

Next Steps for the U.S. to Hold the Burmese Military Accountable for Its Human Rights Violations

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KEY TAKEAWAYS

More than two years after the Rohingya crisis began, the U.S. must hold military leaders accountable and make an official legal determination on crimes committed.

The U.S. should financially sanction Burmese military-owned enterprises and individual members of the Burmese military involved in the Rohingya genocide.

It is time for a robust U.S. response to human rights violations in Burma, and the U.S. must exert true global leadership in responding to the Rohingya crisis.

On August 5, 2019, the United Nations' Independent International Fact-Finding Mission (IFFM) on Myanmar (Burma) released a revealing report on the economic interests of the Burmese military.¹ The report was a follow-up to the IFFM's initial report released in August 2018, which found credible evidence that the Burmese military may be responsible for committing genocide, crimes against humanity, and war crimes in the states of Shan, Kachin, and Rakhine.²

The new 111-page report deepened already credible links between the military and military-owned enterprises and atrocities committed principally by the Burmese military.³ The report's findings should inspire the international community, particularly the U.S. Congress and the executive branch, to consider targeted financial measures against individuals in the Burmese military, as well as against military-owned enterprises and other enterprises linked to both.

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FFM Principle Findings on Burmese Military's Economic Interests

The Burmese military's economic interests are vast, comprising a substantial percentage of Burma's economy. Two military-owned conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), own at least 120 businesses, with another 27 closely related to the military.⁴ According to the FFM report, MEHL and MEC operate in a variety of sectors, including gemstones (jade and rubies), construction, pharmaceuticals, tourism, and manufacturing. MEHL and the MEC also control Myawaddy Bank and Innwa Bank, two of the largest private banks in Burma.⁵

Reliable figures on the profits that the Burmese military generates from these enterprises are impossible to estimate, but the available statistics paint a picture of the military's robust access to resources. According to the FFM report, the military can draw annual profits to the tune of many millions, possibly billions, from its banks, gemstone trade, and various fundraising, in particular, fundraising that took place after so-called clearance operations that resulted in the displacement of more than 750,000 Burmese Muslim Rohingya in August 2017.⁶ These findings are supported by other, more limited research, conducted by other institutions and organizations.⁷

Beyond providing a general outline of military-owned enterprises, the FFM provides direct links between the profits of these enterprises and human rights violations in Burma.

Shan and Kachin States. One especially illuminating example connects the military's trade in jade and rubies directly to its human rights abuses in both Shan and Kachin states.

Profits from both of these industries are believed to be significant. While available statistics on the military's precise profits are somewhat limited, the FFM report found that profits from the jade trade may exceed \$31 billion, which is equivalent to half of Burma's economy.⁸ Between 2013 and 2014, MEHL recorded \$230 million in jade sales and in 2016 and 2017 ranked among the ten highest-value producers of jade.⁹ The same is true for rubies. According to a 2007 estimate, Burma's share in the global ruby trade has, at times, been as high as 90 percent.¹⁰

Many of these profits are the direct result of exploitation. The FFM report documented the use of forced labor in Shan and Kachin states in the jade and ruby mining industries. It also documented instances of sexual violence, including rape, and murder. This led the FFM to conclude that military-owned enterprises "benefited from and directly contributed to international human rights abuses in conflict-affected areas in Kachin state"

and had “similar concern(s) in Shan State.”¹¹ Finally, the report concluded that “[m]any of the human rights violations...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.”¹²

Rakhine State. The FFM report also draws a direct linkage between the military’s profits and atrocities committed in Rakhine state, specifically identifying three fundraising events held by the Burmese military for the purpose of raising funds for “clearance operations” against Rohingya that began in August 2017. These events raised more than \$10.2 million.¹³

The FFM found that the Burmese military began to fundraise specifically to build a wall that would keep the more than 750,000 Rohingya who fled after the violence from returning to Burma.¹⁴ Border fences and structures were also reinforced in certain areas to specifically keep the Rohingya from returning to claim their land. Satellite imagery analysis confirms that much of this land and the properties on them have been destroyed through bulldozing or burning that was also believed to have been carried out by the Burmese military.¹⁵ In fact, the Burmese military, in some cases, has already constructed new bases for military operations on Rohingya-owned land.

The FFM’s report concludes by noting that the varied economic interests and undertakings of the Burmese military contributed to their ability to carry out atrocities in Shan, Kachin, and Rakhine states. In this way, the second FFM report,¹⁶ published nearly a year after the first, bolsters the findings from the first FFM report released in August 2018 that there is credible evidence that genocide, crimes against humanity, and war crimes were committed, and in this case, made possible, through the Burmese military’s vast access to capital.

History of Sanctions Against Burmese Military and Military-Owned Enterprises

Both the MEC and MEHL were sanctioned under the Block Burmese Junta’s Anti-Democratic Efforts (JADE) Act of 2008 and subsequently placed on the Specially Designated Nationals List until the U.S. government lifted sanctions on Burma after the election of Aung San Suu Kyi and the National League for Democracy (NLD) in 2015.¹⁷ President Barack Obama officially lifted the state of emergency under the International Emergency Economic Powers Act (IEEPA) on October 7, 2016.¹⁸ The decision to lift sanctions was too much, too soon.¹⁹

The structure of the Burmese government consists of a complicated power-sharing agreement between the military and civilian powers. According to the constitution, the Burmese military retains 25 percent of the voting power in

parliament—just enough to impede constitutional reform.²⁰ The military also retains control of the powerful Homeland, Defense, and Interior ministries.²¹ A victory for a more pro-democracy, reform-minded party, therefore, is blunted by the power-sharing arrangement mandated by the current constitution. However regrettable the set-up, this complicated structure means that sanctions affect decision making and, arguably, enjoy a disproportionate ability to leverage power externally.²² A decision to sanction the military would actually grant the civilian government greater authority to govern Burma how it sees fit.

In lifting the sanctions, the Obama Administration returned power to the military at the exact moment that true political reform in Burma looked possible.²³ The international community hung its hopes on the then-famed pro-democracy figure, Aung San Suu Kyi, the head of the NLD who took the helm as state counsellor, the de facto head of state. The NLD victory made it look like Burma was primed for fundamental transformation, especially after modest reforms were already implemented under the previous president, Thein Sein. So far, reforms have only limitedly materialized. The peace process today remains largely stalled, making only modest progress.

Since the Obama Administration lifted most U.S. sanctions against Burma, bureaucrats in the U.S. Department of State and the Department of the Treasury have been reluctant to reinstate pressure. Memories of how difficult it was to unwind the sanctions regime, and a reluctance to admit that lifting sanctions at the speed and extent they did was the wrong move, in part, contributes to ongoing intransigence. These concerns are often coupled with fears that implementing sanctions will push Burma further into China's orbit and lead to isolation from the U.S.

The latter concern looms especially large, as many in Congress and the executive branch believe that countries in Southeast Asia will ultimately choose engagement with China or engagement with the U.S. This characterization creates a false dichotomy that has not occurred in a single country in Southeast Asia. The countries in the region choose to engage, particularly economically, with both countries, and have good reasons for doing so. U.S. engagement in the region, however, has historically been characterized by promotion of human rights and values. Something that, rhetorically, remains an enduring commitment in the Trump Administration's Free and Open Indo-Pacific strategy. Those commitments, unfortunately, have not consistently translated into policy.

U.S. Burma Policy Under the Trump Administration

Over the Trump Administration's tenure, U.S. policy toward Burma has been animated by its response to the Rohingya crisis. The U.S. is the top

provider of humanitarian assistance to Rohingya Muslims. As of March 2019, the U.S. has provided \$494 million in humanitarian assistance.²⁴

The U.S. has also applied sanctions against parts of the Burmese military. Since the crisis began, the U.S. government placed four Burmese military officials and border guards, and the 33rd and 99th Light Infantry Divisions, divisions of the military directly involved in atrocities against Rohingya, on the Treasury Department's Specially Designated Nationals (SDN) list.²⁵ In July 2019, the State Department issued a travel ban against Commander-in-Chief Senior-General Min Aung Hlaing and three other Burmese military officials.²⁶ The State Department stopped short of financially sanctioning Min Aung Hlaing, who is ultimately responsible for the atrocities.

Not a single military-owned enterprise has been sanctioned by the Administration. However, pending legislation—the Burma Unified through Rigorous Military Accountability (BURMA) Act of 2019,²⁷ which has already passed the House of Representatives—does suggest the need to eliminate the military-owned enterprises from the Burmese economy.

The Administration has also been reluctant to issue an official determination on atrocities committed against the Rohingya.²⁸ Despite the U.N.'s findings that genocide, war crimes, and crimes against humanity were carried out by the Burmese military against the Rohingya, the U.S. still calls what took place “ethnic cleansing”—a term that has no bearing in international law.²⁹ The FFM's finding that genocide—which is a term with legal consequences—was carried out by the Burmese military is corroborated by others, including the U.S. Holocaust Memorial Museum, which does not take atrocity determinations lightly.³⁰

The Trump Administration's response has been inconsistent at best, haphazard at worst. The U.S. government should give serious consideration to the substantial findings of both FFM reports to determine how the finding of credible evidence that genocide took place affects U.S. thinking on atrocity determinations and U.S. sanctions policy.³¹ Both FFM reports should have significant influence on U.S. policy toward Burma.

Hitting the Burmese Military Where It Hurts

There are many takeaways from the FFM's latest report. The most significant: It is time to hit the Burmese military where it hurts most—in its bank accounts. That will undoubtedly require a web of sanctions instituted in a swift, targeted, and strategic manner.

When evaluating potential sanctions targets, the Treasury typically looks for two characteristics: (1) vulnerability of assets to sanctioning, and (2)

identification of influential sanctionable individuals and entities whose designations are most likely to stave off would-be bad actors from engaging in the same nefarious, sanctionable, activities. In essence, Treasury is looking for maximum deterrence effect and to get the most bang for its buck.

In order to accomplish these objectives, the U.S. government should:

- **Financially sanction Burmese military-owned enterprises.** The MEC and MEHL are notorious for providing funding to the Burmese military. The FFM's second report makes these concerns undeniable. When coupled with the fact that the MEC and MEHL were previously sanctioned, they should be obvious sanctions targets. Presumably, a designation of the MEC and MEHL would substantially impact their subsidiaries; if necessary, however, especially egregious subsidiaries should be explicitly named and targeted either under authorities that exist under the JADE Act or under the Global Magnitsky Act.
- **Sanction individual members of the Burmese military, including Senior-General Min Aung Hlaing and others senior members of the Burmese military.** Financial sanctions, thus far, have stopped short of designating Senior-General Min Aung Hlaing. Given the visible role he played in atrocities carried out against the Rohingya, he should be designated and face financial consequences for his actions. Other Burmese military and security officials should be explicitly targeted and placed on the SDN list. The Global Magnitsky Act is a particularly valuable sanctions tool in this case, as it permits the Treasury to sanction individuals and entities on human rights and corruption grounds.
- **Evaluate relevant financial tools to craft an over-arching sanctions policy toward Burma.** The Obama Administration's approach toward the country sacrificed much-needed leverage with Burma at a moment of critical change. That leverage needs to be regained and that is best accomplished through the re-implementation of financial measures aimed at the Burmese military and others posing obstacles to political reform.

As Congress crafts legislative measures to hold the Burmese military accountable, it should keep the following in mind:

- **The Treasury should use its existing authorities under the JADE Act to sanction individuals in the Burmese military for their**

role in instigating violence leading to the mass displacement and severe abuse of Rohingya. The JADE Act specifies four categories of individuals who fall under potential sanctions authorities:

(A) Former and present leaders of the SPDC [State Peace and Development Council], the Burmese military, or the USDA [Union Solidarity Development Association].

(B) Officials of the SPDC, the Burmese military, or the USDA involved in the repression of peaceful political activity or in other gross violations of human rights in Burma or in the commission of other human rights abuses, including any current or former officials of the security services and judicial institutions of the SPDC.

(C) Any other Burmese persons who provide substantial economic and political support for the SPDC, the Burmese military, or the USDA.

(D) The immediate family members of any person described in subparagraphs (A) through (C).³²

- **While the JADE Act was passed with the express purpose of countering anti-democratic forces in Burma, the act's authorities are broad enough to encompass other actors** who might be overlooked if the designation categories were tailored more narrowly. For example, the U.S. government has used the JADE Act to sanction the MEC and MEHL in the past.³³ Since the JADE Act is still in effect, these same authorities could be used to sanction the MEC and MEHL again.

Legislative and executive branch efforts to craft sanctions legislation should be broad enough to encompass scenarios beyond the violence that has already been perpetrated against the Rohingya, *and* should expect that additional similar (or even worse) human rights abuses may be carried out in the future. Sanctions authorities should also be broad enough to encompass entities that materially or financially paved the way for the Burmese military to commit atrocities against the Rohingya.

- **Legislation should direct the Treasury Department to use all available tools to hold the Burmese military to account.** In addition to placing individuals and entities on the SDN list,

anti-money-laundering and counterterrorism sanctions can—and should—be applied. Burma was previously designated, for example, under Section 311 of the USA Patriot Act as a primary money-laundering concern. These authorities should be considered for use, once again. Global Magnitsky authorities can also be used to target individuals on human rights and corruption grounds.³⁴ (Current legislation specifies only SDN authorities.)

- **Congress should require the State Department to issue a report every six months identifying key entities** (including military-owned enterprises) or individuals in Burma who are either directly responsible for human rights abuses or who enable them, including atrocities committed against the Rohingya. This would serve as a useful benchmark against which to measure the executive branch’s response.
- **Just as sanctions should include a clear “on-ramp,” or directive, for designating individuals and entities for their role in atrocities, there should be an equally clear “off-ramp.”** Legislation currently under consideration—such as the BURMA Act—lays out criteria under which sanctions could be removed. This is essential to any effective sanctions regime.

The Administration should:

- **Make an official, public legal determination on crimes committed against the Rohingya.** Refusal to issue a legal determination calls into question the sincerity of the Administration in responding to the crimes committed. If the U.S. intends to continue to lead, not just in provision of humanitarian assistance, it should issue a determination.³⁵
- **Pursue alternative legal and judicial mechanisms for holding the Burmese military accountable** in light of the Administration’s objections to bringing a case before the International Criminal Court.
- **Continue to affirm the legitimacy of the civilian government and express support for the continuation of the peace process.** Such rhetoric should encourage Aung San Suu Kyi and the Burmese government to act responsibly and develop a more comprehensive response to the Rohingya crisis. The Administration should also voice

continued U.S. support for the Burmese people and recognize that the Burmese people possess the right to self-determination in forging future political outcomes.

- **Use the Rohingya crisis as an opportunity to re-evaluate and reset U.S. policy toward Burma.** At the root of atrocities committed against the Rohingya lies a crisis of good governance in Burma. The Obama Administration's premature near-full lifting of sanctions on Burma in 2016 reduced pressure on the Burmese military in a way that hampered the civilian government's ability to lead the country toward meaningful democratic reform. The U.S. should conduct an audit of the U.S.–Burma relationship to determine how the U.S. response to the Rohingya crisis can dovetail with a reset of U.S. policy toward Burma.¹⁸

Conclusion

The FFM's latest report represents another significant strike against the Burmese military. The U.S. government should take this new evidence into account and consider what bearing it has on the U.S.'s response to the military's abuses. The report itself raises the international awareness about what took place in August 2017, but it is time for the U.S. to truly lead in responding to severe human rights violations perpetrated by the Burmese military.

The international community cannot discount the leadership role the U.S. has played in alleviating suffering through provision of humanitarian aid to the Rohingya. But it must wonder why the U.S. sanctions regime against the Burmese military is so limited.

If the U.S. is truly to lead, it must rebuild its sanctions program and issue a determination on crimes committed against the Rohingya. Sanctions need not be limited to individuals, and should extend to military-owned enterprises that prop up the Burmese military and perpetuate its abuses. Two years on from August 2017, when some of the most severe human rights violations perpetrated by the Burmese military to date were committed, it is necessary for the U.S. to have a robust response.

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