



# STILL OVERLOOKED

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

**Report #97**

**SWED  
WATCH**



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, ACT Church of Sweden, Diakonia, Fair Action, Solidarity Sweden-Latin America, and the Swedish Society for Nature Conservation (SSNC). This report, which can be downloaded at [www.swedwatch.org](http://www.swedwatch.org), is authored by Swedwatch. The report has been conducted with support from ACT Church of Sweden.



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Cover: The moment in which a truck unloads mining waste is dangerous as large numbers of informal jade diggers line 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.

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## Table of contents

Executive summary .....	4
Recommendations.....	5
<b>1. Introduction .....</b>	<b>7</b>
Methodology .....	8
<b>2. Human rights and jade mining in Kachin .....</b>	<b>8</b>
<b>3. Swedwatch’s investigation in the jade mining epicentre.....</b>	<b>13</b>
Landslides.....	13
Flooding and access to clean water .....	16
Impacts on children and adolescents.....	17
Sexual exploitation and health impacts on women and girls .....	18
Jade diggers and heroin .....	19
Jade and the outlook for peace in Kachin.....	22
<b>4. What are companies expected to do?.....</b>	<b>22</b>
<b>5. Company dialogues .....</b>	<b>30</b>
Caterpillar .....	30
Komatsu.....	32
Volvo CE .....	33
<b>6. Conclusion .....</b>	<b>37</b>
Notes .....	41

# Executive summary

Myanmar is a high-risk environment from a business and human rights perspective. Pockets of the country constitute some of the most complex environments in the world; one example is the mineral rich Kachin state in the northern part of the country, home to “the world’s longest running civil war”. The Myanmar military and the ethnic armed group the Kachin Independence Army (KIA) have for decades engaged in a territorial dispute in Kachin state, profiting from hundreds of millions of dollars from the trade of a single mineral: jade.

90 percent of the world’s jade, a valuable gemstone used mainly in jewellery, is mined in Kachin state, particularly around Hpakant Township. Since the early 2000s, the dramatically increased use of heavy mining machinery in Myanmar has enabled the extraction of minerals – including jade – at an unprecedented speed. More than ten thousand mining machines were used in the jade mines in 2016, including those produced by three of the world’s largest mining equipment companies, Caterpillar Inc., Komatsu Ltd, and Volvo Construction Equipment. Swedwatch’s understanding is that there is no reason to believe that this number has decreased since then.

In 2018, Swedwatch published the report *Overlooked and undermined - Communities affected by jade mining operations in Myanmar, and the responsibilities of companies providing machinery*. The report showed how negligent use of mining machines in Kachin’s jade mines has created significant environmental destruction, and that irresponsible mining practices are linked to a range of severe human rights impacts, including hundreds of deaths in landslides, loss of land and livelihoods, and lethal traffic accidents involving mining trucks. The mining context is further characterised by endemic heroin abuse among youth and jade diggers, and by commercial sexual abuse of women and girls; overall a context that stands in stark contrast to Myanmar’s and the international community’s commitment to Agenda 2030 and its 17 Sustainable Development Goals (SDGs).

This report is a follow-up to the 2018 publication and shows how the SDGs continue to be undermined in Kachin state. Community members consulted for this report testify that the situation around Hpakant Township has deteriorated further, especially for the young. Children as young as eight are said to be addicted to heroin, and girls from the age of 14 are used for sexual commercial abuse, including by military and police. According to media reporting, at least 210 persons have died in landslides in the jade mines since mid-2018. Given the difficulties in recovering bodies after an accident, the number of fatalities is likely higher.

The UN Guiding Principles on Business and Human Rights (UNGPs) clearly state that businesses have a responsibility to seek to prevent or mitigate the adverse human rights impacts linked to their products – even when the impacts are caused by a third party, such as a customer. The UNGPs also state that circumstances deemed “high risk” from a human rights perspective should be the highest priority for company action. When selling mining machinery – themselves high-risk products – on high-risk markets, companies should therefore make it a priority to ensure that their sales processes take into account the risk that their products may be used in ways that cause adverse impacts.

Although the widespread negative impacts of irresponsible mining practices in Kachin state have been well known for years, the three world-leading international mining machinery companies consulted by Swedwatch were in 2018 unable to demonstrate that they had conducted human rights due diligence – a core concept of the UNGPs and other responsible business standards – in relation to their sales in Myanmar. When asked by Swedwatch about their efforts to better align their sales practices with responsible business standards in the research for this follow-up report, only Volvo CE had taken initial steps to address the concerns raised by Swedwatch. Caterpillar and Komatsu were still not able to demonstrate credible efforts in alignment with the relevant standards.

The global mining machinery companies’ seemingly blatant lack of safeguards in response to this context is a matter of serious urgency and should be made a priority by Caterpillar, Komatsu and Volvo CE, and by all companies selling mining equipment in Myanmar. As the unquestioned global mining machinery leader, Caterpillar in particular is uniquely positioned to exert leverage and to influence the overall sector to adhere to international human rights standards.

This report uses the example of Myanmar’s jade mines to illustrate the risks of selling mining machinery in high-risk contexts without conducting adequate human rights due diligence. Failing to do so in relation to sales in Myanmar’s jade mining area in Kachin state arguably exposes some of the world’s largest mining machinery providers to the risk of contributing to or being directly linked to the many international human rights and international humanitarian law violations in the area perpetrated by the country’s military.

With this report, Swedwatch points to the need for states to adopt legislation on mandatory human rights due diligence and urges mining machinery producers as a sector to step up to their responsibilities as outlined in the UNGPs. Failing to do so will result in continued harm for people and the environment, and prevent the fulfilment of the SDGs long beyond 2030.

## Recommendations

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

- Urgently conduct human rights due diligence (HRDD) processes and human rights impact assessments (HRIA) to identify and address the risks and impacts of customers’ operations in the Myanmar mining sector. HRDD and HRIA activities should be conducted with a gender perspective and should follow the Organisation for Economic Co-operation and Development Due Diligence Guidance for Responsible Business Conduct or an equally recognised guidance.
- Maintain ongoing dialogue with human rights and environmental defenders and other actors that are true representatives of impacted communities so that issues

identified during the HRDD and HIRA can be prevented and addressed according to the rights holders' best interests.

- Commission external legal counsel to determine how to contribute to the remediation of impacts in Kachin's jade mining area as per each company's contribution to the impacts.
- Step up efforts regarding leverage until customers' respect for human rights related to the use of products in high-risk contexts can be proven to be satisfactory. Forge partnerships with peers and other relevant parties to create approaches that are in the local communities' best interests.
- Enhance communication of the activities and results of companies' HRDD and HRIA in accordance with the concept of "know and show" as outlined in the UNGPs.

#### *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 HRIA that meet the highest international standards.
- Enforce requirements on mining companies to regularly provide lists of the number and nature of the machinery employed at each mine site.

#### *To home states of companies that export mining equipment, including the United States, Japan and Sweden*

- Adopt legislation on mandatory HRDD, including accountability measures, to 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). The legislation should require that HRDD are conducted with a gender perspective.
- Ensure that Export Credit Agencies condition credits to export of mining machinery, by requiring HRDD that covers the entire life cycle of the product.
- 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.
- Through their embassies, facilitate dialogue and cooperation between relevant stakeholders in high-risk countries and sectors in which US/Japanese/Swedish/other companies operate, and strengthen civil society by enabling representatives of affected parties and communities to be a part of such dialogue without fear of retaliation.

## 1. Introduction

Thousands of mining machines are present in Kachin's jade mines,<sup>1</sup> including those produced by 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 Trucks (referred to hereafter as Caterpillar, Komatsu, Volvo CE and Terex Trucks, respectively).

Swedwatch's report *Overlooked and undermined - Communities affected by jade mining operations in Myanmar, and the responsibilities of companies providing machinery*, published in 2018, presented the findings of research conducted by Swedwatch in the jade-rich state of Kachin, in northern Myanmar. The report showed that seemingly thousands of people in the jade mining area in Kachin state 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.

The report also examined companies' responsibilities regarding their customers and end users of their products based on the UN Guiding Principles on Business and Human Rights (UNGPs), the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the UN Global Compact, and other international norms on business and human rights – specifically regarding the sale of mining machinery in high-risk contexts such as Myanmar.

**This report is a follow-up to the 2018 publication *Overlooked and undermined*. It outlines the extent to which the three world-leading mining machinery producers have attempted to enhance human rights safeguards in relation to sales in high-risk markets such as Myanmar, two years after Swedwatch presented its findings to the three companies. It also discusses the companies' responsibilities in light of a UN investigation into the Myanmar military's economic interests in Kachin's jade mines, conducted in 2019 by a fact finding-mission specifically established by the UN Security Council to investigate alleged human rights violations by Myanmar's military and security forces.<sup>2</sup>**

Swedwatch's dialogue with the three companies in early 2018 indicated, in Swedwatch's view, that their implementation of international norms on business and human rights for sales in Myanmar, was low. For instance, none could demonstrate adequate efforts to identify, mitigate or prevent the potential adverse human rights impacts of their products sold in Myanmar, and none had conducted human rights due diligence (HRDD) – a core responsibility under the UNGPs. This, concluded Swedwatch, is not in alignment with the UNGPs or the OECD Guidelines.

Swedwatch's first report reviewed how companies that, through their omission to respond to well-known human rights abuses linked to their products can be considered to 'contribute to' such abuses (as defined by the UNGPs), and risk being

considered complicit (as defined by UN Global Compact Principle 2) in the abuses. Swedwatch concluded that, based on the findings presented in its report, the three companies should demonstrate clear steps to fulfil their responsibilities under the UNGPs and in alignment with their own policies in relation to sales of their products in Myanmar.

## Methodology

As part of this follow-up report, Swedwatch asked the three companies, on two separate occasions, what measures they had taken in response to the human rights and environmental impacts outlined in the initial report and in other reports and news, and how these efforts had been integrated into their sales processes: First, Swedwatch shared its questions for this follow-up report with the companies in April 2019. Second, after the publication of the UN Independent Fact-Finding Mission on Myanmar published its report in August 2019, which concluded that, given the military's far-reaching economic interests in the jade mines, any company doing business in Kachin jade mining areas should conduct heightened due diligence, Swedwatch offered the three companies the option to update their answers from April 2019. Only Volvo CE chose to do so. In addition, prior to the publication of this follow-up report, the companies were offered the opportunity to read the full report and provide statements on Swedwatch's website.

Jade mining is concentrated around Hpakant Township. The area around the city is officially closed to foreigners, including humanitarian workers. For its first report, Swedwatch interviewed community members from Hpakant in August and September 2017, as well as the secretariat of a network of civil society organisations, which since 2004 has documented the impacts of natural resource extraction in Kachin state. Due to the Myanmar government's repressive measures against those who raise human rights concerns, the interviews were conducted in a secure location in the state capital, Myitkyina. For this follow-up report, Swedwatch organised interviews with two local civil society organisations from Hpakant, and with experts on Myanmar national resource management and international law. For security reasons, the interviewees chose to remain anonymous.

## 2. Human rights and jade mining in Kachin

Myanmar is a high-risk environment from a business and human rights perspective, and the exceptionally mineral-rich Kachin state is one of the country's most complex areas in this regard. Since the early 2000s, the dramatic increase in the use of heavy mining machinery in Myanmar has enabled the extraction of the country's many minerals at an unprecedented speed. In addition to its wealth of gold, rubies and amber, Kachin state is home to the country's valuable jade extraction industry.

Myanmar's armed forces, known as the Tatmadaw, dominate much of the mining industry in this area, particularly in relation to jade.<sup>3</sup> Due to the thriving illicit trade and non-transparent ownership structures of the jade trade, the billions of dollars generated remain concentrated in the hands of a few<sup>4</sup> – principally the military and its crony associates. Several ethnic armed groups also benefit from control over mine sites and smuggling.<sup>5</sup>

Due to the rapid expansion and irresponsible jade mining practices in Kachin state, local communities have experienced widespread negative human rights impacts and environmental devastation. Residents in Kachin's jade epicentre – an area around Hpakant Township – have paid a high price for the irresponsible business practices and the human rights context that has evolved around the jade trade. The impacts are experienced by all residents, but the hundreds of thousands of small-scale miners who work informally in the jade mines, and women and children living in the area are particularly impacted, especially by the reoccurring landslides, commercial sexual abuse, and flagrant access to cheap heroin. As the expansion of jade mining operations have led to loss of farmland and loss of natural sources of drinking water, local household economies have been severely affected.<sup>6</sup>

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 the rapid pace of extraction, and a study from 2017 established a record loss of intact forests in the area.<sup>7</sup> It remains unclear what long-term effects the deforestation will have on the local climate, but local residents interviewed by Swedwatch have experienced increases in temperature, which they attribute to the deforestation that is driven by mining.<sup>8</sup>

Media coverage of the human rights situation in Hpakant and numerous UN reports about the humanitarian crisis in Kachin state and its linkages to jade mining have been publicly available for several years, including photos of actively employed Caterpillar, Komatsu, Volvo CE and Terex Trucks mining machinery. The degree of foreseeability for human rights risks in Kachin state is therefore high.<sup>9</sup>

FACT

### The value of Myanmar's jade

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.

Myanmar accounts for approximately 90 percent of global jade production. The main market for jade is in China, where it has traditionally been highly valued and associated with royalty.<sup>10</sup>

The country's official jade sales were estimated at EUR 671 million in 2016–17. Yet the true value of the industry is thought to be much larger, as 60-80 percent of the jade (by volume) is smuggled out, robbing the government of billions in taxes.<sup>11</sup>





Jade is mined in Kachin state, mainly around Hpakant; a city officially closed off to foreigners.

The red circled cities indicate where Swedwatch conducted interviews in 2017 and 2019.

Rakhine state came into renewed focus in 2017 due to the Myanmar military's persecution of the Rohingya.

A large share of the jade mines is secured by actors that for decades have engaged in armed conflict over territorial control; the Myanmar military, its aligned militias, and the ethnic armed group the Kachin Independence Army (KIA).<sup>12</sup> Given that the jade trade annually brings hundreds of millions of dollars to the conflicting parties, experts agree that it plays a key role in Kachin's ongoing armed conflict, commonly referred to as "the world's longest running civil war".<sup>13</sup>

The intensity of fighting between the Myanmar military and the KIA in Kachin state has fluctuated for around 60 years, and reignited in 2011 after a 17-year ceasefire.<sup>14</sup> The fighting has led to the killing of thousands of people as well as waves of displacements, and it continues with regular bursts of intensity. Close to 100,000 persons live in the over 100 camps and other provisional sites for displaced civilians that are scattered throughout Kachin state. Many receive no humanitarian aid as the Myanmar government has not permitted the UN to access certain areas since 2016. For civilians



Jade comes in different colours, but most commonly in the shade of green. China is by far the largest market, where jade for centuries has been associated with royalty and prosperity. Today, jade is a status symbol among the wealthy. One kilo of jade can be sold for millions of dollars on foreign markets. PHOTO: SWEDWATCH

that have been displaced multiple times, the risk of psychological trauma increases, especially for elderly people. It also disrupts children's education.<sup>15</sup> In addition to the fighting, landmines and unexploded ordinance makes it difficult for those displaced to return home.<sup>16</sup>

There are no signs that the human rights situation in Kachin's jade mining area – where some of the fighting between Tatmadaw and the KIA takes place – has improved since Swedwatch's initial report *Overlooked and undermined*. On the contrary, several UN reports covering the human rights situation in Kachin state signal that conditions are deteriorating, particularly for children, women and small-scale miners.<sup>17</sup>

In mid-2019, a report by the UN Independent International Fact-Finding Mission on Myanmar described human rights and humanitarian law violations in Kachin state, and how the Myanmar's military's business and military interests in the jade industry directly contributes to human rights violations under international law.<sup>18</sup> The report concluded that, given the global reach of Myanmar's jade trade, the involvement of the Tatmadaw in jade extraction, and the Tatmadaw's responsibility for human rights and international humanitarian law violations perpetrated in mining areas, businesses should ensure they are not contributing towards, or benefiting from, those violations.<sup>19</sup>

## Conclusions of the UN Independent International Fact-Finding Mission on Myanmar

In 2017, the UN Human Rights Council established a fact-finding mission to investigate alleged human rights violations by Myanmar's military and security forces. In August 2019, the Fact-Finding Mission published its report *The economic interests of the Myanmar military*,<sup>20</sup> with a more detailed version released the following month.<sup>21</sup> The two reports concluded that the jade mining industry in Kachin state is dominated by the armed forces of Myanmar, the Tatmadaw, and that the Tatmadaw's economic interests enable its conduct.

In relation to the Tatmadaw's economic interests in Myanmar, the Fact-Finding Mission further concluded that:<sup>22</sup>

- The Tatmadaw's economic activity in some sectors is linked to its military strategy. This is particularly evident in the Tatmadaw's involvement in jade mining in Kachin where its economic interests overlap with its military objectives.<sup>23</sup>
- In relation to jade and ruby mining in Kachin state, "the Tatmadaw has used forced labour to increase mining revenue and has used mining areas as staging grounds for abductions, forced labour, sexual violence and murder. The perpetration of these serious violations suggests that civilians, in particular women, living and working in mining areas are at a particularly heightened risk of experiencing sexual violence by the Tatmadaw".<sup>24</sup>
- Many of the human rights violations that the Fact-Finding Mission documented "are also violations of international humanitarian law and some rise to the level of war crimes, due to their association with non-international armed conflict."<sup>25</sup> On reasonable grounds, concluded the Mission further, "the Tatmadaw's business and military interests in the jade and ruby extractive industries benefited from and directly contributed to international human rights violations in conflict-affected areas in Kachin State."<sup>26</sup>
- The Fact-Finding Mission found specifically that hostilities around Hpakant Township in Kachin State are inextricably linked to the natural resource economy in these areas.<sup>27</sup> Human rights and international humanitarian law violations, including forced labour and sexual violence, have been perpetrated by the Tatmadaw in mining areas, particularly in Kachin State, in connection with their business activities.<sup>28</sup>
- The Fact-Finding Mission also "found reasonable grounds to conclude that **any extractive industry business** seeking to do business or doing business in Kachin and Shan States should fulfil their responsibility to respect human rights by not contracting with Tatmadaw-related businesses (including their subsidiaries) directly or indirectly – i.e. they **should not** source from or **have Tatmadaw-related businesses in their supply chain, given the involvement of the Tatmadaw in natural resource extraction and its responsibility for violations of international human rights law and international humanitarian law in mining areas. Doing so could expose them to criminal and civil liability**".<sup>29</sup>

One of the Fact-Finding Mission's key recommendations was that "No business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into a business relationship of any kind with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them, including subsidiaries, or their individual members".<sup>30</sup>

Based on these findings, the Fact-Finding Mission concluded that "**any businesses seeking to or doing business in these areas should conduct heightened due diligence to ensure it is not otherwise causing, contributing to or directly linked to the many international human rights and international humanitarian law violations in the area perpetrated by the Tatmadaw**".<sup>31</sup>

Note: Emphasis added by Swedwatch.

## 3. Swedwatch's investigation in the jade mining epicentre

The following builds on reporting by the UN and reliable media sources, interviews with experts and, above all, on testimonies from residents in Hpakant collected by Swedwatch in Myanmar in 2017 and 2019. It outlines how the jade mining sector impacts the lives of several hundred thousand women, men and children, and the ways in which mining machinery has been used to irreversibly change the landscape in Kachin state.

### Landslides

Due to irresponsible mining practices that involve large mining machines, landslides are a constant threat in the jade mining area, and they are particularly frequent when monsoon rain destabilises banks and slag heaps. Up to hundreds of jade diggers are killed in landslides each year. As bodies are quickly buried and disappear in the sliding land masses, they are often not recovered.

In its first report, Swedwatch referred to one of the most well-known landslides in Hpakant, in which 120 people were reportedly killed in a single landslide from a mining waste dump in 2015. A community leader from Hpakant helped in the rescue search and recalled in her interview with Swedwatch: "*We managed to find 118 bodies, but we estimate that 400–500 people died that night. After three days of digging for bodies, the smell was so bad that we had to stop.*"

Landslides have been frequent in Hpakant's jade mines since Swedwatch published its first report. Interviewees for this follow-up report estimate that around 20 more have taken place since then, but media is not able to report on all incidents. To list a few of those that have been documented:

- In May 2018, 20 jade diggers were confirmed to have died and many more are believed to have been buried in the soil that collapsed in the landslide.<sup>32</sup>
- In July 2018, an old pond of mud collapsed in a jade mine, killing at least 100 people according to estimates from survivors and local politicians.<sup>33</sup>
- In February 2019, six jade diggers died when a 45-metre cliff wall collapsed at a jade mine. Ten miners had died in previous weeks from similar collapses and landslides at mining sites in the area.<sup>34</sup>
- In April 2019, 54 formally employed jade miners were killed when a large refuse pile collapsed late at night, burying them along with 40 mining machines. The Ministry of Information identified one of the two companies involved in the event as Myanmar Thura Gems – which is a confirmed buyer of Volvo CE's brand Terex Trucks.<sup>35</sup> Investigations revealed that Myanmar Thura Gems did not have a permit to mine in the blocks affected by the collapse.<sup>36</sup>



Mining equipment of different kinds 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.

“Under the military government, jade operation permits were issued in areas where local people lived. Villagers from the area in this photo were forced to relocate with little compensation. Local government and local authorities just ignored their responsibilities” explained a local resident.





After the April 2019 incident, the UN Special Rapporteur on the situation of human rights in Myanmar urged the government to consider declaring an environmental emergency in Hpakant and to halt all mining indefinitely until a proper regulatory framework that met international standards could be adopted and enforced; not just a three-month moratorium during the rainy season.<sup>37</sup>

The Ministry of Resources and Environmental Conservation subsequently issued an order to halt all jade mining around Hpakant during the months of July to September.<sup>38</sup> It is unclear whether the ban was adhered to, since at least three additional landslides took place during that time:

- In late June 2019, another two jade miners died in a landslide.<sup>39</sup>
- In mid-July 2019, four young miners were never found and believed dead after the collapse of a suspended jade mine.<sup>40</sup>
- In late July 2019, at least 19 mining security guards and police officers died in a jade mine. The upper part of a mine collapsed and fell 200 meters onto those sleeping below, and it is unclear how many informal jade diggers were killed in the same event.<sup>41</sup>

Based on this reporting, more than 210 people died in landslides due to irresponsible practices in the jade mines between May 2018 and July 2019. Given the inaccessibility of the area and other reasons outlined in this report, the total number of fatalities during this period is likely significantly higher.

## Flooding and access to clean water

*Overlooked and undermined* described how the poor management of mining waste has impacted the large rivers in the area, causing irregularities in the water flow. This has led to two kinds of risks that are new to residents of Hpakant – floods and a shortage of clean water.

In 2002, over 1,000 people were reportedly killed when floodwaters inundated a jade mine in Hpakant.<sup>42</sup> Since then, the continued dumping of waste soil into the Uru River by jade mining companies causes flooding that is said to inundate hundreds of houses each year.<sup>43</sup>

During the rainy season, schools are frequently forced to close due to inundation, causing students to miss out on their education. A woman interviewed by Swedwatch for this report explained: “The school had to be closed for one month due to the flooding. There was no action taken by the central government.”

In terms of access to clean water, local communities have intensified protests over alleged water pollution. In late 2018, residents of 22 villages in Kachin demanded an end to mining activities in their region, complaining that the water pollution from the jade mining operations is causing drinking water shortages and skin problems. Villagers whose livelihoods depend on fishing reported that their incomes have

decreased because consumers from neighbouring China have rejected seafood from the suspected toxic waters in the area.<sup>44</sup>

One interviewee explained to Swedwatch: *“People can no longer access clean water; they can only access water near the mining area. The water is diverted for mines, used and then discarded again. This is the only drinking water available.”*<sup>45</sup> She added: “Every year, communities have requested the Hpakant Township governor and Ministry of Health [to take tests], but nothing has ever been tested.”

Due to the dramatic loss of access to clean natural drinking water, community members rely on buying bottled water. One interviewee explained to Swedwatch: “The cost of buying safe drinking water per year has risen to over [400 Euro per family]. It used to be for free in our rivers.”<sup>46</sup>

## Impacts on children and adolescents

In its initial report, Swedwatch described that children and adolescents are paying a high price for the increasingly unsafe environment and the social impacts brought about by the mining activities in Hpakant, along with the easy access to heavy drugs. Drugs were seen as the largest problem for the young, for several reasons. Apart from risking lethal overdoses, they 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.

One man explained: *“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.”* The leader of one community organisation interviewed for this report said: *“The situation for children has worsened in many ways [over the past year]. You can get drugs easily. Kids aged 8 and 9 are addicted to drugs.”*<sup>47</sup>

She added: *“Because of the difficult family financial situations, parents cannot look after and support their kids well, as they are always working. The Hpakant area looks like a conflict area, because there are a lot of army like Burmese, army Kachin army, and others. So solving problems is difficult because there are so many players. A lot of young people do not want to study properly, they prefer to find jade and then to buy drugs. Young people are being ruined by drugs.”*

Commenting on how the young are affected by the trucks used in the mines, she said: *“Another point is that from east to west trucks are crossing the village to dump waste and the villages are becoming so dusty. [...] It affects kids a lot.”*

A member of another local organisation elaborated on the children’s health situation, which impacts their school attendance: *“Children suffer from inflammation in the lungs [caused by dust from the mining]. They also suffer from diarrhoea and liver swelling disease due to impacts from the jade mining. [When they are sick], it affects their education. Children can’t access clean water, instead they have to drink the dirty water near the mining area.”*



She added: *“For sure there are many psychologically and emotionally affected children from the jade mining and its big machines. Also, many children have lost their parents in landslides.”*

Interviewees also mentioned that children are exposed to life-threatening environments. One interviewee explained: *“Children have been killed by stones falling on houses and on their way to school. Old mines are also dangerous, children fall into the water holes and down in pits.”*<sup>48</sup>

Another woman described the situation for the young: *“There is no social development or good schools for young people in the region. For them, it is like someone is running without knowing the goal and destination.”*<sup>49</sup>

## Sexual exploitation and health impacts on women and girls

Swedwatch reported in 2018 that, in addition to landslides and flooding that can expose women to life-threatening risks due to their traditional responsibility for washing clothes in natural ponds that can suddenly be hit by a mudslide, women are also vulnerable to other severe safety and health risks in jade mining areas, including sexual exploitation. This was confirmed in the UN Fact-Finding Mission’s report, which concluded that the Tatmadaw has used jade mining areas in Kachin as staging grounds for sexual violence and other serious violations, and that women living and working in the mining areas are at a particularly heightened risk of sexual violence perpetrated by the Tatmadaw.<sup>50</sup>

As described in Swedwatch’s original report, the jade industry is male dominated; there are therefore few job opportunities for women in Hpakant. This forces many women to take jobs as maids or in massage parlours, most of which serve as fronts for brothels. Many of the women are said to be sexually abused, and use heroin to cope; many die of AIDS and other sexually transmitted diseases.

One woman interviewed for this report explained: *“The girls are often 14–15 years old. Everyone is buying [sex], jade diggers, military, police, civilians... Young beautiful virgins cost more: [17 Euro] for 30 minutes is standard price and then it goes up or down depending on other ‘qualities in the girl’.”*

The overall conflict situation in Kachin, which is partly driven by the jade trade, is also said to facilitate cross-border human trafficking.<sup>51</sup> In July 2019, the UN Special Rapporteur reported that women and girls, some as young as nine, are being trafficked from northern Myanmar to neighbouring countries for sex work. She noted that the long conflict in Kachin state (and in the northern part of the adjacent Shan state) has left families financially desperate, making women and girls vulnerable to human trafficking.<sup>52</sup>

Women’s economic situation can also be impacted by landslides. The leader of one community organisation explained to Swedwatch that once farmland has been taken over by a mining company, farmers have no other option than to look for jade in the

dump sites of the mining companies. *“Unfortunately, in landslides at the sites, many women lose their husbands and sons. After that, women can’t provide for their family.”*<sup>53</sup>

Interviewees further believe that miscarriages experienced by women in the Hpakant area can partly be ascribed to the health impacts from the water pollution and the psychological stress from the mine explosions, which cause rocks to hit houses – sometimes killing people. One woman explained to Swedwatch: *“Children and women always need to be alert and find a safe place in order to avoid the falling stones from the mine.”*

Several women interviewed saw a correlation between the emotional stress from this situation and miscarriages. Swedwatch has not been able to confirm the perceived correlation with a medical professional. Regardless, the explosions and the subsequent falling rocks cause significant levels of fear.

## Jade diggers and heroin

As described in Swedwatch’s first report, Hpakant has for years been (and continues to be) a magnet for hundreds of thousands of migrants from all over Myanmar who dream of finding a jade stone large enough to lift them and their families out of poverty. Over 300,000 informal jade diggers are estimated to operate in the area.<sup>54</sup> Since very few are registered, it is almost impossible to gauge how many people are working at each site each day, much less determine an accurate death count from landslides and other accidents.<sup>55</sup>

Most of these small-scale freelance jade miners, referred to locally as “scavengers”, are men with low levels of education seeking their fortune. They commonly share cramped rooms in barracks or live in tarpaulin shelters, working long shifts in hazardous conditions, digging through piles of mine waste dumped by large dump trucks. The moment at which a truck unloads the waste is dangerous, as hundreds of diggers can be lined up ready to rush onto the pile, and many accidents occur.<sup>56</sup>

Swedwatch’s report *Overlooked and undermined* also described how drug use is almost intrinsic to jade mining in Hpakant. While there are no official data, local civil society groups estimate that more than two-thirds of the informal diggers in Hpakant are addicted to heroin, which is sold openly in mining areas.<sup>57</sup> Jade miners inject heroin at “shooting galleries” – small stalls assembled from planks and plastic tarps where heroin is freely sold. One shot costs around 2 USD, but miners can also trade lumps of jade. Overdoses are common. Users often share needles: up to 70 percent of the drug users in Hpakant are estimated to be HIV positive.<sup>58</sup>

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.”*

Interviewees for this report said that the situation for jade pickers has “changed for the worse over the past year”.<sup>59</sup>





The several ongoing armed conflicts in Myanmar lead to soaring numbers of internally displaced persons who must find new sources of income. "When they come to work in the mines around Hpakant some families bring their young children, although they should be in school" one man explained to Swedwatch. Depicted is a family that has fled the armed conflict in Rakhine state, now searching for jade.



## Jade and the outlook for peace in Kachin

Myanmar's jade is intertwined with the ongoing armed conflict in Kachin state, and principal stakeholders have seemingly few (if any) incentives to engage in peace negotiations due to the lucrative income from the jade mining.<sup>60</sup> As concluded by the UN Fact-Finding Mission, the Tatmadaw dominates the jade mining industry in Kachin (and in neighboring Shan State), and generals from the five-decade military junta and army officials in Kachin state are making fortunes from the trade.<sup>61</sup> As mentioned above, the Tatmadaw's business and military interests in the jade extractive industry in Kachin has directly contributed to international human rights violations in Kachin's conflict-affected areas.

Jade is also one of the main sources of income for the ethnic armed group the KIA and its political branch, the Kachin Independence Organisation (KIO).<sup>62</sup> Some of the profits from the jade trade are also believed to finance arms purchases for both the army and the KIA.<sup>63</sup> The Myanmar government has initiated peace talks with the KIA/KIO, but according to several of the experts and community members interviewed by Swedwatch, a successful end to the armed conflict is unlikely without a change to the regulations related to jade mining and trade.<sup>64</sup>

A natural resource management expert interviewed for this report told Swedwatch: *"The jade mines benefit both the military and armed groups in Kachin. People are taking advantage of the lack of firm policy direction and implementation [around the jade trade]. The lack of revenue-sharing and tangible social development in Kachin state exacerbate the feeling of grievance and ignorance suffered by the ethnic minority. There needs to be a major revisit of resource distribution in the country. Until then, it will be an overt war going on in that area."*

Although other factors also influence the likelihood of a potential peace agreement in Kachin state, it is difficult to understate the role of jade mining in ending one of the world's longest-running armed conflicts.

## 4. What are companies expected to do?

Several international guidelines stipulate how companies should take human rights into account in their operations. The 31 principles of the UNGPs, endorsed by the UN Human Rights Council in 2011, build on existing laws and constitute the most widely recognised business and human rights framework. They serve as the international standard for preventing and addressing the risk of adverse impacts on human rights associated with business activities.

## 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 Rights and the International Labour Organization's (ILO) core conventions should be respected.

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.<sup>65</sup>

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".

Under the UNGPs, a company may have three degrees of involvement in human rights impacts:

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 neither cause nor contribute to human rights abuses, but the abuses may be directly linked to its operations, products, and services through a business relationship.

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. At this point, the company should also contribute to remediating the harm for impacts that have occurred, to the extent of the company's contribution to the harm (see fact box on page 27).

When a company is linked to the impact, it should use its leverage to mitigate the impact as much as possible.



## Key concepts of responsible business conduct

**Human rights due diligence (HRDD)** is at the core of the UNGPs. It is a fundamental tool that enables companies to respect human rights, including in relation to the use of their products.<sup>66</sup>

HRDD involves understanding impacts and risks from the perspective of the people who are or could be affected, and should be an ongoing process. Meaningful and continuous stakeholder engagement is therefore critical to conducting effective HRDD.<sup>67</sup> According to the UNGPs, a HRDD should cover human rights impacts that may be directly linked to a company's products.<sup>68</sup>

An effective HRDD informs a company of impacts that have already taken place, and thereby helps companies to understand when a **human rights impact assessment (HRIA)** should be conducted.<sup>69</sup> A HRIA can be a time-consuming exercise but is needed to adequately understand who has been impacted, and in what way. A HRIA also helps a company to understand the level of company involvement in the impact, and is therefore a vital tool for assessing issues related to remedy.

Conducting appropriate HRDD helps businesses address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.<sup>70</sup> However, companies should not assume that conducting such due diligence will automatically and fully absolve them of liability for causing or contributing to human rights abuses.<sup>71</sup>

The OECD Due Diligence Guidance for Responsible Business Conduct, published in 2018, provides practical guidance for conducting HRDD, and stresses the need to tailor approaches to specific risks and to take into account how these risks affect different groups, such as applying a gender sensitive perspective.

Applying a gender sensitive perspective to due diligence means thinking through how real or potential adverse impacts may differ for or be specific to women, girls, men, and boys. It is important to be aware of gender issues and women's human rights in situations where women and girls may be disproportionately impacted, such as in conflict and post-conflict areas.

**"Leverage"** refers to a company's ability to effect change when its business partner is causing or contributing to an adverse human rights impact.<sup>72</sup> If the company has leverage to prevent or mitigate such impacts it should exercise this leverage. If the company experiences that it lacks leverage, it should find ways to increase it, for example by collaborating with other actors.<sup>73</sup>

If there are no other alternatives, and efforts to efficiently exercise leverage have been exhausted, the company can consider terminating the business relationship after taking into account the human rights consequences of doing so.<sup>74</sup>

**Focus on better outcomes for people** is another important dimension of the UNGPs. As described by Shift, a non-profit organisation that advises on UNGP implementation, "the UNGPs are grounded in 'principled pragmatism': they do not expect businesses to simply eliminate all connections to negative impacts. Rather, they ask businesses to take reasonable measures to assess and understand the most severe risks to people that the business could be connected to, and, where resources are limited, to focus their efforts on engaging with business partners and other entities in the value chain to seek to improve outcomes for people in those areas."<sup>75</sup>



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.

According to the UN Human Rights, the UN agency that developed the UNGPs, business' responsibility can shift over time depending on their actions or their failure to act. Subsequently, there can be a continuum between 'contributing to' and having a 'direct link' to an adverse human rights impact, and a firm's location on this continuum depends on several factors:

1. the extent to which a business enabled, encouraged or motivated human rights harm by another;
2. the extent to which it could or should have known about such harm;
3. the quality of any mitigating steps it has taken to address it.<sup>76</sup>

In other words, a business' involvement with an impact may shift over time, depending on its own actions and omissions. For example, 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, the business could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of 'contributing'.<sup>77</sup>



## What happens over time when companies refrain from acting on evidence of negative impacts from the use of their products?

Apart from the UN Human Rights' clarification that a business involvement with an impact may escalate over time if it fails to act on known human rights impacts directly linked to its products, the UN Global Compact – the world's largest sustainability initiative, which two of the companies examined in this report are participants of – has elaborated on the concept of "complicity".

Complicity 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 UN Global Compact, complicity is generally comprised of two elements:

- An act or omission (failure to act) by a company, or an individual representing a company, that "helps" (facilitates, legitimises, assists, encourages, etc.) another to carry out a human rights abuse, and;
- The company's knowledge that its act or omission could provide such help.

Principle 2 further states that accusations of complicity can arise in a number of contexts, for example:

- Direct complicity – when a company provides goods or services that it knows will be used to carry out the abuse;
- Silent complicity – when the company is silent or inactive in the face of systematic or continuous human rights abuses.<sup>78</sup>

## Conflict-affected contexts and increased risks of complicity in abuses

UN Guiding Principle 23 notes that some operating environments, such as conflict-affected areas, may increase the risk that enterprises will be complicit in gross human rights abuses committed by other actors, such as security forces.

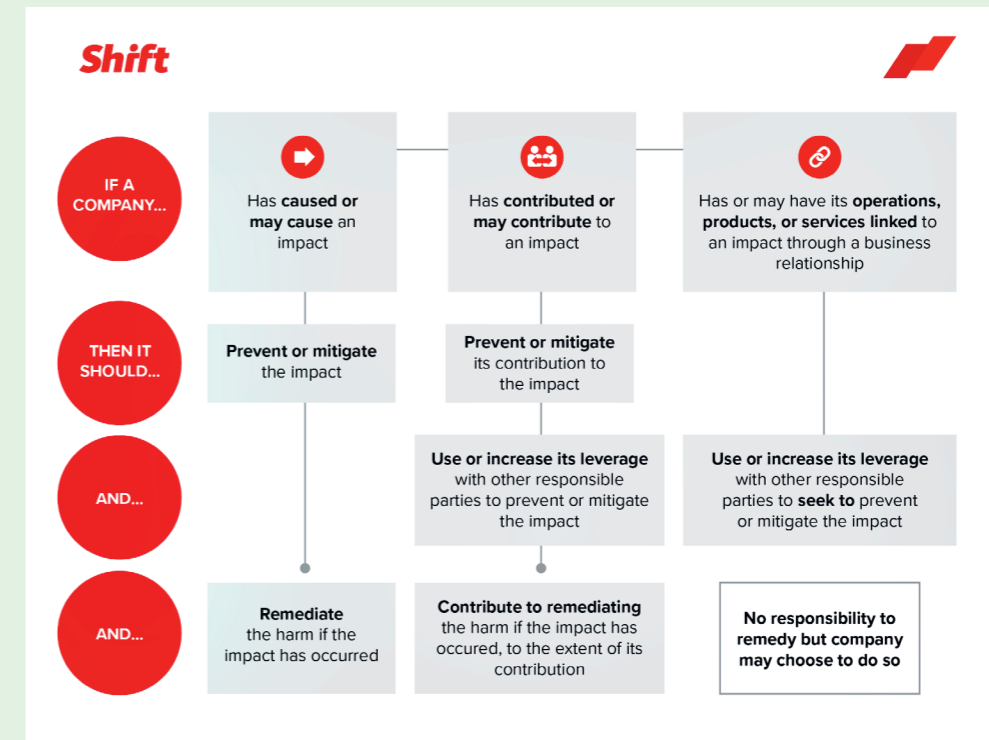
In complex situations such as these, Principle 23 concludes that business enterprises:

- should ensure that they do not exacerbate the situation;
- should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate;
- will be well advised to consult credible, independent experts, including from governments, civil society and national human rights institutions, to assess how best to respond.

The three companies included in this report do not have offices in Myanmar, but do have long-term business agreements with local authorised dealers (Caterpillar), distributors (Komatsu) or private dealers (Volvo CE). It can thus be argued that 'operate' should be interpreted in a wider sense; not only in relation to the physical presence of a company's office, but also if the company designates staff to the country to train others to use their products (which at least one of the companies has done) and if there is a continuous business relationship with the same partner in that country.

## What is an appropriate response?

The appropriate response to adverse human rights impacts depends on how a given business is connected to the impact. In the absence of international standards and regulations that specifically target mining machinery producer companies' downstream responsibilities, the UNGPs – which apply equally upstream and downstream – serve as the main tool for identifying the level of responsibility and what the appropriate response should be. The graphic below, courtesy of Shift Project, Ltd, summarises these options.



© Shift Project 2020.





Apart from the formally employed mine workers, more than 300,000 persons are believed to search for jade in the mining area. Through an agreement with mining companies, these informal jade diggers are allowed two hour-slots to search for jade. The photograph shows police preventing diggers from entering before the allowed period.



## 5. Company dialogues

In its report from 2018, Swedwatch concluded that the three companies had failed to fulfil their responsibility to conduct HRDD in order to prevent or mitigate adverse human rights impacts directly linked to their products in high-risk contexts under the most recognised and relevant international norms; the UNGPs and the OECD Guidelines for Multinational Enterprises. Swedwatch findings also showed that none of the companies could demonstrate that they used or sought to increase their leverage over their business partners in Myanmar as required by the UNGPs.

In early 2019, almost one year after Swedwatch's first report, Swedwatch asked the companies about their efforts to address human rights risks downstream in their supply chains, and to what extent they had acted upon Swedwatch's recommendations in regard to HRDD and the use of leverage. None of the companies replied to these specific questions; they instead submitted general statements. After the UN Fact-Finding Mission published its report in August 2019, Swedwatch once again contacted the three companies, inviting them to update their statements in light of the findings by the Fact-Finding Mission. Only Volvo CE provided more information. Caterpillar replied that it stood by its original statement, and Komatsu did not reply.

The remainder of this section outlines the results from Swedwatch's communication with the three companies in 2018-2020 and includes information gathered from the companies' publicly available sustainability reporting, mainly from early 2020.

### Caterpillar

Caterpillar is the world's largest construction machinery brand in terms of sales volume.<sup>79</sup> Its headquarter is in the USA, and its products are sold via a worldwide dealer network. When contacted by Swedwatch for this follow-up report, the company submitted the same brief statement that it had shared with Swedwatch during the dialogue for the *Overlooked and undermined* report. The statement referred to the high quality of its products, saying that its "customers use our products to help build a better world". According to Caterpillar, there are "millions of Cat products active around the world today" and the company's Code of Conduct applies to the daily activities of affiliates worldwide. The statement did not provide any information significant to the questions that Swedwatch posed. This section is therefore based on publicly available information produced by Caterpillar.

Caterpillar is not a member of the UN Global Compact. In its 2018 Environmental, Social and Governance Priorities & Approach, Caterpillar stated that its Human Rights Program is "informed by" the UNGPs and that the company will consider the use of on-the-ground human rights impact assessments in high-risk regions. It also states that Caterpillar is "committed to engaging in dialogue with external stakeholders to understand human rights-related issues and concerns". In Swedwatch's experience of two years of dialogue with Caterpillar this commitment is not convincing in terms of the quality of engagement; the company did reply to Swedwatch's emails,



"It used to be green here. Now it looks like we live on the moon," local resident in Hpakant, interviewed by Swedwatch in 2017.

but only submitted a brief statement, and did so twice, instead of responding to questions posed by Swedwatch on two separate occasions.<sup>80</sup>

Caterpillar has adopted a "Statement of enterprise policy"<sup>81</sup> which states that the company's "commitment to respect internationally recognized human rights supports Caterpillar's vision to create a work environment that all can take pride in, to be a company others respect and admire, and contribute to a world made better by our actions."

It further says that "Caterpillar's products and services advance sustainable global economic development and improve standards of living in communities where it operates. Within our business, we will support our commitment to human rights by assessing human rights issues, conducting relevant human rights training, and integrating results of due diligence into our policies and internal systems."<sup>82</sup>

According to the statement, Caterpillar "will consult with relevant internal and external stakeholders to understand human rights related concerns and issues. Caterpillar will assess and escalate issues and concerns as appropriate."

In spite of these promising commitments, information regarding HRDD processes, eventual findings and/or address of such findings, and efforts to exercise leverage has



not been 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 still do not appear to be satisfactorily streamlined in Caterpillar's processes. Two years after Swedwatch's initial report, and at least five years after reports about the situation in Kachin's jade mines by organisations such as Global Witness<sup>83</sup>, in which Caterpillar's products frequently appear, Caterpillar still appears not to have attempted to identify negative issues related to its products in Myanmar. The critical concerns raised by Swedwatch and others seemingly still 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 the 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 remains highly urgent. 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 mining machinery sales, Caterpillar is uniquely positioned to exert leverage and to influence the overall sector to adhere to international human rights standards. Swedwatch was not able to find evidence that Caterpillar is using its leverage possibilities to contribute to positive change in Myanmar's jade mining area, or that it has taken other reasonable steps to seek to prevent or mitigate the impacts outlined by Swedwatch and others since 2015.

At the time of publication of this Swedwatch report Caterpillar released an updated Sustainability Report<sup>84</sup>. Swedwatch was however not able to find new information that changes Swedwatch's analysis of Caterpillar as outlined in this report. Positively however Caterpillar's updated reporting refers to its Human Rights Policy and encourages "any party to report situations in which they have a good faith belief that the entities or individuals covered under our policy have taken actions that are inconsistent with the principles set forth in the [Human Rights] policy". In sharing this Swedwatch report with Caterpillar Swedwatch expects the company to acknowledge it as a formal reporting of a situation that appears inconsistent with the company's Human Rights policy.

## Komatsu

Komatsu is the world's second largest machinery brand, second only to Caterpillar.<sup>85</sup> The company is based in Japan and mainly manufactures construction, mining and utility equipment.<sup>86</sup> As a member of the UN Global Compact since 2008, Komatsu affirmed to Swedwatch that it "acts with an awareness of [the Global Compact] through its supply chain, which also encompasses its business partners".<sup>87</sup>

During Swedwatch's dialogue with Komatsu for *Overlooked and undermined*, Komatsu responded that it had conducted general HRDD in relation to impacts from its business, and although it had considered conducting country specific HRDD in the future, it had not yet done so. Komatsu had thus not conducted a HRDD in rela-

tion to its sales in Myanmar. Komatsu also stated that it had not identified any local communities in Myanmar that had been negatively impacted by mining operations using the company's products and services. When Swedwatch's report demonstrated the impacts from the use of mining machinery in Kachin's jade mines, which clearly include Komatsu products, the company did not provide any comment.

When Swedwatch contacted the company again in 2019 for this follow-up report, asking questions about specific activities in Myanmar in response to human rights issues linked to the company's products, Komatsu replied that it "has been conducting activities in accordance with its responses to the questions posed by Swedwatch last year"<sup>88</sup>. As the comment did not contain any significant information, Swedwatch asked Komatsu to clarify but did not receive a reply.

In its 2018 reply to Swedwatch, Komatsu stated: "If it comes to Komatsu's attention that customers are using its products in businesses that have significant adverse human rights impacts, Komatsu refrains from making any further sales to such customers through its distributors." Komatsu's reply to Swedwatch in 2019 in no way indicates how (or if) the company had complied with that commitment.

According to the company's sustainability reporting from 2020<sup>89</sup>, Komatsu has established a human rights policy, and through HRDD it will implement measures for preventing or mitigating negative impacts on human rights. Komatsu also states that it will "consult with independent external knowledge on human rights issues" to better understand human rights related issues. The company also commits to put frameworks in place "to allow for corrective measures to be instituted should it be found that the Company was directly or indirectly involved in activities that had a negative impact on human rights."<sup>90</sup>

These commitments are encouraging. Nevertheless, due to the sweeping nature of Komatsu's statements to Swedwatch, it does not appear plausible that the company has conducted country specific HRDD in Myanmar or taken reasonable steps to seek to prevent or mitigate the impacts linked to the use of its products in Kachin, two years after Swedwatch first presented its findings.

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. Swedwatch therefore reiterates its call for Komatsu to urgently conduct HRDD in high-risk contacts such as Kachin and consult with the true representatives of those negatively impacted, and to deliver on all other aspects of its recently adopted human rights commitments.

Swedwatch also calls on Komatsu to earnestly proceed with the "corrective measures" the company has committed to institute if it is found to be directly or indirectly involved in activities that have had a negative impact on human rights. According to the findings outlined in Swedwatch's two reports from the jade mines in Kachin, such corrective measures would seem to be highly relevant to implement in relation to the products and services that Komatsu provides in Myanmar.





In addition to excavators and trucks by Volvo CE, Komatsu and Caterpillar, excavators by the mining machinery producers Liebherr-Mining and Doosan are operated in the jade mines, seen here in white and orange respectively.

## Volvo CE

As part of the Volvo Group - 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. Another mining machinery producer, Terex Trucks, forms a division of Volvo CE. Terex Truck's characteristic white dump trucks are produced in Scotland, and the company has, according to its own admission, several customers among the mining companies in Kachins' jade mines. 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.

From Swedwatch's dialogue with Volvo CE for *Overlooked and undermined*, it was evident that the company had not conducted HRDD in relation to its sales in Myanmar. The company replied to Swedwatch that it was not aware of any examples of negative community impacts involving Volvo's products in Myanmar, and that it relied on assurances from its dealer in Myanmar, which had informed Volvo CE that its products are only sold to companies that have the required permits in place.

When Swedwatch contacted the company in 2019 for this follow-up report, asking questions about specific activities in Myanmar in response to human rights issues linked to the company's products, Volvo CE sent a statement, saying that since the

publication of Swedwatch's Myanmar report it had worked "together with an external expert organisation to provide further clarity on Volvo CE's potential scope of responsibility under the UNGPs and other relevant international guidance based on Swedwatch's findings in its report [..]"<sup>91</sup>.

Volvo CE later added to its statement, saying that "As a step two, we have worked together with the external expert organisation to conduct a country Due Diligence on Myanmar to further understand potential high-risk areas related to our business model."<sup>92</sup> Volvo CE also said that it would discuss the expert organisation's inputs internally and decide on next steps, and that the company during 2019 had adopted a Responsible Sales Policy which it continued to implement.

In its Annual and Sustainability Report 2019,<sup>93</sup> the Volvo Group affirmed that it had initiated the strengthening of internal procedures on sales to high risk customers in conflict-affected areas. The company referred to the concerns raised by Swedwatch and confirmed that Volvo CE subsequently started working "together with an external human rights expert organization to identify and assess human rights risks in relation to sales to Myanmar".

"Based on this and our own continuous improvement work, we are working on strengthening our screening of selected sales deals and providing relevant additional trainings for our employees and dealers", said Volvo Group in its report.

Throughout its communication with Swedwatch, Volvo CE has reiterated that it does not have its own operations or employees in Myanmar, but that its sales are handled by a private dealer – a company in which it has no ownership. Volvo CE states that it requires its private dealer in Myanmar to comply with all applicable laws, regulations and sanctions, and that the private dealer has its own Code of Conduct, including a statement on respect for human rights.<sup>94</sup>

FACT

### What constitutes a business relationship?

According to the UNGPs, a company's 'business relationships' are defined broadly to encompass relationships with (1) business partners, (2) entities in its value chain or (3) any other state or non-state entity directly linked to its business operations, products or services. This includes entities in its supply chain beyond the first tier and indirect as well as direct business relationships.<sup>95</sup>

All the references to companies' responsibilities discussed in Swedwatch's original Myanmar report and in this report rely on the UNGPs' definition of a business relationship (see box above). Volvo CE's reiteration is noted, but Swedwatch finds it redundant since it does not change the company's responsibilities as defined by the UNGPs and as outlined by Swedwatch in this and the first report.

Overall, Volvo CE has undoubtedly taken an important step that, if handled to its fullest potential, could contribute to concrete change, both within corporate conduct across the sector and for rights holders in Myanmar (see box below).



### Will Volvo CE take the lead?

Swedwatch welcomes Volvo CE's collaboration with an external business and human rights consultant, particularly regarding a country due diligence assessment of Myanmar from a human rights perspective. This initiative could set the standard for mining machinery companies worldwide if performed in close alignment with international standards and with accurate considerations of the complexities of the Myanmar context.

As Volvo CE was not yet able to point to concrete elements of its due diligence initiative, the quality and outcomes of the initiative remains to be seen. Until then, Swedwatch encourages Volvo CE to conduct an effective HRDD on Myanmar, as well as a HRIA in relation to Kachin state. In doing so, Volvo CE should:

- Consult credible, independent experts, including civil society in Myanmar;
- Consult women, men, girls and boys from affected communities, particularly in areas where armed conflict and mining activities overlap. Doing so is a key requirement for understanding the local impacts and how best to respond;
- Publicly share the results (or a summary) of the risks and impacts identified in the due diligence process;
- Create an action plan to address the risks and impacts identified, and make it publicly available;
- Based on the identified impacts, and where relevant, ensure that access to remedy for affected stakeholders is available;
- Monitor how well the efforts are resulting in improvements and where renewed efforts are required;
- Share the experiences and results from the process with peers, and make them available to the public;
- Invite peers to jointly discuss ways to address the challenges identified during the due diligence process;
- Ensure that the due diligence process is not a one-off exercise but is conducted at regular intervals in order to adequately capture and respond to developments in the country.

Swedwatch lastly encourages Volvo CE and peers to apply the lessons identified from conducting impact assessments and due diligence activities in Myanmar to other complex markets where their products are affecting human rights and the environment.

## Summary of company dialogues

**In conclusion, Swedwatch notes a significant difference between the three companies' respective actions over the two years since Swedwatch's initial report. Due to the sweeping nature of the statements from Caterpillar and Komatsu, and in the absence of publicly available information about convincing measures that have led to results, these companies have failed to show that they have taken reasonable action in response to the human rights impacts caused by the irresponsible use of their products in Kachin's jade mines as presented by Swedwatch in 2018.** They consequently also fail to adhere to the concept of "know and show" as outlined in the UNGPs. It should however be noted that Komatsu has made encouraging public commitments towards human rights, which could lead to positive change for impacted rights holders; for this to happen, Komatsu must act on its ambitious pledge.

**In contrast, by embarking on a due diligence process from a human rights perspective, Volvo CE has taken an encouraging step towards improved alignment with the UNGPs and other international norms. If managed well, its initiative could yield concrete improvements for rights holders in Myanmar and other high-risk contexts.**

Lastly, according to the UNGPs, business' responsibilities extend to the buyers of their products – the so-called downstream responsibility. When business relationships entail both high-risk products, such as mining machinery, and high-risk markets, such as Myanmar, companies should make it a priority to ensure that their sales processes fully consider the risks. None of the companies demonstrated, in their dialogue with Swedwatch, that they have sufficient processes in place to meet this requirement. Failing to do so in Kachin is devastating to thousands of women, men, girls and boys and their prospects for a future free from armed conflict. It also undermines the achievement of Sustainable Development Goal 16 to promote peaceful and inclusive societies.

## 6. Conclusion

The three companies publicly communicate that they adhere to or strive to align their work with international norms such as the UN Global Compact and the UNGPs and/or state that they respect internationally recognised human rights. However, Caterpillar and Komatsu are still either unwilling or unable to demonstrate that they map or seek to address the human rights risks specific to their sales in Myanmar, or that they have used, or sought to increase, their leverage towards their business partners in the country. Before the publication of this report, Volvo CE stated that it had taken the positive step of initiating a due diligence process from a human rights perspective in relation to Myanmar. While an encouraging development, Swedwatch deems it too early to assess the quality of this initiative and whether it qualifies as a heightened human rights due diligence process in line with the UNGPs and the OECD Due Diligence Guidance for Responsible Business Conduct.



Informal jade diggers have set up simple constructions made of blue and green tarp in a jade mine.

PHOTO: MINZAYAR OO/PANOS





Caterpillar, Komatsu, and to some extent also Volvo CE, have not been forthcoming in sharing documentation showing that their sales in Myanmar are in line with the UNGPs and similar international business and human rights standards (which in itself is a failure to meet the UNGP requirement of “knowing and showing”). Therefore, **Swedwatch infers that Caterpillar and Komatsu have still not attempted to identify the negative human rights impacts related to their products in Myanmar or taken other reasonable actions to prevent or mitigate the impacts as outlined in Swedwatch’s first report. Volvo CE has initiated positive steps, although it is too soon to assess the extent and effectiveness of such steps in addressing the human rights impacts that have already taken place from the irresponsible use of its products.**

From a continuum perspective, failing to act over time, especially after being notified of the human rights and environmental impacts that the irresponsible use of their products is causing in Myanmar’s jade mines, has shifted the companies’ involvement with the impacts. At least two of the three companies (Caterpillar and Komatsu) can, according to the logic of the UN Human Rights, now be seen to be facilitating the continuance of the situation in the jade mines. **Swedwatch therefore concludes that Caterpillar and Komatsu can be considered to be ‘contributing to’ human rights abuses in Kachin’s jade mines as defined by the UNGPs. It remains to be seen whether this is also applicable to Volvo CE.**

In light of the above, the appropriate response by Caterpillar and Komatsu has – according to the UNGPs – subsequently escalated; they should now contribute to remediating the impacts, to the extent of their contribution to these impacts. According to the UNGPs, the companies should treat this as a legal compliance issue and take immediate action to ensure they do not exacerbate the situation in the jade mining area. Depending on the quality of its due diligence efforts, the same might apply to Volvo CE.

As the companies “provide goods that they know will be used to carry out the abuse”<sup>96</sup> and apparently remain “silent or inactive in the face of systematic or continuous human rights abuse”<sup>97</sup>, **Caterpillar and Komatsu can also, according to the logic of UN Global Compact Principle 2, be considered responsible for ‘direct complicity’ and ‘silent complicity’ in the human rights situation in Kachin’s jade mines. Volvo CE has taken an important step in the right direction, but until proven otherwise, these types of complicity also apply.**

From a business and human rights perspective, Myanmar is one of the world’s most complex operating environments. The UN Fact-Finding Mission concluded that the economic interests of the armed forces permeate most sectors of society, including the mining sector. The same armed forces are responsible for violations of international human rights law and international humanitarian law in mining areas, including in Kachin where it dominates the jade mining industry. The economic interests of the armed forces have been found to enable its conduct,<sup>98</sup> which includes the rape and gang rape of women and girls, and acts of torture and murder. The global mining machinery companies’ seemingly blatant lack of safeguards in response to this con-

text is a matter of serious urgency and should be made a priority by Caterpillar, Komatsu and Volvo CE, and by all companies selling mining equipment in Myanmar.

**With this report, Swedwatch once again calls on Caterpillar, Komatsu and Volvo CE to urgently conduct heightened HRDD in Myanmar, and assess and address the impacts that have taken place through conducting HRIA. Swedwatch also calls on the three companies and their peers to do the same in other high-risk country contexts where they sell products and services.**

This would be in line with the sustainability commitments that Caterpillar, Komatsu and Volvo CE have made, with international corporate responsibility standards, and as a minimum response to the acute findings by the UN Independent International Fact-Finding Mission on Myanmar. 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, and thereby contribute to, instead of undermining, the goals as set out in the Agenda 2030. It would also set a much-needed example of responsible business conduct for the entire mining sector, which could improve the lives of millions of people and the environment in mining areas across the globe.

**“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 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.”**

*/ Director of a civil society organisation in Kachin*



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