of the societal shift brought about by the rapid mining expansion. Drugs were seen as the largest problem for the young, for several reasons. One reason mentioned is that when a parent starts using heroin, this has severe impacts on how the children are economically and emotionally provided for.

Above all, the interviewees expressed great fear regarding the life-long consequences will be for the many young who are introduced to heroin at an early age. Apart from risking lethal overdoses, the young are also at great risk of HIV exposure when they share needles to inject heroin. Interviewees explained that young people commonly try smoking or injecting heroin or methamphetamine for the first time around the age of 14 or 15.

A 25-year-old man from Hpakant said: *“The drugs are everywhere. Even in the schools. For just a few dollars, they can stay high a whole day. Many of the young overdose and die.”*

One mother in her 40s told Swedwatch: “When I was young and grew up in Hpakant, there were no drugs. Now the drugs are everywhere. If I could, I would send my children to school in another part of the country. It is too dangerous for children here. Most end up doing heroin.”

One 24-year-old former jade digger and heroin addict interviewed by Swedwatch at a rehabilitation centre explained: “We all come to Hpakant to escape poverty and look for our fortune. But many of us just end up working to be able to buy more drugs. Almost everyone takes heroin, you can buy it anywhere and as much as you want. I would have been dead if I had stayed on in the mines.”

The extensive presence of drugs also takes a severe toll on the general safety situation. “We see how all this heroin leads to theft, robbery, suicide and murder in our communities”, explained one community member.

“Every family in Myitkyina has a member or an extended member addicted to drugs. Both sides in the conflict profit from the drug trade.”¹⁷⁸ /A senior UN official, interviewed by Swedwatch

“Dumping grounds, company machines, scavengers and heroin – that’s what you see in Hpakant.”¹⁷⁹ /A former jade digger and heroin addict, interviewed by Swedwatch

Drugs

As the world's second-largest producer of poppy plants (from which heroin is derived), Myanmar is considered the epicentre of the heroin trade. It is also one of the key players in producing methamphetamine.¹⁸⁰ Drug production serves as an important source of revenue for both the Myanmar military and non-state armed groups. Several of the most powerful armed groups run large-scale methamphetamine production operations and/or control the cultivation of poppy.¹⁸¹

According to a UN report from 2017, Myanmar's overall poppy cultivation has decreased in recent years, apart from in Kachin state, where "the cultivation remained practically stable". In reference to the armed conflict, the report concludes that Kachin's steady cultivation levels appear to be linked to the "continued turmoil" in the area.¹⁸²

Local civil society groups estimate that more than two-thirds of the informal jade diggers in Hpakant are addicted to heroin, which is sold openly in mining areas.¹⁸³ No official data exists, but one estimate indicates that up to 70 percent of the drug users in Hpakant are HIV positive.¹⁸⁴

Violence and security

Violence and harassment of those who speak out against companies' negative impact on human rights and the environment are increasing worldwide. According to the UN Special Rapporteur on the situation for human rights defenders, it is especially true for land and environmental defenders, where the roots of conflict are often found in the exclusion of affected communities from decisions regarding their land and natural resources.¹⁸⁵ The deadliest year on record for land defenders around the world was 2017, and the mining industry was linked to many of the killings.¹⁸⁶

Actions for the freedom to speak out regarding human rights violations and communicating with authorities through effective, accountable and inclusive institutions is in line with SDG 16, which is dedicated to the promotion of peaceful and inclusive societies for sustainable development, and the provision of access to justice for all.

SWEDWATCH'S FINDINGS

The names and photographs of community members who agreed to describe the situation in Hpakant and other mining areas in Myanmar to Swedwatch cannot be published due to the great risk of reprisals from armed actors, and all interviews had to be conducted under strict security considerations.

Even for those who do not actively protest against the mining companies, security is one of the biggest problems in Hpakant, according to the interviewees. This situation was largely attributed to the security forces that protect the mining companies and their compounds. It was explained that the mining companies do not employ private security companies, but rather rely on public security forces such as police and sol-

diers to protect the mining area. These actors were said to have large economic interests in the mining projects and in the conflict.

A community leader described the security situation in Hpakant as follows: *“People get shot by the military, which is here because of the profits it makes from jade mining. People get shot by the security forces that protect the mines. People die from landslides and traffic accidents which are both caused by the mining machines. People who find jade are extorted by the KIA. Mining has brought drugs and conflict. Mining is the beginning of all the problems we see in Hpakant, and until there is a solution to these problems, we want the mining to stop. If mining in Hpakant were done in a sustainable way, it could resume.”*¹⁸⁷

Accidents linked to mining machines

All community member interviewees testified that road accidents are common, and every year people die after being run over by dump trucks driving on village roads. Community members from Hpakant have documented many such road accidents, showing bodies demolished and torn apart by dump trucks, which were shared with Swedwatch.

Family members of victims can be left in dire economic situations when a bread-winning parent is killed by reckless driving of mining machines. Interviewees explained that although some companies have recently improved their compensation, it is not always granted. A young man explained “Sometimes there are accidents on the road by the heavy machines, and in some cases the person dies. Sometimes their families get compensated, but not always. We are very scared when they drive by.”

Another young community member said: “In Hpakant, the big machines are everywhere. I have seen people get run over by dump trucks and die. Once, a dump truck fell off the mountain and rushed 200 meters down. People died.”

FACT

Responsibility of mining machine companies

Swedwatch interviewed the General Secretary of the Kachin Development Networking Group, a network of civil society organisations that since 2004 has documented the impacts of natural resource extraction in Kachin state, about perceptions of the responsibility of the foreign companies that sell mining machinery in Myanmar, and are used in the jade mines around Hpakant. The organisation supports the Kachin people’s wish for semi-autonomous rule.

According to the General Secretary, all companies that have sold machinery (via distributors) to the mining companies operating in Myanmar’s jade mines are guilty by association with the enormous consequences on the local environment and communities. He shares the general understanding that military generals are the dominant owners of the Hpakant jade mines, and explained: “By selling their machines to the jade mines, machinery companies are legitimising the military generals and the government who are responsible for torture and other atrocities.”



The belongings of a jade miner named Zaw Win Maung. He was killed by a backhoe digger as he searched in a commercial jade mine's waste dump. He left a wife and five-year-old son. His family say they have received no compensation.

He noted: "The jade extraction is still in the hands of the generals. If the international machinery companies keep selling their machines, they are helping the generals and cronies make profit, while the local communities continue to suffer [the consequences of this] industry."

Referring to KDN's own research from Hpakant, the General Secretary added: "There is not even one mine in Hpakant that adheres to international norms. It's impossible for mining machinery companies to argue that they do business with mining companies that follow international norms and have a proper EIA, because there is not a single mine here that does."

"There are some companies that are currently trying to show that they are more serious about sustainable mining, but it is only to wash off their guilt for how they have ignored those issues in the past", he concluded.

Rough jade stones are cut and polished into smooth and shiny gems that mainly end up in in jewellery. China is by far the largest market for jade gemstones.





Impacts of heavy mining machinery employed in Myanmar's copper extraction

Copper is officially Myanmar's largest mining export product,¹⁸⁸ and is closely linked to military financial interests. Monywa is Myanmar's largest copper project. It is an open-cast copper deposit situated in the Sagaing region. It has stirred strong controversies over the years due to allegations of forced evictions, unlawful land confiscations, corruption, failure to provide compensation and substitute farming land, and severe pollution that jeopardises the livelihood and health of the local population.¹⁸⁹ The project consists of two large mine operations, the Letpadaung and the S&K copper mines,¹⁹⁰ and a sulphuric acid factory (owned by UMHEL).

Amnesty International has conducted extensive research in this area (focusing on the Letpadaung mine). In line with Amnesty International's findings, interviewees told Swedwatch that there are 26 villages located within 5 km of the mines, which have a population of about 25,000. Most people living in these villages used to rely on agriculture, but many lost their farm plots as land was confiscated by the mines.¹⁹¹ Community members have conducted more than 250 protests against the project and have repeatedly been met with excessive force by police. Protestors are prosecuted and arrested on questionable grounds.¹⁹²

In 2013, a report of the Letpadaung Investigation Commission¹⁹³ (set up by the then President of Myanmar) concluded that the Letpadaung mine "lacked strong environmental protection measures and had been developed without an environmental impact assessment, a social impact assessment or a health impact assessment having taken place, and without an environmental management plan having been developed".¹⁹⁴

Amnesty International concluded in 2017 that the project, in spite of many years of local protests, "continues to be plagued by human rights abuses". Amnesty International has repeatedly called for the suspension of the mine project until the environmental and human rights concerns have been resolved. Thousands of people in the area are at risk of being forcibly evicted from their homes and/or their farmland, as there are plans to expand the Letpadaung mine.

Swedwatch's interviews with community members affected by the Letpadaung and S&K copper mines revealed that many of the impacts caused by the use of mining machinery in Kachin's jade extraction are also found in the copper project. According to community members, Caterpillar, Terex Trucks and Komatsu are the dominant brands. Volvo does not appear to have a significant presence in the copper project.

Swedwatch was not able to verify the number of active mining machines used in this area, but according to a mechanic who used to work at the Letpadaung mine, there is a steady influx of new mining machinery to the copper mines within the Monywa project. He recalled a significant number of Terex Trucks dump trucks and Caterpillar machinery. Most of these had, according to the mechanic, arrived over the past few years.

Land confiscation and human rights impacts

In 2013, the Letpadaung Investigation Commission highlighted severe problems with the land acquisition process for the Letpadaung project, including a lack of consultation with affected communities.¹⁹⁵ Community members impacted by the Monywa project interviewed by Swedwatch recalled when mining machines arrived in 2011 together with army and police to clear land, and described how this has impacted their livelihood:

“They used big machines when they cleared our land. They didn’t talk to us before; they just showed up. It would be better if they talked to the local people before they make such dramatic moves”, explained one man in his forties.

“I used to have 20 acres of land, but everything was confiscated by the [S&K] mine. None of my children was hired by the mining company. The mine is very bad for us”, one woman in her seventies told Swedwatch.

Her neighbour elaborated, saying: “There was never a consultation. They just ordered us to move. Most people had land rights and all the papers but it didn’t matter. She added: “The forests and the mountains have disappeared. The whole landscape looks different. It’s warmer now, our water is dirty, and our livelihood is gone.”

A leader from a community affected by the S&K mines explained: “We used to have grazing land, farmland, we used to hunt in the mountains and cultivate bamboo on the hillsides. We always had fruit, beans and other crops. Now we have to buy everything, but there are so few jobs. The mining companies don’t hire so many local people.”

Another community leader added: “Most farmers have become indebted because their harvests are so poor nowadays. They have to borrow money from their neighbours, but often can’t repay. Sometimes they pay back by giving away their land plot. This creates serious social side effects in our communities.”

The mines also affect the younger generation, as illustrated by a comment made by one father in his forties: *“Most children still go to primary school, but since the land confiscation, parents now have to use their savings to pay all the fees. By the time children are supposed to start high school or university, only very few parents can afford to pay. When we had our farms, we could pay for higher education for our children.”*

A community leader representing residents affected by the Letapdaung mine shared the following with Swedwatch: “We are against the Letapdaung mine for two main reasons: First, the land grabbing that was ordered in 2011, and which has continued. At first, 6,000 acres were confiscated although everyone had their papers in order that they owned the land. The confiscation was unlawful, according to Burmese law. There was no consultation or compensation. Second, the environmental destruction caused by the mine.

Our protest is based on three demands: First, substitute farmland has to be created. The final report of the Letpadaung Investigation Commission concluded in 2013 that 1,900 acres should be given as substitute farmland. To date, only 114 acres have been given, and this is land of very poor quality. The government insists that things can grow there, but they can't.

Second, there must be proper compensation for the land grabbing. Compensation should be given according to current prices of land. Third, the mine must be run with adequate environmental management. The company claims to have conducted an Environmental and Social Impact Assessment but it has not showed it to us. We cannot find it. We demand that a proper such assessment is done.”

4. Leverage - the key to responsible provider conduct?

As already mentioned, the UNGPs state that the responsibility to respect human rights requires business enterprises to seek to prevent or mitigate adverse human rights impacts that are directly linked to their products or services by their business relationships, even if they have not contributed to those impacts (Principle 13).

FACT

LEVERAGE - UN GUIDING PRINCIPLE 19

Leverage refers to a company's ability to influence the behaviour of others; it thus plays a key role in helping companies uphold their responsibility to respect human rights. The following excerpt from the Commentary to Principle 19 clarifies this responsibility and elaborates on the concept of “leverage”:

“Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise'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 consequences.

The more complex the situation and its implications for human rights, the stronger the case for the enterprise to draw on independent expert advice in deciding how to respond. If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.”

Source: United Nations Human Rights Office of the High Commissioner, 2011

Shift, a non-profit organisation that advises on UNGP implementation, describes leverage in the context of the UNGPs as a way of “changing the thinking and behaviour of key people within a supplier, contractor, business partner, customer, client or government, where their actions are increasing risks to human rights”.¹⁹⁶

Together with business actors, Shift has explored practical approaches to building and using leverage. It has identified a number of ways in which a provider might create additional leverage in its relationships with customers. For example, a provider may build key provisions on the future use of its products into the terms of its contracts in order to create a shared responsibility for the human rights impacts of its customers’ operations.

Such contractual requirements could be designed to create future dialogue with the customers regarding human rights. The contract could also require customers to seek clearance from the provider if the product’s use has changed in ways that have potential human rights risks and impacts.¹⁹⁷ The provisions in the contract could also allow the provider to recall the equipment if it has been used in a way that violates human rights provisions. If such a contractual breach occurs, the provider should have the necessary means to conduct a recall or other type of action.¹⁹⁸

David Kovick, Senior Advisor at Shift, explained in an interview with Swedwatch: “We have seen the importance of thinking about ways to build in leverage early in the relationship, for instance, before a sale is made. It is often much more difficult to build in moments of leverage later in a relationship, particularly after impacts have occurred. Companies can be creative about ways to create this leverage. Particularly in downstream relationships, it may be important for companies to look for an appropriate balance of positive incentives and negative penalties, in order to align the incentives of their customers to respect human rights when using the provider’s products. One of those really important uses of leverage up front is for businesses to build in data points along the value chain, so that companies can understand how their products are being used or potentially misused.”¹⁹⁹

“Every company – regardless of size, industry or geography – faces situations in which they do not have, or do not perceive, sufficient leverage to influence the behaviour of others. This raises questions about what steps can be taken to create or increase leverage; what steps could have been taken earlier in the relationship to have created leverage; and when and how to consider terminating a business relationship.” /Shift, 2013

To address challenges related to exercising and increasing leverage, Shift has developed the following table (an outcome from a workshop with companies held by Shift in 2013).²⁰⁰ A shortened version of the table is included in this report with Shift’s permission.

Leverage over business clients/customers/end-users

HOW?	WHY?
Traditional commercial leverage	
Contractual requirements/sanctions: Build key provisions on future use of products into the terms of contracts. For example: <ul style="list-style-type: none"> ● Limiting warranties on a product in the event of unacceptable usage; ● Asking business customers to pass requirements on product usage onto their end-users. 	To build shared responsibility for human rights outcomes.
Contract-driven interactions: Create future interaction points with a customer or client through contract provisions. For example: <ul style="list-style-type: none"> ● Increasing the number of times that follow-up service will be provided, providing added value for the customers and additional opportunities for leverage; ● Requiring a business customer to seek clearance from the company or the company's home government in the event of a modified use of the product. 	To increase the 'moments of traction' in the relationship where practices might be checked and leverage could be applied.
Company policies and processes: Standardize certain practices across the company through the introduction of policies and process that make respect for human rights 'just how we do business'. Examples: <ul style="list-style-type: none"> ● Sales approval policies and processes that escalate decisions on higher-risk products or business customers to a Sales Compliance Board with the ability to veto a sale; ● A service provider potentially adopting a policy defining it as their duty to advise clients on human rights risks alongside other issues. 	To standardize approaches so staff are less exposed to external pressure to ignore key human rights issues.
Leverage with business peers	
Driving shared standards in the industry: Work through a business association to build shared standards of practice.	<p>To standardize certain practices in relationships with clients.</p> <p>To reduce any perceived competitive disadvantage of applying standards unilaterally.</p> <p>To build markets for responsible behaviour.</p>
Common industry voice: Raise human rights concerns with clients as an industry.	<p>To add weight to the issues being raised.</p> <p>To avoid competitive disadvantage.</p>
Leverage through bilateral engagement (with one or more third parties)	
A holistic approach: Engage multiple actors bilaterally in response to a specific challenge. One example raised was the public case study of when GE discovered MRI machines were being used to identify (for abortion) female fetuses in India. GE worked bilaterally with business partners to institute sales protections, with the government to enhance regulatory action, and with wider industry in the country to find methods of addressing this issue.	<p>To target a specific challenge.</p> <p>To offer leadership by mobilizing different actors essential to a solution.</p>
Leverage through multi-stakeholder collaboration	
Building shared standards on challenging issues: Work through a multi-stakeholder initiative to build shared understanding of human rights challenges that can arise from customers and government clients, and appropriate responses - for example, as the Global Network Initiative has sought to do in addressing freedom of expression and privacy rights.	<p>To standardize approaches to human rights issues.</p> <p>To add weight to the issues being raised.</p>

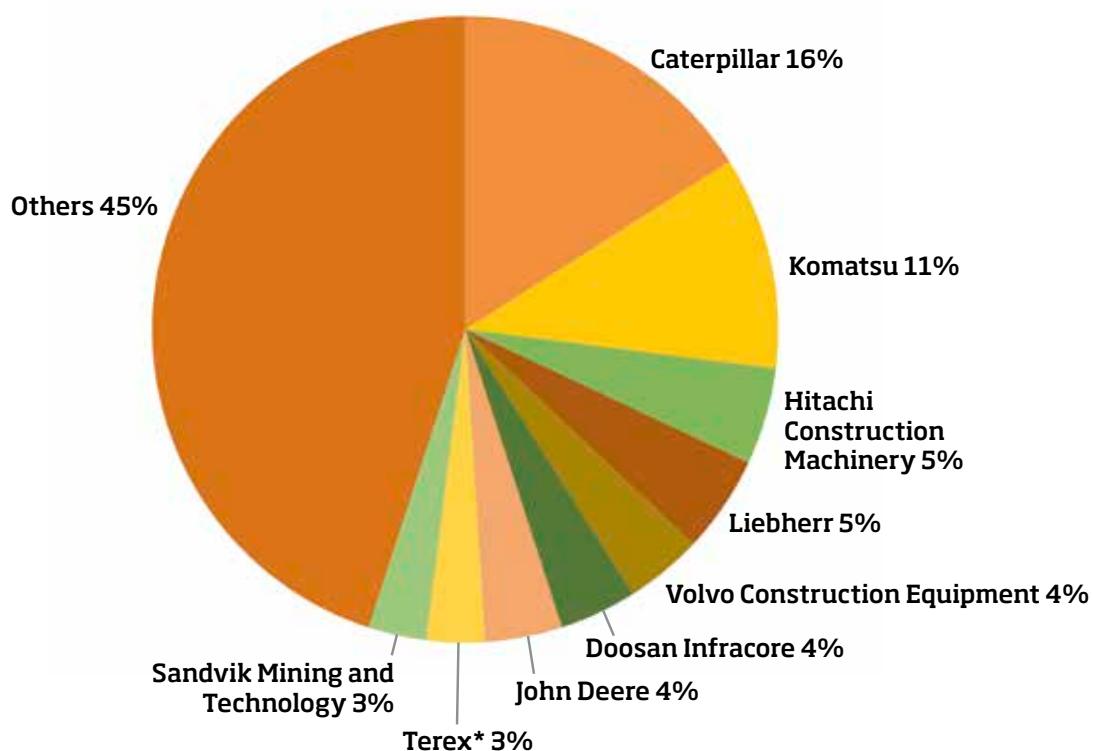
5. International mining machinery companies

Caterpillar, Komatsu and Volvo CE are three of the world's leading mining machinery manufacturers (see Figure 1), and among the brands found to be used in Myanmar's jade and copper mines.

Equipment provided by companies such as Caterpillar, Komatsu, Volvo CE and its fully owned subsidiary Terex Trucks, are important to the core operations of the mining companies. According to Principle 19 of the UNGPs, this links the companies to the adverse human rights risks and impacts of the mining operations. Thus, once the companies have identified these adverse impacts, they have a responsibility to seek to prevent or mitigate them.²⁰¹

The three companies that engaged with Swedwatch state that they are committed to respecting internationally recognized human rights and have made commitments to contribute to the SDGs. Komatsu and Volvo Group are participants of the UN Global Compact, while Caterpillar is not.²⁰² This section outlines the results from Swedwatch's communication with the three companies. It also includes information gathered from the companies' publicly available sustainability reporting.

Top machinery manufacturers, based on sales in US dollars in 2016.²⁰³



**Terex listed here is different from Terex Trucks (Terex Trucks is owned by Volvo CE).*

Caterpillar

Caterpillar is the world's largest machinery brand in terms of sales volumes.²⁰⁴ Its headquarters is in Peoria, Illinois, USA, and its products are sold via a worldwide dealer network. The company provided a general written response to Swedwatch and did not respond to any of the specific questions posed by Swedwatch (the full answer is included below). This section is therefore based on publicly available information produced by Caterpillar.

Caterpillar's Supplier Code of Conduct includes a specific section on human rights. According to its 2016 Sustainability Report, Caterpillar conducted a human rights impact assessment in 2015 to identify actual and potential human rights issues and impacts on vulnerable groups along its value chain (such as children, migrant labourers, workers or local communities). It is not clear in publicly available information what the human rights impact assessment covered or included, or how Caterpillar has acted on potential findings from the assessment. Caterpillar's 2017 Sustainability Report states that the company is "currently developing an enterprise human rights program" but it does not elaborate on the matter; notably, the report provides less information about its efforts to respect human rights than the 2016 report.

Caterpillar did not respond to Swedwatch's request to elaborate on the findings from the assessment, or whether it had conducted a specific assessment for Myanmar. Swedwatch was therefore not able to analyse the quality or potential impact of Caterpillar's assessment.

According to Caterpillar's sustainability reporting, it has introduced mechanisms to understand its human rights impacts across its value chain with its partners. In spite of this encouraging statement, it remains uncertain to what extent these mechanisms have been efficient.

Caterpillar recognises that the impacts of the company's products are gaining more attention. In its 2016 sustainability report, it states that a large share of the grievances from interested parties related to "controversial use of Cat equipment" and "doing business in conflict-affected areas". The two issues are therefore, according to the company, currently the focus of Caterpillar's attention.

In the report "Jade: Myanmar's Big State Secret" from 2015, Global Witness alleged that Caterpillar's authorized dealership in Myanmar was linked to a group of jade mining companies that Global Witness believes to be controlled by a US-sanctioned narcotics kingpin named Wei Hsueh Kang.²⁰⁵

Wei Hsueh Kang is wanted by the US Department of State, which offers a reward of up to 2 million USD for information leading to the arrest or conviction in the United States of the kingpin.²⁰⁶ He is also said to be a long-time financier of the UWSA ethnic armed group, and controls a range of companies licensed to exploit the Hpakant jade mines. According to Global Witness, the front man for the jade companies controlled by Wei Hsueh Kang including Myanmar Takaung and others is Zaw Bo Khant. Zaw Bo Khant was a director and shareholder of Myan Shwe Pyi Mining, a company

whose associated company Myan Shwe Pyi Tractors Limited (MSP CAT) describes itself as Myanmar’s “premier Caterpillar dealership.”²⁰⁷

MSP CAT is since 2011 the authorized Caterpillar dealer in Myanmar²⁰⁸ and has at least 13 location offices “strategically located around the country”. According to Swedwatch understanding, this includes in Hpakant and Myitkyina in Kachin, and in the copper area in Monywa. According to MSP CAT, Caterpillar products have been available in Myanmar since 1995.²⁰⁹ In addition, there is substantial photographic evidence of Caterpillar machinery from Myanmar’s jade mines, and the presence of Caterpillar’s machinery was mentioned in all interviews that Swedwatch conducted with community members in Myanmar. It therefore seems beyond doubt that Caterpillar has sold mining machinery in Myanmar over the past decade.

In response to Global Witness’ allegations, Caterpillar said (in a letter to Global Witness dated 17 July 2015) that whilst Caterpillar cannot monitor the use of every piece of its equipment around the world, it “expects customers to use its products in a responsible, lawful and productive manner”.²¹⁰

In 2018, Swedwatch concluded that Caterpillar’s authorized dealer in Myanmar has not changed since Global Witness’ disclosed its allegations. At the time of writing, MSP CAT’s seemingly retains ties to the US-sanctioned narcotics kingpin. Caterpillar did not reply to Swedwatch’s question of whether it had conducted due diligence from a human rights perspective of its dealership in Myanmar.

FACT

Caterpillar’s full response to Swedwatch’s 13 questions

“Caterpillar has been in business for almost a century. Our customers are the reason we’re in business. They use our products each day to build roads, power communities, mine essential commodities and extract fuel to satisfy global energy demand. Quite simply, our customers use our products to help build a better world.

There are millions of Cat products active around the world today. Our machines and engines are built- and rebuilt - to last, so the life of each can span many years, many owners and many projects. When our customers buy our products and services, they know they will be supported by the most capable and reliable global service network - an independent dealer network totalling more than 170 and spanning about 190 countries around the world.

And, at the heart of Caterpillar’s business, is our longstanding code of conduct – Our Values in Action. They define what we do and who we are. Our Code of Conduct applies to the daily activities of every Caterpillar employee, company subsidiaries and affiliates worldwide as well as members of Caterpillar’s Board of Directors. Together, we are laying the foundation for the values-based culture and upholding the reputation of one of the world’s great companies – and strengthening it for tomorrow.”²¹¹

Jade from the Hpakant area was extracted in small-scale operations in the 1800s, and slowly evolved into medium-sized extraction in the late 1900s. With the import and use of heavy mining machinery in the early 2000s, the mode and speed of extraction dramatically changed. By 2014, mining companies began using machines that were significantly larger and with a value of up to 2 million USD apiece.





In its reply, Caterpillar referred to the high quality of its products, and stated that its “customers use our products to help build a better world”. Caterpillar’s efforts to address human rights risks in its supply chain were unclear, however. Information regarding HRDD processes, eventual findings and/or address of such findings, and efforts to exercise leverage was not forthcoming. Nor was communication on addressing the possible impacts from its products in Myanmar made available to Swedwatch. As such, the international frameworks to which this report refers do not appear to be satisfactorily streamlined in Caterpillar’s processes.

Caterpillar appears not to have attempted to identify negative issues related to its products in Myanmar, and that reports from organisations such as Global Witness, in which Caterpillar’s products frequently appear, seemingly have not translated into concrete action to prevent and mitigate potential negative impacts in relation to its products in Myanmar.

The findings in this report suggest that there is an urgent need for Caterpillar to intensify its HRDD in Myanmar and possibly also in other high-risk country contexts where Caterpillar sells its products and services. This would be in line with the sustainability commitments that Caterpillar has made, and with international corporate responsibility standards.

As the unquestioned global leader of producing mining machinery, Caterpillar can significantly influence the overall market’s adherence to international human rights standards. Swedwatch was not able to find evidence that Caterpillar is yet using this opportunity or seeks to contribute to positive change in Myanmar’s jade mining area.

Komatsu

After Caterpillar, Komatsu is the world’s largest machinery brand.²¹² The company is based in Tokyo, Japan and mainly manufactures construction, mining and utility equipment.²¹³ In its Corporate Social Responsibility (CSR) report from 2017, Komatsu expressed a strengthened commitment to environmental, social and governance issues, and stated that it will re-examine its community and social responsibility priorities. The report presents an in-depth analysis of how the company seeks to deliver on the SDGs and provides a thorough overview of how it has used internal processes to identify which CSR issues the company must prioritise, yielding 16 material issues.

Komatsu replied to Swedwatch in writing and showed openness to further dialogue. This is commendable and in line with the UNGPs.

By its own account, Komatsu has over the past ten years sold approximately 350 units of mining machinery, mostly dump trucks and hydraulic excavators, in Myanmar. Komatsu also supplies spare parts to service offices in the country (owned by its local distributor).

Komatsu has conducted general human rights risk assessments in relation to impacts from its business, and although it has considered conducting country specific human

rights risk assessments in the future, it has not yet done so. Komatsu has thus not conducted a human rights risk assessment in relation to its sales in Myanmar.

With regard to the company's impacts on local communities, Komatsu states in its Code of Business Conduct that "Companies cannot continue to exist without maintaining good harmony with the local community. Komatsu shall maintain close communication with our local community and actively seek harmonious balance of interests".²¹⁴ Based on its publicly available information, Komatsu appears to have only engaged with communities impacted by its manufacturing plants (located in Japan), and not with communities in high-risk contexts such as those in Myanmar.

When asked by Swedwatch if Komatsu has identified/been made aware of any local communities in Myanmar that have been negatively impacted by mining operations using Komatsu's products and services, the company said that it "has not identified any issues of this kind".

The company's "Worldwide Code of Business Conduct" states that "Komatsu shall support and respect the protection of internationally proclaimed human rights and make sure that we are not complicit in human rights abuses."²¹⁵ The company has also elaborated a public commitment related to the end use of its products in conflict, and stated that "Komatsu shall implement export controls for maintenance of international peace and security."²¹⁶

In response to Swedwatch's question about processes to monitor the end use of its products in Myanmar, and about the possibility of recalling products, Komatsu replied that it generally relies on its distributors to confirm end users/use and that the possibilities to recall machinery is limited. The company explained that it "agrees to sell the products only when Komatsu is satisfied that there are no concerns with respect to the end users and the end uses".

The company added that if it finds out that its products are used in any of the irregular circumstances as exemplified by Swedwatch, it "tries to take measures to prevent its products from being used in these ways". If Komatsu is made aware that customers use its products in businesses that have significant adverse human rights impacts, it refrains from making any further sales to such customers through its distributors.

Given that Komatsu has not identified any negative issues relating to the use of its products in Myanmar, it is Swedwatch's understanding that Komatsu has not yet tried to take any specific measures to prevent its products from being used in mine sites that are causing negative human rights impacts in Myanmar, including the jade and copper mines described in this report.

In response to Swedwatch's question about how the company is currently managing the risk of being implicated in gross human rights abuses in Myanmar and in other high-risk areas where it sells its products, the company did not address the question per se, but referred to the two general human rights risks assessments that were conducted in 2014 and 2107 (in cooperation with the non-profit company Business for Social Responsibility) to assess the human rights risks related to its business.



Komatsu and Terex Trucks machinery in a jade mine. Mining machinery is used to clear land and level out hills, excavate and drill deep open-pit mines, and to dump, pile up and transport large amounts of mine waste produced during the extraction process. Trucks are also used to carry jade out of the area.

Komatsu appears to have made progress on its sustainability commitments and reporting in recent years, and in efforts to understand how it can contribute to the SDGs. It is also encouraging that Komatsu expresses a stand against the use of its products in activities that are a threat to international peace. Swedwatch encourages Komatsu to elaborate on its commitment to also include subnational armed conflicts (such as those in Myanmar), and above all, to implement the necessary mechanisms to deliver on this commitment.

Swedwatch finds it troublesome that Komatsu has not attempted to identify negative issues related to its products in Myanmar, and that reports from organisations such as Global Witness, in which Komatsu's products frequently appear, do not appear to have raised red flags within the company.

The findings in this report suggest that there is an urgent need for Komatsu to intensify its HRDD in Myanmar, and possibly also in other high-risk country contexts where it sells its products and services. This would be in line with both its ambitious sustainability commitments and international corporate responsibility standards.

As the world's second-largest mining machinery brand, Komatsu can significantly influence the overall market's adherence to international human rights standards. Swedwatch was unable to find evidence that Komatsu is yet using this opportunity or seeks to contribute to positive change in Myanmar's mining areas.

Volvo Group/Volvo Construction Equipment and Terex Trucks

As part of the Volvo Group²¹⁷ (one of the world's leading manufacturers of trucks, buses, construction equipment, and marine and industrial engines), Volvo CE is one of the world's leading manufacturers of excavation equipment. It is headquartered in Sweden, and its products and services are offered in 145 markets globally. Mining equipment constitutes 5 percent of the company's different segments.²¹⁸

In 2014, the Volvo Group acquired the off-highway truck product line from Terex Corporation (not owned by the Volvo Group) and Terex Trucks, which formed a division of Volvo CE.²¹⁹ Terex Trucks is based in Scotland and manufactures seven models of dump trucks that are marketed as "no-nonsense machines" suitable for extreme environments which "perform extremely well in tough mining conditions". Terex Trucks does not provide any communication regarding sustainability issues or its address thereof; the Volvo Group engages in all such communication on its behalf. As part of the Volvo Group and as the owner of Terex Trucks, Volvo CE's reply to Swedwatch also applies to Terex Trucks, as requested by Volvo CE.

Volvo CE replied to Swedwatch in writing and showed openness to further dialogue. This is commendable and in line with the UNGPs. Without providing a quantitative number, Volvo CE replied that it does not have its own dealer in Myanmar, but sells its products, including to mining companies, via a private dealer.

FACT

"Terex Truck's Odyssey to Myanmar"

In the article "Terex Truck's Odyssey to Myanmar", posted on Terex Trucks's own website in March 2016, the company describes the successful delivery of 19 TR100s (91 tonne/100 ton capacity) and 10 TR60s (55 tonne/60 ton capacity) to the Hpakant jade area, bought by three mining companies via a Yangon-based dealer. As per the company's own admission, two of the mining companies were already Terex Trucks customers, having previously purchased six haulers and 20 trucks from Terex Trucks. According to the article, the new trucks were registered with the Myanmar government, and upon arriving to Hpakant quickly began "working almost 24/7, only undergoing scheduled stoppages for planned maintenance and servicing".²²⁰

In its Annual Sustainability Report (published in 2018), the Volvo Group states that it "continuously monitors changes in the international environment, particularly in conflict markets." The company recognises that "conducting business in certain parts of the world constitutes higher risks for potential human rights violations" and that the company strives to "identify, prevent and mitigate potential negative human rights impacts in our own organization and through our business relationships". The Volvo Group's efforts are focused where the company believes there are the highest risks of doing harm to people. The report also refers to the company's CSR and Sustainability plan which "helps us to contribute to the UN Sustainable Development Goals, do business with the intention of the UN Global Compact".²²¹

The Volvo Group introduced a new Code of Conduct²²² by the end of 2017 which focuses on compliance and ethics for its employees. In its reply to Swedwatch, Volvo CE stated that the company is “currently working to set standards relating to our relationship with business partners and other stakeholders” and added that the Volvo Group stands by its commitment to respect human rights.

In its reply to Swedwatch, Volvo CE stated that it has conducted due diligence of its dealer in Myanmar from a corruption perspective. Swedwatch concludes that Volvo CE has not conducted due diligence of its dealer from a human rights perspective.

As of 2018, Terex Trucks and Volvo CE mining equipment is distributed by the same private dealer in Myanmar, UMG Myanmar. The private dealer has more than 35 service offices throughout Myanmar, including in Hpakant and Myitkyina.

Volvo CE told Swedwatch that it is “aware of the situation in Myanmar in general related to impacts on local communities due to mining operations, such as jade mining”. Volvo CE also recognizes that “the risk level is generally judged to be high in jade mining, specifically in illegal mining, less in controlled mining”.

In spite of these observations, Volvo CE has not conducted a HRDD in relation to its sales in Myanmar. The company replied that it is not aware of any examples of negative community impact involving Volvo’s products in Myanmar. The company relies on assurances from its dealer in Myanmar, which has informed Volvo CE that its products are only sold to companies that have the required permits in place.

Volvo CE added that for sales that have a finance guarantee from the Swedish National Export Credits Guarantee Board, the company performs desktop assessments of the social, ethical and environmental risks related to its customers and the use of its products. So far, this process only applies to deals involving the Swedish National Export Credits Guarantee Board (which has not been the case in Myanmar), but Volvo CE is considering how to expand what it calls its “Responsible Sales” process.

In response to Swedwatch’s question about processes that exist to enable the monitoring of the end use of its products in Myanmar, and about the possibilities to recall products, Volvo CE said that it has very limited possibilities to influence how its products will be used throughout the product’s entire life cycle. The company also pointed out that it has no legal right to recall products after the ownership is transferred to another entity. Swedwatch acknowledges the legal obstacle that Volvo CE refers to in this regard.

In its reply to Swedwatch, the company said that it complies with applicable laws and regulations and requests all their dealers to do so. Volvo CE stated that “It is Volvo CE’s firm opinion that we do not in any way contribute to, or are complicit in, any human rights abuses in Myanmar”. The company also stressed the limited possibility of influencing the end use of its products throughout their life cycle.

Volvo CE appears committed to continuously improving its sustainability performance and seeking to understand how it can contribute to the SDGs. Swedwatch is



Active Volvo excavators in a jade mine in the Hpakant area.

encouraged to note that Volvo CE provided the highest level of detail in its reply of the companies surveyed for this report.

However, Volvo CE does not seem to have made significant attempts to identify potential negative issues related to its products in Myanmar, particularly as the company recognises that the risks of negative human rights impacts in the jade area are high.

Swedwatch concludes that Volvo CE underestimates the impacts from officially licenced jade mines in Kachin and fails to take the lack of rule of law in Myanmar's mining sector into account. Swedwatch is further troubled by the observation that Volvo CE, in spite of the numerous UN reports and direct engagement in 2015 by a Swedish non-governmental organization, Svenska Burmakommittén,²²³ on the situation in Kachin's jade area, and the company's own recognition that the risks of negative human rights impacts in the jade area were high, still has not conducted HRDD of any kind or made efforts to exercise leverage when its fully owned Terex Trucks (in 2016) openly communicated that 55 Terex Trucks mining machines have been sold in Myanmar; at least 29 of which were delivered directly to the jade mines in Kachin in 2016 (about three months after the Swedish NGO made contact with Volvo CE, according to Swedwatch's understanding).

The findings in this report suggest that there is an urgent need for Volvo CE to intensify its HRDD in Myanmar and possibly also in other high-risk country contexts where the company's products are sold. This would be in line with the ambitious sustainability commitments that the Volvo Group has made (for example related to conflict markets and HRDD) and with international corporate responsibility standards.

Summary of company replies

It is commendable that all companies replied to Swedwatch. Komatsu and Volvo replied to all 13 questions, and although their replies varied the level of detail, the two companies' willingness to reply and openness to continue the dialogue with Swedwatch is in alignment with the spirit of the UNGPs.

As Caterpillar did not respond to any of the specific questions posed by Swedwatch, it is impossible to draw detailed conclusions about all three companies' potential attempts to identify, prevent and mitigate the negative human rights impacts caused by the use of their products in Myanmar. The following observations are therefore based on the replies from Volvo CE and Komatsu:

Heavy mining equipment manufactured by Komatsu, Volvo CE and Terex Trucks has over the past decade - at least - been sold to Myanmar's mining sector. Based on photographic evidence from jade and copper mine sites in Kachin and Sagaing, and the fact that, according to its authorized dealer, Caterpillar's products have been available in the country since 1995, it seems beyond doubt, though not confirmed by the company, that Caterpillar has also done so.

HRDD

The companies have not conducted HRDD in relation to their sales in Myanmar and have not sought to identify the community impacts from the use of their equipment in Myanmar. This is contrary to the UNGPs which state that companies should carry out HRDD in regard to adverse human rights impacts that may be directly linked to their products through their business relationships.

The companies are not aware of any negative community impacts related to the use of their equipment sold in Myanmar. Notably, however, Volvo CE is aware of the general situation in relation to community impacts of mining, such as jade mining, and acknowledges that the risks are higher in illegal mining sites. Volvo CE has been informed by its local dealer that its products are only sold to companies that have the required permits in place to pursue mining activities. Komatsu also referred to such assurances from its dealer.

The companies have conducted due diligence of their local distributor/dealer from a corruption and financial perspective, but not in relation to the distributor's/dealer's preparedness to adhere to international human rights frameworks. (Komatsu's due diligence also included environmental aspects.)

Life-cycle monitoring

The life cycle of mining equipment is very long, and the second-hand market for mining machines is considerable. The companies reviewed by Swedwatch share the view that possibilities to monitor and influence the end-use of their products is very limited, and Volvo experiences that it is impossible to control the equipment throughout their life cycle. In spite of these difficulties, the companies could not demonstrate that they have made attempts to monitor the end use of their products or address the risk of smuggling in Myanmar or elsewhere. Instead, they appear to rely on their distributor's/dealer's assurances that the equipment is used in accordance with local laws and regulations.

The companies also experience a lack of possibilities to recall products if they are found to be used in irregular and harmful circumstances, such as illegal mining activities; activities that significantly benefit armed groups; or activities that have a significant negative impact on communities, the local environment or human rights. As pointed out by Volvo CE, the company has no legal right to recall products after the ownership is transferred to another entity.

In spite of a lack of possibilities to control the end-use or recall products (whether perceived or limited by law), the companies do not seem to have made any attempts to exercise – or seek to increase – their leverage toward business partners in Myanmar. As pointed out earlier in this report, doing so is in line with the UNGPs, which encourages companies to increase their leverage, for example, by collaborating with other actors.

Local business partners

According to the companies, they do not have their own services offices in Myanmar, but their distributor/dealer does. Caterpillar's and Volvo CE's distributor/dealer have service offices throughout Myanmar, including in Hpakant and Myitkyina. Komatsu provides spare parts to its distributor, which are used in the service offices (it is unclear where these offices are located).

Volvo CE and Komatsu have shared their Code of Conduct or similar policy with their local business partners in Myanmar. Their local partners are not contractually obliged to adhere to these codes or policies and they have not formally agreed to do so. Volvo CE explained that its dealer is independent and represents other companies as well. Similarly, Komatsu explained that its Code of Conduct only applies to Komatsu group companies, but that its agreement with its distributor in Myanmar contains a provision requiring the distributor to conduct business in a socially responsible and ethical manner.

The companies do not appear to have made any attempts to monitor the extent to which their business partners in Myanmar adhere to the code/policy that has been conveyed. Monitoring efforts have been limited to anti-corruption.

Small-scale freelance miners have set up simple constructions made of blue and green tarp in a jade mine.



To Swedwatch's knowledge, the companies lack adequate safeguards in relation to risks of being implicated in gross human rights abuses in Myanmar or other high-risk areas where their products are sold.

Volvo CE does not consider that it is, in any way, complicit in any human rights abuses in Myanmar. The company states that it complies with all applicable laws and regulations and requests that its dealers do the same. The company stresses that it has limited possibilities to influence the end use of its products, as they have a long life span and may be resold many times during their lifecycle.

Based on these observations, Swedwatch concludes that the three companies have failed to fulfil a basic concept of the UNGPs and of the OECD Guidelines for Multinational Enterprises, namely to conduct HRDD and seek ways - including using or increase leverage - to prevent or mitigate adverse human rights impacts that are directly linked to their products in high risk contexts.

They have apparently also failed to understand that the enforcement of environmental and safety standards in Myanmar remains largely absent, and that military-affiliated companies occupy a central position in the country's mining industry.

In the phrasing of the UNGPs, failure to take action over time can place a company in a situation of "contributing to" negative human rights impacts even though the impacts are caused by a customer. In the language of the UN Global Compact, accusations of complicity can arise when a company provides goods or services that it knows will be used to carry out abuses (direct complicity) or when the company is silent or inactive in the face of systematic or continuous human rights abuse (silent complicity). Drawing on the findings presented in this report, it is necessary that the three companies examined in this report demonstrate that these concepts are not applicable in relation to them and their products in Myanmar.

Summary of company responses and public information

	Question posed by Swedwatch (shortened)	Caterpillar	Komatsu	Volvo CE and Terex Trucks
1	<i>The Company states it has sold heavy mining machinery to Myanmar over the past 10 years.</i>	Question not addressed in the reply.	Yes. Approximately 350 mining machinery, mostly dump trucks and hydraulic excavators.	Yes, including to mining companies.
2	<i>The Company has processes in place to monitor the end use of its products in general and particularly in Myanmar.</i>	Question not addressed in the reply.	Generally relies on its distributors to confirm end users/use. Agrees to sell the products only when Komatsu is satisfied that there are no concerns with respect to the end users and the end uses. No specific information regarding Myanmar.	Limited possibilities to influence end use. No specific information regarding Myanmar. Desk top assessments of customers' end use of products are sometimes conducted (but not in Myanmar) and may become more frequent.*
3	<i>The Company has processes in place to recall its products if they are found to be used in illegal mining activities; activities that significantly benefit armed groups (state or non-state); or activities that have a significant negative impact on communities, the local environment or human rights.</i>	Question not addressed in the reply.	Limited possibilities to recall products. Tries to take measures if made aware of products being used in any of such circumstances.	Very limited possibilities to recall products. Has no legal rights to do so when ownership is transferred to another entity.
4a	<i>The Company has strategies in place to exercise/increase its leverage over third parties that through the use of the Company's products are responsible for significant adverse human rights impacts.</i>	Question not addressed in the reply.	Response does not mention leverage per se, but company "can refrain from making further sales to such customers".	Response does not mention leverage per se but refers to a 'responsible sales process' (which applies for sales with finance guarantee from Swedish National Export Credits Guarantee Board).
4b	<i>The Company has employed its leverage strategies towards its business partners in Myanmar.</i>	Question not addressed in the reply.	Reply indicates that this has not been done.	No.
5a	<i>5a. The Company has identified/ been made aware of any local communities in Myanmar that are negatively impacted by mining operations using the Company's products and services.</i>	Question not addressed in the reply.	No.	Aware of the situation in general related to community impacts from mining, such as jade mining. Not aware of any examples of negative community impacts involving Volvo's products or services. Has been informed by distributor that Volvo products are only sold to companies which have required permits in place.
5b	<i>The Company has shared with Swedwatch how it has responded to the findings (from the question above).</i>	Question not addressed in the reply.	Not applicable since company is not aware of any negative community impacts in Myanmar in relation to its products.	Not applicable since company is not aware of any negative community impacts in Myanmar in relation to its products.
6	<i>The Company considers its current policies and processes in reference to questions 2-5 to be sufficient.</i>	Question not addressed in the reply.	Unclear response.	Policies and processes are continuously reviewed and improved when necessary.
7	<i>The Company has conducted a specific HRDD related to its sale of mining machinery in Myanmar.</i>	Question not addressed in the reply.	No.	No. Risk level is generally judged to be lower in controlled mining, but high in jade mining, specifically in illegal mining. Distributor in Myanmar has informed company that products are only sold to companies with required mining permits in place.

	Question posed by Swedwatch (shortened)	Caterpillar	Komatsu	Volvo CE and Terex Trucks
8	<i>The Company has conducted due diligence of its Myanmar distributors, with emphasis on the local distributors' preparedness to adhere to international human rights frameworks, such as the UNGPs.</i>	Question not addressed in the reply.	From a business/financial perspective yes. Not from a human rights perspective.	From a corruption/financial perspective yes. Not from a human rights perspective. Relies on the distributor's own assurance to integrate social (including human rights) and environmental concerns into its business model.
9	<i>The Company has officially licensed service offices in Myanmar, through which the Company provides spare parts.</i>	Question not addressed in the reply.	The distributor has its own service offices. Komatsu only provides the distributor with spare parts for maintenance and repair services.	The distributor has its own service offices, including in Hpakant and Myitkyina. Did not reply whether Volvo CE/Terex Trucks provide spare parts to these offices.
10	<i>The Company has conveyed a Code of Conduct (or similar document) and other policies related to respect for the environment and human rights to its business partner(s) in Myanmar. The distributor has formally agreed to adhere to this code.</i>	Question not entirely addressed in the reply, but the Code applies to affiliates worldwide.	A general policy has been conveyed. No formal agreement by the distributor to adhere to the policy appears to exist.	The Code has been shared, but as the dealer also represents other companies, the dealer has its own Code (which Volvo CE shared with Swedwatch).
11	<i>Business partners that relate to the Company's sales and operations in Myanmar are contractually obliged to adhere to the Company's Code of Conduct (or similar).</i>	Question not addressed in the reply.	No. There is however a provision in the distributor agreement which requires the distributor to conduct business in socially responsible and ethical manner.	No. Distributors are governed by their own policies. (Swedwatch's comment: Respect for internationally declared human rights is one of the primary responsibilities identified by the local distributor in its Code.)
12	<i>The Company actively seeks to monitor to what extent each of its business partners in Myanmar live up to its Code of Conduct (or a similar document).</i>	Question not addressed in the reply.	Reply indicates that such monitoring does not exist.	Reply indicates that monitoring only exists from an anti-corruption perspective.
13	<i>The Company is able to explain in what ways it is currently managing the risk of becoming implicated in gross human rights abuses in Myanmar and in other high-risk areas where it sells its products.</i>	Question not addressed in the reply.	No specific measures appear to have been taken in relation to Myanmar. However, Komatsu has in cooperation with Business for Social Responsibility, conducted general human rights risk assessments to assess the human rights risk relating to its business.	No specific measures appear to have been taken in relation to Myanmar, but Volvo CE complies with all applicable laws and regulations and requests all dealers to do so.
	OBSERVATION MADE BY SWEDWATCH: <i>The Company publicly communicates that it adheres to international norms such as the UN Global Compact, UNGPs and/or states that it respects internationally recognized human rights.</i>	Yes.	Yes.	Yes.

6. Analysis and conclusions

In order for businesses to responsibly address the human rights risks that may arise as a result of their operations or transactions, they must adequately mitigate risks and address impacts. This entails a responsibility to manage the human rights risks to which a company is linked through provider–customer relationships: the UNGPs and the OECD Guidelines for Multinational Enterprises recognise this responsibility. If applied, this responsibility could make a marked difference for businesses, rights holders and states, and help contribute to the fulfilment of the SDGs.

As outlined in this report, Swedwatch’s research concurs with what numerous expert reports have already established – that the Myanmar jade mining sector is coupled with significant and salient human rights impacts. Several of those impacts are also associated with mining operations in Myanmar’s copper belt.

Based on these research findings, Swedwatch makes the following analysis: First, mining machinery produced by the three companies is used in the jade mining area. Therefore, there is a link between the companies’ products and the impact caused by the mining activities – even if the machinery has been smuggled. (See factbox on page 21.)

Second, there is a high degree of foreseeability. From a business and human rights perspective, mining is a high-risk sector, and for the reasons described in this report, Myanmar qualifies as a high-risk environment. In addition, media coverage and UN reports about the humanitarian crisis in Kachin and its linkages to jade mining has been publicly available for several years, including photos of actively employed Caterpillar, Komatsu, Volvo and Terex Trucks mining machinery in the mines. Furthermore, in 2015 at least two of the companies (Caterpillar and Volvo Group) were approached by human rights organizations that, in direct communication with the companies, raised concerns about the impacts caused from the use of their machinery in the jade mining area.²²⁴

Third, the impacts from the use of the mining machinery in the jade area are severe. Hundreds of people are estimated to have died in landslides and flooding since the mining operations started using heavy mining machinery; many households have lost their livelihood as their land rights have been violated; vulnerable groups such as women, children and migrant workers are exposed to significant health and safety risks; and the extensive environmental degradation affects people’s access to water and sanitation. The severity of these impacts implies a heightened expectation for the companies to act.

Fourth, without the mining machinery, the current mining activities in the jade area would not be possible. The scale of mining equipment to these operations is increasing the risk of negative impacts to occur. Without more efficient safeguards, the sale of mining machinery in Myanmar facilitates mining activities that are causing severe impacts.

In spite of these observations, the three mining companies are not able to demonstrate that they map or seek to address the human rights risks specific to their sales in Myanmar, or that they have used/sought to increase their leverage towards their business partners.

The OHCHR has clarified that a business involvement with an impact may shift over time, depending on its own actions and omissions; if a business is made aware of an ongoing human rights issue that is directly linked to its products, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact, it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of “contributing”.²²⁵

Based on this analysis, Swedwatch concludes that the burden of proof has shifted to the companies. Without further information about the companies’ efforts, it can be argued that they are at risk of - or indeed already are - contributing to the negative human rights impacts in Myanmar’s jade mining area (especially considering the “continuum” argument).

It can also be argued that by omission to act, the companies are at risk of - or indeed already are - complicit from potentially all three aspects (as defined by UN Global Compact Principle 2) to the human rights abuses in Kachin’s jade mining area.

In conclusion, all mining companies operating in Myanmar, and all mining machinery providers that sell products in Myanmar, must recognize these risks and act in accordance with international norms on business and human rights. Failing to do so inevitably exposes companies to risks of becoming implicated in the severe human rights violations that are taking place, particularly in the jade mining area, but also in other mining settings in the country.

With its abundant natural resources and a political transition that allows for an influx of foreign investment, millions of Burmese could be brought out of poverty in Myanmar over the next decades. It could also assist the Myanmar government’s endeavour to deliver on the SDGs. The ongoing national peace dialogue, which also includes hope for an end to the nearly 60-year long armed conflict in Kachin, makes these pressing issues even more urgent.

State actors, providers of mining equipment and mining companies would benefit from addressing human rights risks and working to resolve any existing issues. Doing so would allow local communities to take part in the benefits that could come from mining and enjoy the full set of human rights to which they are entitled.

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