

GENOCIDE, BUSINESS, AND HUMAN RIGHTS: THE COMPLEXITY OF MYANMAR AND WHAT INVESTORS AND COMPANIES NEED TO DO ABOUT IT

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BLOG

The United Nations Independent International Fact-Finding Mission on Myanmar (FFM)'s released its [report](#) this week stating that the Myanmar military's far-reaching economic and business interests strengthen its autonomy from civilian oversight and help to finance the army's (Tatmadaw) military operations. This is in a context where our investigations found that crimes committed by the army against the Rohingya in Myanmar rise to the level of the most severe atrocity crimes that are possible to commit in today's world: genocide, crimes against humanity, and war crimes. Even worse for the private sector, the FFM documented connections between the Tatmadaw and certain businesses and investors that are so deep that some companies may be "legally implicated in the conduct of the Tatmadaw," particularly in northern Rakhine State. This report and what is happening in Myanmar today should be of grave concern to any company operating in or sourcing from Myanmar and any investor investing in Myanmar.

Eight years ago, Myanmar emerged from four decades of military rule characterized by extensive human rights violations, weak rule of law, corruption, and decades of civil war in Myanmar's ethnic states. As the country took steps to progress its democratization, including having a principally civilian government in office with pro-democracy icon Aung San Suu Kyi as its de facto leader, international companies and investors were [eager to invest](#) in this country they had previously shunned or from which they had been barred due to international sanctions. The country provided a wealth of business opportunities, including oil and gas; coals and minerals, such as gold; gemstones, including rubies and jade; arable land; forest products; freshwater and marine resources; and tourism. It offered untapped potential, with a population of an estimated 60 million individuals, most of whom lacked access to numerous services, including reliable electricity, financial services, or cell phone and internet connections. It offered a young labor force, eager to be a part of the country's economic development and to start competing for jobs with its neighbors from the Association of South East Asian Nations (ASEAN) region.

Yet, as part of our work with the international *pro bono* law firm Public International Law & Policy Group (PILPG), we investigated and documented evidence of crimes recently committed against the Rohingya, an ethnic group living in the western coastal state of Rakhine in Myanmar. These were the worst atrocities committed in Myanmar's many years of violence. Paradoxically, these atrocities were not perpetrated during the decades of military rule. Neither were they hidden from sight. Instead, they were conducted openly by Myanmar's military—

namely its Tatmadaw Army—which has been considerably strengthened since the country has opened its gates to the international community and business. Since 2011, the Tatmadaw has benefited from new networks enabling it to coordinate its military campaigns; a boost in financial resources through joint ventures with and investments from international companies, revenues from conglomerates owned by military leaders, and close ties with domestic crony companies; and purchases of state-of-the-art military equipment. The Tatmadaw now also benefits from a government that is viewed externally as ‘civilian,’ but that it can continue to influence and control.

It is hardly fathomable that after lifting sanctions on a country transitioning from a military regime, we could collectively watch and enable a genocide to take place. Yet, this is what happened in Myanmar in late 2017.

The FFM’s recent report shines the spotlight on the economic interests of Myanmar’s military and the strong connections between the Tatmadaw and businesses and investors. And now, unless businesses and investors take concerted action—together with sovereign governments, international organizations, and international financial institutions—Myanmar’s military will continue to use its far-reaching economic and business interests to avoid accountability, enrich its leaders, avoid civilian oversight, and further entrench its ability to perpetrate abuses and violate international law.

Both of us worked on the U.S. State Department-commissioned investigation into atrocity crimes in Myanmar. The resulting Public International Law & Policy Group (PILPG) [findings](#) represent the largest to-date investigation into the crimes against the Rohingya, based on over 1,000 interviews with refugees. Our findings were the basis of the State Department’s own [report](#) and have been confirmed by numerous other organizations conducting independent research and investigations, including the United Nations and its [Fact-Finding Mission](#) on Myanmar.

The horrors we investigated and documented are barely imaginable. The Rohingya suffered mass killings, the burning and drowning of children, gang rapes of women, and mutilation of pregnant women and newborns. The Rohingya were even shot at from behind as they fled for safety, and many were killed while they were physically in the act of crossing into Bangladesh. The investigators we worked with — who have worked on an array of atrocities and conflicts, including the former Yugoslavia, Darfur, and South Sudan — [noted](#) that the breadth, depth, and extent of atrocities was possibly the worst they had ever seen. According to our investigation’s factual and legal findings, the crimes against the Rohingya rise to the level of the most severe atrocity crimes that are possible to commit in today’s world: genocide, crimes against humanity, and war crimes.

While the Rohingya crisis in 2017 caught the world’s attention and helped shine a light on decades of abuse and violations by the Burmese military, there has yet to be any justice or accountability. Largely because of its constitutionally entrenched power within the Myanmar government and deep ties with numerous companies and industries, Myanmar’s Army (also

known as the Tatmadaw) does not appear to foresee an end to its impunity. It is precisely those deep ties between and among the Army, the Myanmar government, and businesses that should concern any company/ investor present in or sourcing from/ investing in Myanmar. This is especially the case in light of recent developments in Rakhine State that suggest Myanmar's armed forces are committing further war crimes, as well as the UN's Fact-Finding Mission's call on countries of the world [to cut business ties](#) with Myanmar's military.

The business world now has expectations and guidance when it comes to investors' and companies' conduct in high risk environments, particularly those enshrined in the UN Guiding Principles on Business and Human Rights (the [UNGPs](#)). The UNGPs place parameters around a business enterprise's responsibility for human rights impacts, depending on whether the enterprise caused or contributed to the impact, or whether the impact is directly linked to its operations, products, and services through its business relationships. How the investor or company is connected to an impact and the level of severity of that impact then determine the actions that are expected of that entity.

An increasing number of companies operating in or sourcing from Myanmar are asking themselves whether adverse human rights impacts are occurring in their value chains and then using the UNGPs' guidance to determine the kind of action that is warranted. Investors are also starting to consider what an appropriate role would be for them to play when investing in companies present or sourcing from Myanmar. We are seeing forward-looking companies conduct this assessment and decide to take a number of actions in response. We are also seeing companies conclude that where the Rohingya are not in their value chain, they can continue with business as usual.

However, these assessments are insufficient and cannot withstand scrutiny in a country where atrocity crimes such as genocide and crimes against humanity have been committed. Rather, the UNGPs expect companies and investors connected to such high-risk countries to ask themselves how they could be connected to adverse impacts more broadly, extending beyond the presence of a directly impacted stakeholder group in their value chain. There are other ways in which companies and investors could be connected to the atrocities in Myanmar, for instance by providing resources, financial or otherwise, to the Army or by conveying to the government their desire to use land that has now been 'freed up' by the mass killings and displacements. The Myanmar government and the Tatmadaw have been actively seeking to attract businesses and investors to development projects in northern Rakhine State to capitalize on the effects of the Tatmadaw's mass displacement of the Rohingya and to further their goals of "[re-engineering](#)" the region to erase all evidence of the Rohingya in Myanmar.

The UNGPs ask companies and investors to look broadly at how they may be connected to impacts and think creatively about the various ways in which they could use or build their leverage to prevent or mitigate these impacts. The three ways in which companies can be connected to impacts — causation, contribution, and direct linkage — are intended to support companies in thinking about a root cause analysis of human rights issues encountered in their

value chain, to then drive them toward designing the most effective solution to prevent these impacts from occurring. A broader root cause analysis is therefore warranted. As for investors, they play a critical role in encouraging companies they invest in to conduct this assessment. This UNGPs' analysis starts by delving into ownership details of business partners in Myanmar and reviewing past, present, and future connections to Rakhine State. The FFM's [report](#) and its extensive annexes and infographics provides companies and investors with a head start in this analysis.

Consistent with the spirit of the UNGPs, companies and investors should think about taking actions where companies feel their actions will help build the foundation for respect for human rights. In the context of Myanmar, such actions can include considering the role the private sector can play in working with government to help bridge the gap between the international community's expectations following the genocide and the government's current positioning. Indeed, accountability for past crimes, justice for those harmed, and truth-telling play a paramount role in creating an environment that is conducive to human rights respect and the rule of law.

Playing a meaningful role in advocating for accountability, justice, and truth-telling would also be consistent with the consideration of remedy for those business enterprises seeking to play a role in remedy – either because they see themselves as having contributed to the harm through their support to the military or because they chose to do so. Truth-telling was indeed one of the primary asks of the Rohingya in the course of our investigations. Many of the Rohingya PILPG interviewed stated that they wanted an acknowledgement of what they had suffered and the truth to be told. They wanted the world to know what had happened and how their relatives had been harmed.

If businesses are to act responsibly in Myanmar, they should play a role in advocating for a truth-telling and accountability process. Not only would this be the humane thing to do, but also this would support them to fulfill their own responsibilities under the UNGPs. Such efforts can range from backdoor diplomacy with governments to conditions placed on future investments connected to Myanmar. Other efforts can be collective and should steer clear of backing government actions that seek to minimize the atrocities or dilute the truth. Companies can proactively identify areas where their own business may contribute to accountability efforts, for instance, by offering to share collected data from their platforms with international investigators.

Additionally, the UNGPs do not prevent companies from choosing to play a role to support the Rohingya in Bangladesh, where more than [1 million](#) Rohingya now live as refugees. In addition to supporting the refugee crisis, this could include participation in public-private partnerships designed to support overall infrastructure development or service provision around the refugee camps in Bangladesh. In both Myanmar and Bangladesh, companies could also seek to implement minority hiring pledges or campaigns that would seek to provide opportunities for employment for the Rohingya in the near future. Companies could also find ways to connect

their support with their own business, for instance by donating its products and services to the refugees or support agencies.

Businesses and investors should also look to the [guidance](#) provided by the UN FFM, which lays out a road map of recommended actions for businesses or investors operating in or with ties to Myanmar. Specifically, the FFM's road map strongly urges cutting off and avoiding all ties with those conglomerates identified as being owned or controlled by the Tatmadaw, its leaders, or their families; prohibiting contributions or donations to the Tatmadaw, its connected businesses, or development and investment projects in areas where the Tatmadaw committed atrocities; and conducting heightened due diligence in all business, investment, and sourcing in Myanmar, in line with the UNGPs.

Myanmar is as high risk as it gets when it comes to international investment, and this situation will continue until the recent past has been accounted for. The private sector played a role in strengthening the Army since the country opened up in 2011 through to its perpetration of widespread atrocity crimes, and the private sector should play a role now in considering its role in the conflict, as well as its contribution to broader accountability, justice, and truth-telling. Consistent with the spirit of the UNGPs, companies and investors have a role to play in building the foundation for respect for human rights, starting with accountability, justice, and truth-telling. In a context where numerous international bodies have concluded that there are reasonable grounds to believe that genocide, crimes against humanity, and war crimes have been committed, any expectation of companies and investors committed to operating with purpose would be no less.

About the authors

Over a decade ago, as director of the New York office of Nobel Peace Prize nominee Public International Law & Policy Group (PILPG), Ms. Triponel worked with the National Council of the Union of Burma to [challenge](#) the legitimacy of the ruling military junta at the United Nations in New York. When the country later opened up, she conducted [field research](#) in Myanmar and Thailand for Shift, the leading centre of expertise on the UNGPs, related to what stakeholders from various ethnic groups expect when it comes to meaningful engagement from companies. Ms. Triponel presented the results of this research to companies and government officials at the World Economic Forum (WEF) on East Asia in Nay Pyi Daw in 2013, which included discussions with Aung San Suu Kyi. She was a lead author of PILPG's [Factual Findings and Legal Analysis Report](#) documenting the results of the 2018 investigation mission in Bangladesh and providing guidance to policymakers on the international legal ramifications of the findings to facilitate the formulation of measures to respond to the atrocities.

Mr. Fullerton has worked on a range of issues supporting Myanmar's peace process and Democratic reforms since 2012, including working with ethnic armed organizations and civil society organizations across Myanmar. Mr. Fullerton was also counsel and program manager for PILPG's 2018 human rights documentation mission to investigate atrocity crimes committed against the Rohingya, and he was a lead author of PILPG's [Factual Findings and Legal Analysis Report](#). Currently, he manages a program to support future local-led efforts to document crimes committed against the Rohingya, for which he travels

to the Rohingya refugee camps in Bangladesh and coordinates closely with international investigative mechanisms.