

International Humanitarian Law and Corporate Accountability in a Conflict Zone (Kachin State, Burma/Myanmar)

Commentary by
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During the early 1990s, more than a dozen armed ethnic political resistance groups, including the Kachin Independence Organization (KIO), entered into ceasefire agreements with the State Law and Order Restoration Council, the military regime then in power. The agreements did not resolve the political disputes that animated the conflicts, many of which had lasted decades by this point. Rather, the ceasefire agreements dramatically expanded opportunities for different state and non-state actors to diversify their economic activities. The rapid and utterly unsustainable extraction of valuable natural resources in ceasefire areas was chief among them. The extraction took several forms in northern Burma/Myanmar, all of them driven by insatiable Chinese market demand.

Source: Quinn Ryan Mattingly



Source: Wikipedia

In Kachin State, the territorial gains the state's armed forces (*Tatmadaw*) achieved leading up to the ceasefire forced the KIO to abandon control over many of its lucrative jade mines, particularly those around the town of Hpakant. The loss of this critical multi-billion dollar revenue stream pushed the KIO to intensify the extraction of the only profitable natural resource still largely under its control: timber. China, which provides most of the transnational capital, was and remains the primary market for

both commodities.¹

Much of what we know about the inner workings of large-scale natural resource extraction in Kachin State is due to the sustained efforts of [Global Witness](#), an NGO that carried out extensive field research in the war-torn region over the past decade. Swedwatch, an independent research organization, makes an important contribution to this research in its 2018 report, [Overlooked and Undermined](#). The report carefully documents the impacts of jade mining in Kachin State, and it focuses much needed attention on an important and largely overlooked issue. Namely, the extent to which the foreign corporations that supply the heavy mining equipment should take action to address the “detrimental impacts [of the mining] on the local environment and communities.”

The [United Nations Guiding Principles on Business and Human Rights](#) (UNGPs) provide the analytical framework for the Swedwatch report and the actions it recommends the corporations in question (Caterpillar, Volvo, and Komatsu) take to mitigate them.

The question of corporate accountability in high-risk contexts where human rights violations occur is a complicated and highly contested one. Many corporations have taken voluntary steps to comply with best practices developed with such contexts in mind. Corporate Social Responsibility (CSR) initiatives, while not binding, offer one possibility for companies that wish “to go beyond” existing laws and take into account the moral and ethical quandaries that arise in business environments, especially high-risk ones. (The [Extractive Industries Transparency Initiative](#) is one well-known example.) But many corporations have resisted demands for

greater accountability. In the legal sphere, the principle of universal jurisdiction has in some cases enabled plaintiffs to hold corporate actors criminally liable for abuses, particularly when committed by actors they hired to provide armed security for their projects. (The *Doe v. Unocal* case is one such example. The U.S. court found the energy corporation guilty of aiding and abetting human rights violations in Burma/Myanmar.) These successes are extremely rare, however. The situation has prompted some legal scholars to explore whether [international humanitarian law](#) (IHL) provides another avenue to convince corporations to leverage their resources to ensure that basic human rights are protected and to provide recourse to victims when not.

The codification of IHL has its origins in the mid-19th century. The initial focus was on the development of new “rules of war,” as technological developments meant the old ones were no longer sufficient. IHL has grown significantly more complex since then, but the core goal has remained the same: to limit the effects of armed conflict, especially on civilians, by restricting the means (weapons) and methods (tactics) that can be used. Despite the proliferation of different agreements, the four Geneva Conventions of 1949, along with the two Additional Protocols of 1977 relating to the Protection of Victims of Armed Conflict, continue to serve as the cornerstone of IHL today.

According to International Committee of the Red Cross (ICRC), IHL prohibits all means and methods of warfare which:

- Fail to discriminate between those taking part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian

population, individual civilians, and civilian property;

- Cause superfluous injury or unnecessary suffering;
- Cause severe or long-term damage to the environment.

The on-again, off-again fighting in Kachin State has claimed thousands of lives since 2011, and nearly 100,000 people remain displaced along the China-Burma/Myanmar border.² The situation, best described as a chronic emergency, is one where IHL is not honored and serious human rights violations are the norm, and it is unlikely to change soon, as there are no political incentives to restart the stalled peace process.

But the fighting in Kachin State, although funded in part by the profits gleaned from jade mining, does not directly intrude upon the extractive enclaves themselves. Thus the civilians living in and around the enclaves are not subject to attack by the armed groups party to the conflict. (They are subject to violence at the hands of state security forces, however.) Furthermore, the foreign corporations in question do not employ private security companies, often the single biggest source of legal liability when they are found to have committed human rights abuses in connection with business operations.



Source: Soe Zeya Tun/Reuters

In the case of Burma/Myanmar, the corporations only sell heavy mining equipment to their customers, raising the question as to whether they should bear any responsibility for the problems the end-users create. Given these issues, IHL would not appear to apply. But it would be a mistake to dismiss the relevance of IHL to the situation.

[Human Rights Due Diligence](#) (HRDD) initiatives can support respect for IHL, thus they offer a logical direction to proceed. Indeed, HRDD may be more feasible in Kachin State's jade mines than it is with selected "conflict minerals," known as 3TG (tungsten, tantalum, tin, and gold), in the Democratic Republic of Congo and its neighboring states. One recent study found

that, out of 1,300 corporations surveyed, nearly eighty percent admitted they were unable to determine the origin of the 3TG minerals in their products. Only one percent could certify them as conflict-free beyond a reasonable doubt.³ Industrial jade mining, by contrast, relies upon large and technically sophisticated equipment, takes place in a small number of clearly demarcated areas, and occurs in comparatively stable settings. Moreover, jade, unlike 3TG minerals, is not mixed into alloys for use in electronics, which makes it nearly impossible to determine the geographic origin of the latter. Finally, jade mining has very short supply chains, and it is exported overwhelmingly in one direction—from Burma/Myanmar to China—making monitoring potentially easier.

These factors suggest it would be possible to introduce HRDD to the jade mining sector. However, the ability of the corporations to prevent or mitigate adverse human rights and environmental impacts is likely to be extremely limited, unless they hold a near monopoly on the heavy equipment needed (drills, excavators, dump trucks, and backhoes). Otherwise, competitors will simply take their market share. More importantly, the government of Burma/Myanmar not only lacks the political will to enforce relevant existing laws, it does not have the capacity to do so even if it desired. The situation may change over the long term, but the unwillingness of the present government to implement meaningful reforms, including genuine regulatory oversight, means it will not change over the short-term.

The onus currently rests upon the corporations to take action as a result. But what if the corporations do not wish to take steps to comply with the UNGPs and other international norms on business and human

rights? The ICRC has recently pointed out that some business activities during an armed conflict may fall under IHL and, if certain conditions are met, qualify as war crimes. Three of them are relevant here, as all of them are widespread in the jade mining concessions: 1) the unlawful taking of property; 2) population displacements; and 3) severe damage to the environment. The three violations arguably constitute a form of [pillage](#), which is forbidden under IHL. Traditionally, the prohibition on pillage pertained to acts of theft, either by individuals or organized groups, such as military units. The definition broadened after WWII to include the appropriation of property or rights attached to it without consent of the owner in the context of armed conflict. In IHL cases, these acts include illegal exploitation, looting, and the plundering of natural resources. The heavy mining equipment in Kachin State enables all three activities, and on a scale that would not be possible without it.

Again, a clear case can be made for the corporations to respond to these breaches of IHL. Compelling them to do so remains extremely difficult, however. Corporations, although considered “persons” in legal terms, are not subject to the existing mechanisms for determining criminal accountability, which focus primarily on individuals. Legal challenges may eventually open up this possibility, as some of the language in IHL does not fully rule it out. In the meantime, alternative channels to pursue non-criminal (i.e. civil) responsibility for breaches of IHL remain the best option where corporations are concerned. Government-imposed “smart sanctions,” targeting particular sectors of a country’s economy, such as mining, are one example.⁴ But most experts agree. Domestic legal frameworks are absolutely critical for the effective application of IHL on the

operations of corporations abroad. Domestic courts, in the corporation's home country, can provide a forum, procedures, and remedy for victims that are not otherwise available in international arenas. Domestic

legal action may thus be the only viable course of action, if the corporations refuse to leverage their influence to mitigate serious rights violations.

Disclaimer: The views expressed are my own and do not necessarily represent those of Swedwatch.

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¹ Kevin Woods, "[Ceasefire Capitalism: Military-Private Partnerships, Resources Concessions, and Military-State Building in the Burma-China Borderlands](#)," *Journal of Peasant Studies* 38, no. 4 (2011): 747-770.

² Refugees International, [Suffering in Shadows: Aid Restrictions and Reductions Endanger Displaced Persons in Northern Myanmar](#) (Washington D.C.: RI, 2017).

³ Yong Kim and Gerald Davis, "[Challenges for Global Supply Chain Sustainability: Evidence from Conflict Minerals Reports](#)," *Academy of Management Journal* 59, No. 6 (2016): 1896-1916.

⁴ In November 2017, the U.S. Government re-imposed sanctions on jade and rubies mined in Myanmar in response to the ongoing ethnic cleansing campaign targeting Rohingya Muslims. The sanctions also require the U.S. Treasury Department not to support international financial assistance programs that partner with enterprises the Myanmar military owns.