

Memorandum on potential international law issues arising from the sale of Telenor Myanmar

On International Law Issues Arising for Telenor in its Sale of Telenor Myanmar to Shwe Byain Phyu through Lebanon-based M1 Group

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MEMORANDUM

SCOPE OF MEMORANDUM

1. We have expertise in international criminal law and international accountability mechanisms, human rights-based challenges, corporate reporting of modern slavery, broader business and human rights issues, and victim-centred justice.¹ We have previous experience in the legal issues arising from foreign investment in Myanmar, including providing a memo to civil society group Justice For Myanmar (JFM) on the risks relating to investment in a construction project in Myanmar post the coup in February 2021.² This memo was provided to the Singapore Stock Exchange and has led to increased scrutiny of the investment arrangements in the Golden City Development Project.³
2. We have been instructed by the Australian Centre for International Justice (ACIJ) on behalf of the Centre for Research on Multinational Corporations (SOMO) to consider the consequences of the sale of communications company Telenor Myanmar, a subsidiary of Telenor Group (Telenor), a Norwegian company where the Norwegian state has a majority shareholding, to Burmese company Shwe Byain Phyu through its initial sale to Lebanon-based M1 Group. We understand this memo will be delivered to both the CEOs and Boards of Directors of Telenor and M1 Group, to Norway's Minister of Trade and Industry, and published publicly. We have endeavoured to capture the business and human rights issues that arise for multinationals

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²Justice For Myanmar, 'International Legal Issues Arising for the Singapore Stock Exchange from its Listing of Emerging Towns & Cities Singapore', <<https://www.justiceformyanmar.org/stories/international-legal-issues-arising-for-the-singapore-stock-exchange-from-its-listing-of-emerging-towns-cities-singapore>>, 20 October 2021, date accessed 11 February 2022.

³Emerging Towns and Cities Singapore Ltd., 'GRANT OF THIRD EXTENSION OF TIME FOR THE COMPANY TO COMPLY WITH RULE 704(7) OF THE CATALIST RULES', <https://investor.etcingsapore.com/newsroom/20220125_190756_1C0_O61DVO5JYGHYU15V.1.pdf>, 25 January 2022, date accessed 16 February 2022.

engaging and investing in telecommunications in Myanmar.

3. Telenor is a majority Norwegian-state owned company⁴ that operates a mobile network in Myanmar, established in 2014, called Telenor Myanmar. Telenor Myanmar has promoted itself as the sole reliable and trusted mobile operator in Myanmar.⁵ Telenor Group is currently seeking to sell Telenor Myanmar, stating:

...because of the consequences of the military takeover, Telenor was left with no other choice but to sell Telenor Myanmar. This decision was not motivated by financial or strategic objectives. It was a last resort and the only way we could prevent having to decide between following local laws or complying with international law and human rights principles. The sale of Telenor Myanmar allowed for continued employment for our 730 employees, and access to service with a fourth operator, independent of the military regime, for 18 million subscribers, as well as essential industries such as hospitals and banks.⁶

4. Such a sale would be subject to the approval of the shareholders, which includes the majority shareholding by the state of Norway. This is an interesting test of governance arrangements (as opposed to pure profit strategy) in a company and state which have expressed commitments to human rights principles. Indeed, here the business concerned (and thus the Directors and shareholders) appears to have expressed commitment to their employees, their customers and more broadly the people of Myanmar at risk of human rights violations. Telenor has plainly considered the military use of data and metadata against a background of gross violations of human rights carried out with impunity.⁷ However, the legal questions do not end with those internal considerations, even when publicly expressed.
5. Similarly, M1 Group has reportedly stated that it would "never jeopardize its principles or reputation when it comes to human rights issues", and that the Group "will abide by the law" and only comply with "lawful interception requests" for users' information.⁸

⁴ Telenor Group, 'Major Shareholdings', <<https://www.telenor.com/investors/share-information/major-shareholdings/>>, 31 December 2021, date accessed 11 February 2022.

⁵ The Centre for Research on Multinational Corporations, 'Complaint to the Norwegian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises', <https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/07/Telenor-OECD-GLs-complaint-1.pdf>, 27 July 2021, date accessed 11 February 2022.

⁶ Telenor Group, 'Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar (27 September 2021)', <<https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021>>, 27 September 2021, date accessed 11 February, 2022.

⁷ OHCHR, 'UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes', <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>>, date accessed 11 February 2022.

⁸ <https://english.alaraby.co.uk/analysis/what-lebanese-m1-group-just-entered-myanmar>

6. We have been asked to provide a memorandum of legal issues in relation to whether the sale of Telenor Myanmar is contrary to international business, human rights, and criminal law and guidance, and how this might have been considered by Telenor in its decision to sell, if at all. We have also considered the responsibilities and due diligence obligations on M1 Group.
7. We are not experts in Norwegian or Lebanese law so have restricted ourselves to the broader business and human rights questions and their interplay, if any, with common domestic law actions and remedies. We have included some observations on the risk of harm to the people of Myanmar and how assessment of liability by Norway or Lebanon as states, and Telenor and M1 as companies, might be considered. We have raised the potential that both Telenor and M1 Group may find themselves in the position of having a duty of care outside of contractual relations. We have also raised questions over the facilitation of, or corporate complicity in, human rights violations and international crimes as live issues in the corporate decision-making process. In terms of complicity by individuals,⁹ we are aware of police complaints in Norway and assume these will be thoroughly investigated, to include individual decision-making in the sale process.¹⁰ We are not aware of any similar complaint in Lebanon.
8. The core problem for businesses operating in Myanmar is the level of risk in both litigation and compromising business and human rights principles. In Myanmar, the consequences of compromising human rights principles through accepting military directives of a communications company can be severe for the employees of that company, its customers, and the general population. This also comes with business risks through breach of sanctions, litigation risks through responsibility for, or complicity in or facilitation of human rights violations, financial loss and loss of reputation. We consider these are live issues for both Telenor and M1 Group.
9. State responsibility is also engaged. Where host states do not protect against human rights abuses or actively engage in human rights violations, not only are there serious issues for businesses operating in the host state to consider in future decision-making, but state oversight of companies incorporated in their jurisdiction is also engaged and their subsidiaries / corporate chains of supply.
10. Mechanisms for accountability are developing globally and include litigation risks for businesses, the states in which they are incorporated, and the states in which they operate. Those risks are not necessarily ameliorated by divestment by Telenor or by selling to Shwe Byain Phyu through

⁹ Myanmar Now, 'Telenor board members and Norwegian authorities may be 'aiding and abetting crimes against humanity' in Myanmar, says top judge', <<https://www.myanmar-now.org/en/news/telenor-board-members-and-norwegian-authorities-may-be-aiding-and-abetting-crimes-against>>, 12 February 2022, date accessed 16 February 2022.

¹⁰ Myanmar Now, 'Norwegian civil society network reports Telenor Myanmar sale to police', <<https://www.myanmar-now.org/en/news/norwegian-civil-society-network-reports-telenor-myanmar-sale-to-police>>, 12 February 2022, date accessed 16 February 2022.

M1 Group operating in a host state that abuses human rights, particularly where the divestment or corporate separation arrangements would result in further violations and serious criminal activity. Where sanctions are in place, risks for both Telenor and M1 Group include both breach and performance delays.

11. Where a company operates globally, it may also be subject to other requirements, such as bribery and corruption mechanisms,¹¹ or liability for broader torts.¹² Since the decision in *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents)*¹³ (**Vedanta**) by the UK Supreme Court, parent companies such as Telenor and M1 Group should be alive to the potential for liability for the operations of subsidiaries that cause, facilitate or are complicit in such harms.
12. Scrutiny of the decision to sell Telenor Myanmar is available because the state of Norway is a majority stakeholder. Such scrutiny should not, in our view, be opaque. Interestingly, whilst ostensibly M1 Group is privately owned, several of the family members appear to be sufficiently connected to Lebanese state politics such that there may well be sufficient connection for state responsibility to be considered. The corporate and state arrangements of M1 Group are worthy of investigation in this context.¹⁴
13. It is not clear whether Telenor has engaged in thorough due diligence undertaken of the M1 Group as a prospective purchaser. This means that the risks the sale presents to employees and customers are currently unclear. It is also not clear what role the Norwegian state has played in the examination of the sale as majority shareholder. Further, it is not helpful for M1 Group to make assertions of commitments to business and human rights compliance without acknowledging the need for the assessment of risk we outline below.
14. There is a particular risk in this sale of historical call data disclosure in the face of the clear concerns and strong resistance that require more than public assurance but for clear protective mechanisms to be in place to ensure the data held by seller and purchaser is not used to further

¹¹ British Institute of International and Comparative Law, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms',

<https://www.biiicl.org/documents/84_failure_to_prevent_final_10_feb.pdf>, date accessed 16 February 2022.

¹² Business and Human Rights Resource Centre, 'Corporate liability for violating international law under The Alien Tort Statute: The corporation through the lens of globalization and privatization', <<https://www.business-humanrights.org/en/latest-news/corporate-liability-for-violating-international-law-under-the-alien-tort-statute-the-corporation-through-the-lens-of-globalization-and-privatization/>>, 10 July 2013, date accessed 16 February 2022.

¹³ [2019] UKSC 20.

¹⁴ The New Arab, 'What is the Lebanese 'M1 Group' that just entered Myanmar's telecom market?', <<https://english.alaraby.co.uk/analysis/what-lebanese-m1-group-just-entered-myanmar>>, 15 July 2021, date accessed 3 March 2022.

activity which can cause danger to the people of Myanmar.¹⁵

15. It must be understood that corporate liability for human rights violations can accrue over the long term and that sanctions operate within a global compliance mesh that includes duties of care beyond contractual terms. For example, Telenor itself has stated:

The decision to sell Telenor Myanmar was not taken lightly, and we took guidance from the OECD Guidelines recommending that disengagement should be taken only as a last resort. Despite efforts to remain, we were left with no other choice but to sell Telenor Myanmar. The decision was not motivated by financial or strategic objectives. It was guided by our commitment to our values and standards. As part of the sales process, Telenor conducted integrity due diligence on the potential buyers. The sale of Telenor Myanmar to M1 Group will allow for access to service with a fourth operator for 18 million subscribers as well as for essential industries such as hospitals and banks. It will also ensure continued employment for our 750 employees, and continued livelihood for the value chain in Myanmar dependent on Telenor Myanmar. Given the situation in Myanmar, it is the least detrimental option – keeping the impact to the broad set of rights holders in mind.¹⁶

16. For Telenor, the context includes that the Norwegian state does not recognise the Myanmar military leadership installed in the 1 February coup. It has stated that the population’s telecommunications needs should not be met without any input from the National Unity Government, which Norway itself recognises as the only legitimate government of Myanmar.¹⁷
17. Justice For Myanmar have publicly noted the following concerns regarding the Mikati family who own M1 Group, the M1 Group business dealings and the connections between the family members and the business to regimes which do not respect human rights:¹⁸

¹⁵ Myanmar Now, ‘Telenor board members and Norwegian authorities may be ‘aiding and abetting crimes against humanity’ in Myanmar, says top judge’, <<https://www.myanmar-now.org/en/news/telenor-board-members-and-norwegian-authorities-may-be-aiding-and-abetting-crimes-against>>, 12 February 2022, date accessed 16 February 2022.

¹⁶ Telenor Group, ‘Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar’, <<https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021>>, 27 September 2021, date accessed 11 February 2022. It must be noted that Telenor Myanmar employees themselves called upon Telenor to “immediately intervene to terminate the sale”: Myanmar Now, ‘Telenor ‘rushing’ to get junta approval for sale to military-linked company by end of week- industry source’, <<https://www.myanmar-now.org/en/news/telenor-rushing-to-get-junta-approval-for-sale-to-military-linked-company-by-end-of-week>>, 9 February 2022, date accessed 11 February 2022.

¹⁷ Forum for Utvikling og Miljø, ‘Letter to Norwegian PM concerning Telenor Myanmar’, <<https://forumfor.no/assets/docs/Letter-to-Norwegian-PM-concerning-Telenor-Myanmar.pdf>>, 31 January 2022, date accessed 11 February 2022.

¹⁸ Justice for Myanmar, ‘Telenor Myanmar’s Buyers have financed atrocities and cosied up to dictators’ <<https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators>>, 9 July 2021, date accessed 3 March 2022.

In 2019, corruption charges were filed against Najib Mikati in Lebanon for illicit gains through a subsidised housing loan scheme.¹⁹ In May, 2021, the public prosecutor overseeing the charges against Mikati, as well as other high profile cases, was removed from office, in a move the International Commission of Jurists described as an “attack” on the judiciary...²⁰

In 2005, Azmi Mikati, current M1 Group CEO, who is overseeing the Telenor Myanmar buyout, commented, "The telecom business is actually quite resilient to civil instability... There are problems or conflicts that have impeded development in all of the countries where we operate, but the flip side is that the potential for growth is huge"...²¹

The Mikatis established Investcom in 1982, a telecommunications conglomerate that specialised in serving dictatorships, which used offshore tax havens.²²

In 2001, Investcom entered the telecommunications market in Syria under the Bashar al-Assad dictatorship, in a revenue sharing agreement with the state. At the time, the Assad regime was notorious for its denial of basic human rights. According to Forbes, Najib Mikati is a long-time personal friend of Bashar al-Assad...²³

In July 2005, Investcom launched a mobile network in Sudan, during the height of Sudan’s genocide in Darfur. Investcom reportedly paid Sudan’s dictatorship 150 million Euros for the licence.²⁴ While indiscriminate and brutal attacks were taking place, international war criminal and dictator Al Bashir attended the mobile network’s launch, according to a Yale Law School report.²⁵ The Mikatis’ Sudan investment was steered by Azmi Mikati, then chief executive of Investcom and current CEO of M1 Group.

¹⁹ Reuters, ‘Lebanese prosecutor charges ex-PM and Bank Audi over loans’ <<https://www.reuters.com/article/us-lebanon-protests-mikati-idUSKBN1X213A>>, 23 October 2019, date accessed 3 March 2022.

²⁰ International Commission of Jurists, ‘Lebanon: stop removal of investigative authorities overseeing high-level corruption and criminal negligence cases’, <<https://www.icj.org/lebanon-stop-removal-of-investigative-authorities-overseeing-high-level-corruption-and-criminal-negligence-cases/>>, 4 May 2021, date accessed 3 March 2022.

²¹ Institutional Investor, ‘Mikati’s calling plan for chaos’, <<https://www.institutionalinvestor.com/article/b150nnl83xhsr3/mikatis-calling-plan-for-chaos>>, 10 November 2005, date accessed 3 March 2022.

²² MTN, ‘Annexure 1’, <https://www.mtn-investor.com/mtn_ar08/book2/pdf/annex_1.pdf>, no date, date accessed 3 March 2022.

²³ Zina Moukheiber, Forbes, ‘Nation Building’, <<https://www.forbes.com/forbes/2011/0328/billionaires-11-profile-najib-mikati-lebanon-nation-building.html?sh=6ada9b8a5ebc>>, 9 March 2011, date accessed 3 March 2022.

²⁴ The Allard K. Lowenstein International Human Rights Clinic and The Allard K. Lowenstein International Human Rights Project, Yale Law School, ‘An Analysis of Select Companies’ Operations in Sudan: A Resource for Divestment’, <<https://acir.yale.edu/sites/default/files/files/YaleLowensteinSudanReport.pdf>>, 13 December 2005, date accessed 3 March 2022.

²⁵ The Allard K. Lowenstein International Human Rights Clinic and The Allard K. Lowenstein International Human Rights Project, Yale Law School, ‘An Analysis of Select Companies’ Operations in Sudan: A Resource for Divestment’, <<https://acir.yale.edu/sites/default/files/files/YaleLowensteinSudanReport.pdf>>, 13 December 2005, date accessed 3 March 2022.

In Yemen, Investcom partnered with Shaher Abdulhak, a Yemeni businessperson with close ties to the country's former dictator, Ali Abdullah Saleh. A network of companies in tax havens later facilitated violations of international law, uncovered by the [Arab Reporters for Investigative Journalism](#), including secret payments to Ali Abdullah Saleh after he was sanctioned by the UN.²⁶

In 2006, South African telecommunications conglomerate MTN [took over](#) Investcom after it was listed on the London Stock Exchange. The Mikati family got 10% of MTN, through M1 Group, becoming one of MTN's biggest shareholders. Azmi Mikati was appointed as a non-executive director of MTN.²⁷

As a key investor in MTN, the Mikatis are tainted by MTN's [business conduct](#), which includes allegations of paying protection money to the Taliban in Afghanistan, paying bribes to enter Iran (with legal proceedings ongoing in South Africa) and violating US sanctions.²⁸

MTN has an alarming track record when it comes to fulfilling their human rights responsibilities. A 2019 [ranking](#) of digital rights noted that MTN "lacked strong governance and oversight over human rights issues, and disclosed almost nothing about policies affecting freedom of expression."²⁹

18. The overwhelming impression from the information gathered by JFM is that M1 Group is far more focussed on profit than on people and as such its assertions of commitments to business and human rights frameworks appear to be empty. The JFM enquiries go further: ³⁰

M1 are no strangers to Myanmar. The holding company owns a minority stake in Irrawaddy Green Towers (IGT), one of Myanmar's biggest tower companies. IGT's business model is to build and operate telecommunications towers around Myanmar that are leased to telecommunications operators.

In 2017, IGT entered into a [master lease agreement](#) with military-controlled mobile operator [Mytel](#) for 677 towers nationwide.³¹ It is not known if the agreement has been expanded

²⁶ Mohammed AlMahdi, Mokhtar Alibrahim, Musa'ab Al Shawbkeh, and Eman Asi, 'Shaher Abdulhak's Tax Havens Violate International Law', <<https://en.arij.net/investigation/shaher-abdulkaks-tax-havens-violate-international-law/>>, 22 July 2018, date accessed 3 March 2022.

²⁷ news24, 'Lebanon family gets 10% of MTN', <<https://www.news24.com/fin24/lebanon-family-gets-10-of-mtn-20060502>>, 2 May 2006, date accessed 3 March 2022.

²⁸ Business Insider South Africa, 'MTN's leaving the Middle East after 15 years of controversies. Here are the biggest.', <<https://www.businessinsider.co.za/mtn-is-finally-leaving-the-middle-east-2020-8>>, 7 August 2020, date accessed 3 March 2022.

²⁹ Ranking Digital Rights, 'MTN Group Limited', <<https://rankingdigitalrights.org/index2019/companies/mtn/index/>>, no date, date accessed 3 March 2022.

³⁰ Justice for Myanmar, 'Telenor Myanmar's Buyers have financed atrocities and cosied up to dictators' <<https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators>>, 9 July 2021, date accessed 3 March 2022.

³¹ IGT, "'IGT' and 'MyTel' signs Master Lease Agreement for 677 sites Colocation", <<https://igt.com.mm/igt-and-mytel-signs-master-lease-agreement-for-677-sites-colocation/>>, 5 July 2017, date accessed 3 March 2022.

since the original announcement. Their master lease agreement with Mytel means that IGT directly profits from Mytel and it enables Mytel to increase market share through their partnership with IGT. In sum, IGT's business model involves profiting from military business.

In the lead up to the Rohingya genocide in June 2017, IGT made a 5,000,000 MMK (US\$3,644) donation to the commander of the Naypyidaw Regional Military Command, Lt Gen Myint Maw, purportedly for victims of a military plane crash.³² The donation is a sign of IGT's close ties to the Myanmar military. As commander of the Naypyidaw Regional Military Command, Lt Gen Myint Maw is directly involved in the Mytel network, which planned a mobile car tower at command headquarters.³³

During the Myanmar military's campaign of genocide against the Rohingya, an IGT tower used by Telenor in Alethankyaw, a fishing community in Maungdaw Township of Arakan State, was used as a sniper post from which soldiers murdered Rohingya.

The attack was detailed in a report published by the Bangladesh-based Rohingya independent media organisation Kaladan Press: "Well over a hundred villagers were killed as they fled or tried to hide near their homes. Scores of bodies were dragged by troops and thrown into wells, as well as dumped under the Telenor tower, and into a pond near the beach."

Telenor's role in the atrocity is now the subject of an OECD National Contact Point Complaint in Norway.

In Telenor's response to the complaint, they explained IGT's role: "The Alethankyaw tower (known as RA0224 – all towers have a unique identifying code) was commissioned by Telenor Myanmar Ltd, but Telenor Myanmar Ltd does not own or operate it. It is owned and operated by the tower company named Irrawaddy Green Towers who leased the land from the land owner."³⁴

In 2019, IGT was named by the UN Fact-Finding Mission³⁵ because of their commercial relationship with Mytel, implicating M1 Group. The group was also added to Burma Campaign

³² Tower Times, "Tower Times Quarterly Newsletter, July 2017: Volume IV—Issue IV", <https://uploads-ssl.webflow.com/5e691d0b7de02f1fd6919876/5fbc417b8416f61d46b8086f_A55%20Tower-Time-4th-Edition.pdf>, July 2017, date accessed 3 March 2022.

³³ Justice for Myanmar, 'Nodes of Corruption, Lines of Abuse', <<https://www.justiceformyanmar.org/stories/nodes-of-corruption-lines-of-abuse-how-mytel-viettel-and-a-global-network-of-businesses-support-the-international-crimes-of-the-myanmar-military>>, 20 December 2020, date accessed 3 March 2022.

³⁴ Telenor Group, 'Complaint to the OECD National Contact Point Norway: SCJ Alethankyaw – Telenor', <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2020/10/Telenor-Response-to-complaint.pdf>>, 17 February 2020, date accessed 3 March 2022.

³⁵ United Nations Human Rights Council, 'Economic interests of the Myanmar military (16 Sept 2019)', <<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>>, 16 September 2019, date accessed 3 March 2022.

UK's 'Dirty List'.³⁶ M1 Group has not publicly responded to their business dealing with the Myanmar military through Mytel.

19. These are serious concerns that both Telenor and M1 Group have the opportunity to investigate and clarify as part of the sale process in order to give weight to their expressed commitment to business and human rights principles. Not to do so suggests they have not considered risks of harm to people nor the potential for extensive litigation, including corporate and individual liability for breaches of international criminal law.
20. We do not use the prospect of litigation lightly. Legal frameworks already exist to consider any corporate or state duty to prevent human rights harms in a company's own activities and the activities of its business relationships through both established and emerging principles of law. The question as to whether a company should be liable for failing to meet an identified standard of care can be determined on the applicable law and facts of each case. International standards are available through the UN Guiding Principles on Business and Human Rights, as well as a network of other Conventions and Guidelines that form hard or soft law on enforcing human rights obligations. In short, if the people of Myanmar suffer harm facilitated by Telenor and or M1 Group, liability could be enormous.
21. In addition to sounding a warning about the potential for litigation, this memorandum seeks to address the question of business decision-making in compromised markets and the laws that should be taken into account in that calculus. Three of many options are to cease trading altogether, to sell and not to purchase, or to continue to engage in operations for the benefit of people subject to military controls. Each comes with risks that the rights of those people would be compromised and where there is a 'knock on' effect to that business in the global market. The tension between remediation through the promotion of human rights principles and 'cutting losses' is an essential question in a global marketplace, especially when sanctions or other scrutiny are in place. Put shortly, people suffer whether Telenor stays or sells and may well continue to suffer if M1 Group's commitments to good business practice are weak or non-existent.
22. The sale should, in our view, be subject to scrutiny and accountability for any responsibility by both Telenor and M1 Group. A necessary adjunct to this is consideration of what alternatives there might be, and what role can the OECD and the relevant states can play in scrutinising the decisions made, to include due diligence checks or use other established powers. The discussion of alternatives is important since Telenor Group itself is aware that "critical services such as banks and hospitals"³⁷ use the communications services concerned.

³⁶ Burma Campaign UK, 'About the company', <<https://burmacampaign.org.uk/take-action/m1-group/>>, no date, date accessed 3 March 2022.

³⁷ Telenor Group, 'Continued presence in Myanmar not possible for Telenor',

23. Similarly, M1 Group must recognise that “sensitive data that can be used in warfare to wind up networks, make arrests and potentially target people for assault, detention, ill-treatment, and execution” for seeking democratic freedoms and human rights protections.³⁸
24. It is our broad view that the decision-making of the Telenor Myanmar sale and purchase should be transparent and subject to oversight. Bold enquiries should produce evidence to demonstrate that business and human rights principles have (or have not) been applied, including an assessment of alternatives. If such enquiries have not been made, M1 Group should at least seek a postponement until such enquiries are undertaken and alternatives are explored. For the state of Norway as a majority shareholder in Telenor and Lebanon as a state with such close links to the Mikati family, oversight is not limited to the potential for financial loss but can include vicarious responsibility or complicity for gross human rights violations.

<https://www.telenor.com/media/announcement/continued-presence-in-myanmar-not-possible-for-telenor> >, 15 September 2021, date accessed 11 February 2022.

³⁸ Forum for Utvikling og Miljø, ‘Letter to Norwegian PM concerning Telenor Myanmar’, <https://forumfor.no/assets/docs/Letter-to-Norwegian-PM-concerning-Telenor-Myanmar.pdf> >, 31, January, 2022, date accessed 11 February 2022.

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A. BACKGROUND

25. The responsibilities for Telenor and M1 Group are enormous: both generate massive revenue and no doubt both consider the size of the Myanmar client base an attractive business proposition: Telenor Myanmar had 18.2 million subscribers as of the first quarter 2021. According to the company's first quarter 2021 report, the company's Myanmar base grew by 2 million in that quarter alone, which included one month following the coup.³⁹ Telenor's Myanmar subscriber base peaked in 2019, with 22.255 million subscribers.⁴⁰ Customers have generated call data records over more than seven years since the network launched in October 2014. Profit is ever tempting for powerful corporate operations but corporate responsibility also comes at a price.
26. Following the military coup on February 1, 2021, Telenor joined a public statement of businesses expressing concern on the Myanmar situation and reinforcing its commitment to human rights,⁴¹ and it publicly expressed a "strong opinion" that the proposed Cyber Security Bill "should not be passed". Telenor stated their objection in relation to human rights considerations; the fact that the Bill would grant broad powers to a temporary administration during a state of emergency; concerns over the execution of powers; and concerns over the broad scope of the proposed Bill, including lawful interception powers.⁴² The Cyber Security Law Bill is now being re-introduced, coinciding with Telenor's withdrawal, proposing even greater restrictions on due process and freedom of expression and giving the Myanmar military unreviewable powers to "check and take over the systems of digital businesses, order content deleted, block digital platforms, revoke business licences, and seize individuals' computers or phones".⁴³ If passed, this Bill would give the Myanmar military even greater powers than those it has already been exercising on an ad hoc basis. Its exercise of powers under the new Law would be greatly facilitated by access to the historical call data of over 18 million customers. What strategies or frameworks does M1 have in

³⁹ Telenor Group, 'Interim report January-March 2021', <<https://www.telenor.com/wp-content/uploads/2020/11/Telenor-Group-Q1-2021-Report-0fe827900a389764548e3e7664530a14.pdf>>, 2021, page 12, date accessed 11 February, 2022.

⁴⁰ Telenor Group, 'Annual report 2020', <<https://www.telenor.com/wp-content/uploads/2021/03/TelenorAnnualReport2020ENG.pdf>>, 2020, page 35, date accessed 11 February 2022.

⁴¹ Telenor Group, 'Telenor Myanmar stands with businesses in Myanmar', <<https://www.telenor.com/media/press-release/telenor-myanmar-stands-with-businesses-in-myanmar>>, 19 February 2021, date accessed 11 February 2022.

⁴² Telenor Group, 'Telenor Group's response to proposed Myanmar Cyber Security Bill', <<https://www.telenor.com/media/press-release/telenor-groups-response-to-proposed-myanmar-cyber-security-bill>>, 15 February 2021, date accessed 11 February 2022.

⁴³ Free Expression Myanmar, 'Military's cyber security bill worse than their previous draft', <<https://freexpressionmyanmar.org/militarys-cyber-security-bill-worse-than-their-previous-draft/>>, 27 January 2022, date accessed 16 February 2022.

place to adopt responsibility for the use of past Telenor data and to ensure that its future stewardship is not a means for genocide, cruel inhuman or degrading treatment and the subjugation of the people of Myanmar? This is not hyperbole. Development of countries like Myanmar depends on its people being engaged in the future and they in turn rely on modern communications. The emerging events between Russia and Ukraine demonstrate the value of oversight of the international community, to include use of external corporate technology. Telenor and M1 Group face an archaic future where their holdings will lack trust and suffer consequential damage globally. Ultimately, whilst many people in Myanmar are currently dependent on Telenor Myanmar and fearful of how their data will be used, technological advances are such globally that it will not take long for the customer base to move on. Both Telenor and M1 Group know the world is watching and ought to cease trading with those who do not live up to their expressed commitments to business practices that prioritise human rights and a sustainable future.

27. Since the coup, the UN Special Rapporteur on the situation of human rights in Myanmar has reported grave human rights violations including murder, torture and mass arbitrary detentions.⁴⁴ Political prisoners include nonviolent and peaceful protesters, elected members of parliament, journalists, civil servants, lawyers, teachers, medics, students and members of the National League for Democracy (**NLD**), whose election result was annulled by the military coup.⁴⁵ The military has declared a state of emergency, which the UN Special Rapporteur has described as “procedurally unlawful under the Constitution”.⁴⁶ Thousands of people have been displaced in indiscriminate attacks. Media, civil society and NLD offices have been raided, and documents, computers and private property seized. Blocks on social media and internet ‘shutdowns’ have been ordered, to prevent the sharing of information, and there have been ‘bans’ on satellite television limiting access to global media. Civilians have been shot and killed directly and in air strikes and subjected to water cannon and rubber bullets in military and pro-military attacks. Laws regulating the powers of security forces have been suspended. The US and EU have responded with sanctions including asset freezing and travel bans but military rule continues, and democracy

⁴⁴ The Special Rapporteur on the situation of human rights in Myanmar, ‘Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews’, <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf>, 4 March 2021, date accessed 16 February 2022.

⁴⁵ The Special Rapporteur on the situation of human rights in Myanmar, ‘Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews’, <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf>, 4 March 2021, date accessed 16 February 2022.

⁴⁶ The Special Rapporteur on the situation of human rights in Myanmar, ‘Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews’, <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf>, 4 March 2021, date accessed 16 February 2022.

has not been restored.

28. The UN Independent International Fact-Finding Mission on Myanmar (**FFM**) recommended that businesses active or trading in Myanmar should not enter a business relationship with any person in the Myanmar military or any enterprise owned or controlled by them.⁴⁷ Specifically in relation to foreign companies, the FFM found at [145]-[146] that:

any foreign business activity involving the Tatmadaw and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to supporting the Tatmadaw's financial capacity.

Given this situation, the absence of security sector reform and the persistent lack of accountability documented in its 2018 report, the Mission concludes on reasonable grounds that the activities of these foreign companies and foreign SOEs dealing with the Tatmadaw and its conglomerates have a reasonably foreseeable adverse impact on the situation of human rights in relation to Myanmar. States hosting these foreign companies and SOEs therefore have a heightened duty to take appropriate legislative and other measures to ensure that the companies' and SOEs' activities are consistent with the State's human rights obligations and responsibilities. The Mission similarly concludes that foreign companies and SOEs involved with the Tatmadaw and its conglomerates MEHL and MEC should sever their relationships with these enterprises in light of the information presented in this report and should ensure that they are fulfilling their corporate responsibility to respect human rights. Those in commercial relationships with MEHL or MEC may find themselves complicit, in law, fact or the eyes of the broader public, in contributing to the resources available to the Tatmadaw to continue its involvement in gross violations of international human rights law and serious violations of international humanitarian law. This report puts companies on further and effective notice of the human rights implications that arise from maintaining business connections with the Tatmadaw.⁴⁸

29. Both Telenor and M1 Group must accept that employees and customers of Telenor Myanmar are already compromised. For example, since July 2020, mobile connections in Myanmar are

⁴⁷ Independent International Fact-Finding Mission on Myanmar, 'The economic interests of the Myanmar military', <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/08/report/the-economic-interests-of-the-myanmar-military/A_HRC_42_CRP_3.pdf>, 5 August 2019, page 100, date accessed 11 February 2022.

⁴⁸ Independent International Fact-Finding Mission on Myanmar, 'The economic interests of the Myanmar military', <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/08/report/the-economic-interests-of-the-myanmar-military/A_HRC_42_CRP_3.pdf>, 5 August 2019, page 52, date accessed 11 February 2022.

required to be registered to the legal identity of the customer.⁴⁹ Registered Telenor Myanmar customers are therefore easily identified, including the most oppressed and vulnerable to international crimes. Furthermore, since the coup, Telenor has reportedly complied with more than 200 requests from the military junta for the personal data of Telenor users.⁵⁰ Telenor has also complied with Myanmar military Directives to shut down data networks and block IP addresses, putting communities at risk from armed groups without assistance, silencing media websites, and undermining the pro-democracy movement.⁵¹

30. On 28 July 2021, SOMO filed a complaint to the Norwegian National Contact Point (NCP) for the OECD on behalf of 474 anonymous Myanmar-based civil society organisations, alleging that Telenor has failed to comply with the OECD Guidelines for Multinational Enterprises in the sale of its subsidiary, Telenor Myanmar.⁵²

31. On 27 September 2021 Telenor issued a public statement as follows:

Due to the deteriorating situation following the military takeover, it became impossible for Telenor to remain in Myanmar and adhere to international law and human rights, as well as its own values and policies. Telenor has faced increasing pressure to activate intercept technology subject to Norwegian and European sanctions, which is unacceptable for Telenor Group.⁵³

32. Telenor now proposes to sell Telenor Myanmar to M1 Group (M1). However, media reports that Telenor Myanmar will be 80 per cent owned by Shwe Byain Phyu Telecom Co Ltd (Shwe Byain Phyu), a registered company in Myanmar. It appears to have no experience of operating a telecommunications business. Concerns have been raised that Telenor failed to consult civil society stakeholders in relation to the sale and that M1 has a history of business dealings with authoritarian regimes.⁵⁴ It was initially reported that Shwe Byain Phyu proposed to exercise

⁴⁹ Myanmar Times, 'Open letter to everyone disconnected on June 30', <<https://www.mmtimes.com/news/open-letter-everyone-disconnected-june-30.html>>, 01 July 2020, date accessed 11 February 2022.

⁵⁰ Myanmar Now, 'Telenor has shared sensitive customer data with military since the coup: industry sources', <<https://www.myanmar-now.org/en/news/telenor-has-shared-sensitive-customer-data-with-military-since-the-coup-industry-sources>>, 7 February 2022, date accessed 14 February 2022.

⁵¹ Privacy International, 'Myanmar will block phone access for those who miss SIM registration deadline', <<https://privacyinternational.org/examples/3771/myanmar-will-block-phone-access-those-who-miss-sim-registration-deadline>>, 29 April 2020, date accessed 16 February 2022.

⁵² Justice For Myanmar, 'Telenor Myanmar's buyers have financed atrocities and cosied up to dictators', <<https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators>>, 9 July 2021, date accessed 11 February 2022.

⁵³ Telenor Group, 'Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar', <<https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021>>, 27 September 2021, date accessed 11 February 2022.

⁵⁴ The Irrawaddy, 'Myanmar Companies Linked to Regime Leaders Bid to Acquire Telenor',

ownership through a company called Investcom Myanmar. Such a company has not been registered in Myanmar's company registry, but a company named Investcom Pte Ltd (**Investcom**) was incorporated in Singapore in July 2021.⁵⁵ As set out above, its Directors include the CEO of M1 Group and the CEO of M1 Enterprises, registered in the Cayman Islands, a well-known secrecy jurisdiction.

33. M1 was named in August 2019 by the FFM for its investment in tower company Irrawaddy Green Towers (IGT), which is a vendor of the MEC-controlled company, (Mytel):⁵⁶

Irrawaddy Green Towers is owned by Irrawaddy Towers Asset Holding Pte. Ltd. (Singapore) which is owned by Alcazar Capital Limited, Alcazar Projects Ltd and the M1 Group. Majority control is held by the family of the late Maroun Semaan through Alcazar Capital Limited, registered in Dubai. The M1 Group is owned by Taha and Najib Mikati of Lebanon.⁵⁷

34. IGT property has been used in acts of genocide against Rohingya. That Telenor would enter into an agreement to sell the top telecommunications company in Myanmar to a company clearly linked to the Myanmar military is worthy of close examination. It is not fanciful to consider whether the sale would facilitate human rights violations through military connections with such a large communications business. There should be enquiry into the business structure of M1 as part of a due diligence exercise into the purchaser. At the very least, this would reveal whether the purchaser can be trusted to protect the rights of Telenor's employees and customers and whether contractual arrangements could be negotiated to protect users through enforceable terms. The tentative view is 'no': M1's flagship company Investcom reportedly paid 150 million euros to the Sudanese regime in 2005 during the Darfur genocide under President Al Bashir,⁵⁸

<<https://www.irrawaddy.com/news/burma/myanmar-companies-linked-to-regime-leaders-bid-to-acquire-telenor.html>>, 2 December 2021, date accessed 11 February, 2022.

⁵⁵ This company is not to be confused with an earlier Investcom established in 1982 by the same Lebanese family involved in M1.

⁵⁶ The Centre for Research on Multinational Corporations, 'Complaint to the Norwegian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises', <https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/07/Telenor-OECD-GLs-complaint-1.pdf>, 27 July 2021, date accessed 11 February, 2022.

⁵⁷ Independent International Fact-Finding Mission on Myanmar, 'The economic interests of the Myanmar military', <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/08/report/the-economic-interests-of-the-myanmar-military/A_HRC_42_CRP_3.pdf>, 5 August 2019, page 101, date accessed 11 February, 2022.

⁵⁸ Allard K. Lowenstein International Human Rights Clinic and Allard K. Lowenstein International Human Rights Project, Yale Law School, 'An Analysis of Select Companies' Operations in Sudan: A Resource for Divestment', <<https://acir.yale.edu/sites/default/files/files/YaleLowensteinSudanReport.pdf>>, page 46, 13 December 2005, date accessed 16 February, 2022.

and M1's current CEO oversaw both that Sudanese purchase and this Myanmar purchase.⁵⁹

35. On 20 January 2022, 49 per cent of Investcom's shares were transferred to Shwe Byain Phyu. The remaining 51 per cent of Investcom's shares are held by a known Cayman Islands shell company.⁶⁰ It has been suggested that Telenor is shielding the sale arrangements by refusing to confirm the involvement of Shwe Byain Phyu to the public on the one hand, and assuring the junta's telecommunications regulator on the other that a contract with M1 allows it to transfer Telenor Myanmar's ownership to a local company.⁶¹ Reuters has reported an investigation which found that Shwe Byain Phyu will be granted regulatory approval, will own 80 per cent of Telenor Myanmar, and the sale was intended to be finalized within days.⁶²
36. The planned sale of Telenor Myanmar raises the following specific concerns:
- (a) M1 or Shwe Byain Phyu will hand over historical call data from millions of current and past customers, including democracy activists, journalists, civil society advocates, and anti-junta protesters.
 - (b) M1 or Shwe Byain Phyu will activate technology installed by Telenor, which Telenor refuses to activate itself, to intercept future mobile communications.
 - (c) Shwe Byain Phyu will receive revenue from the phone contracts of 18.3 million users, and it is likely that at least part of this revenue will fund military spending against the background of persistent breaches of international criminal law.
 - (d) Customer revenues may flow from Shwe Byain Phyu through companies and individuals which will fund organised crime or terrorist activities by the Myanmar military.
37. Clear answers to these questions appear unknown. One can see why there may be a will to sell

⁵⁹ Institutional Investor, 'Mikati's calling plan for chaos', <<https://www.institutionalinvestor.com/article/b150nnl83xhsr3/mikatis-calling-plan-for-chaos>>, 10 November 2005, date accessed 16 February 2022.

⁶⁰ Tin Htet Paing, 'Telenor sale to military-linked consortium to be complete in mid-February', <<https://www.myanmar-now.org/en/news/telenor-sale-to-military-linked-consortium-to-be-complete-in-mid-february>>, 4 February 2022, date accessed 11 February, 2022.

⁶¹ Justice For Myanmar, 'Norwegian government must urgently stop Telenor Myanmar sale or it will be complicit with terrorist junta', <<https://www.justiceformyanmar.org/press-releases/norwegian-government-must-urgently-stop-telenor-myanmar-sale-or-it-will-be-complicit-with-terrorist-junta>>, 5 February 2022, date accessed 11 February 2022.

⁶² Poppy McPherson, Fanny Potkin, 'EXCLUSIVE-Myanmar firm poised to control Telenor unit after military backs bid-sources', <<https://www.reuters.com/article/myanmar-telenor-idUSL1N2UJ1GM>>, 12 February 2022, date accessed 16 February 2022.

Telenor Myanmar in a context where over 12,000 people have been arrested for resistance to the military regime,⁶³ and where internet surveillance appears to be rife and targeted against those who seek democracy.⁶⁴ However, to continue with the sale / purchase of Telenor Myanmar where M1 has a demonstrated record of noncompliance, puts people at risk of human rights violations, does not protect people from human rights violations, and creates an additional revenue stream for the Myanmar military from the very people it seeks to control. The proposed sale/ purchase requires serious scrutiny to include an independent examination of the process of Telenor's and M1 Group's decision making and whether they are truly compliant with the human rights principles they purport to enforce.

38. Overall, the ostensible reason for the decision by Telenor Group to sell has been cited as linked to the pressure to activate intercept equipment for the use of Myanmar authorities as its ostensible reason for selling Telenor Myanmar.⁶⁵ Telenor Myanmar took the steps to install intercept equipment in the first place, “giving the military the power to listen in on calls, view text messages and emails, as well as track the location of users without the assistance of telecommunications and internet companies”.⁶⁶ Telenor's legal liability regarding intercept equipment require further scrutiny.
39. During the life of Telenor Myanmar, Telenor already complied with over 200 requests from the Myanmar Ministry of Transport and Communications since the coup. These requests included records of calls, call locations, the last known location of a number, instructions to shut down specified mobile numbers, and call histories of different lengths.⁶⁷ Compliance with these requests have already led to the intimidation of people opposed to the coup, including singer Htwe Lynn Ko, who had been using social media to raise funds for state employees taking part

⁶³ Assistance Association for Political Prisoners, ‘Daily Briefing in Relation to the Military Coup’, <<https://aappb.org/?p=20125>>, 11 February 2022, date accessed 16 February 2022.

⁶⁴ Phyu Phyu Kyaw, ‘The rise of online censorship and surveillance in Myanmar: A quantitative and qualitative study’, <https://public.opentech.fund/documents/The_Rise_of_Online_Censorship_and_Surveillance_in_Myanmar.pdf>, November 2020, date accessed 11 February 2022.

⁶⁵ Telenor Group, ‘Continued presence in Myanmar not possible for Telenor’, <<https://www.telenor.com/media/announcement/continued-presence-in-myanmar-not-possible-for-telenor>>, 15 September 2021, date accessed 11 February 2022.

⁶⁶ The Centre for Research on Multinational Corporations, ‘Complaint to the Norwegian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises’, <https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/07/Telenor-OECD-GLs-complaint-1.pdf>, 27 July 2021, date accessed 11 February, 2022., Fanny Potkin and Poppy Mcpherson, ‘How Myanmar’s military moved in on the telecoms sector to spy on citizens’, <<https://www.reuters.com/world/asia-pacific/how-myanmars-military-moved-telecoms-sector-spy-citizens-2021-05-18/>>, 19 May 2021, date accessed 11 February 2022.

⁶⁷ Aung Naing, ‘Telenor has shared sensitive customer data with military since the coup: industry sources’, <<https://www.myanmar-now.org/en/news/telenor-has-shared-sensitive-customer-data-with-military-since-the-coup-industry-sources>>, 7 February 2022, date accessed 11 February 2022.

in the Civil Disobedience Movement against military rule.⁶⁸

40. A cynic would ask – why would M1 Group wish to take on these burdens unless it has some ulterior and objectionable motive?
41. Telenor now claims that “it is crucial to maintain our international commitments and legal obligations and act in accordance with our values and human rights, no matter where we operate”.⁶⁹ Knowing that its previous compliance with occasional requests for information or action by the Myanmar military has or would have facilitated the military repression and associated crimes, Telenor seeks to wash its hands of its unfortunate subsidiary. The consequence would likely be the turning over of *all* information, to allow the junta to identify whole chains of dissident or suspected dissident behaviour based on phone numbers already obtained through interrogation of detainees, rather than the case-by-case drip feed that compliance with data requests entails. Such a divestiture is unlikely to be human rights compliant.
42. The practical reality is that M1 Group has the opportunity to behave responsibly, assess the risks to states, business, customers and employees, and act as a modern operation committed to a sensible and transparent future.
43. Telenor has effectively concluded that prospects for remediation are non-existent but M1 need not do so – it is in a unique position to contribute to the future stability of Myanmar. The sale involves a large telecommunications asset servicing approximately a third of the Myanmar population’s telecommunications to a group that appears more likely to comply with authoritarian directives and less likely to comply with business and human rights principles, where there are already concerns that communications hardware has been used for military activity against vulnerable groups.⁷⁰ It is necessary to consider how levels of power over the people in Myanmar could be exponentially increased if communications were held through operators with military connections or where due diligence enquiries could reveal additional human rights concerns.
44. It may be that Telenor and M1 Group are uniquely placed to lead the reaction to changes to communications regulation. Selling historical call data otherwise poses a serious risk that chains

⁶⁸ Aung Naing, ‘Telenor has shared sensitive customer data with military since the coup: industry sources’, <<https://www.myanmar-now.org/en/news/telenor-has-shared-sensitive-customer-data-with-military-since-the-coup-industry-sources>>, 7 February 2022, date accessed 11 February 2022.

⁶⁹ Telenor Group, ‘Continued presence in Myanmar not possible for Telenor’, <<https://www.telenor.com/media/announcement/continued-presence-in-myanmar-not-possible-for-telenor>>, 15 September 2021, date accessed 11 February 2022.

⁷⁰ Justice For Myanmar, ‘Telenor Myanmar’s buyers have financed atrocities and cosied up to dictators’, <<https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators>>, 9 July 2021, date accessed 11 February 2022.

of resisters will be identified, for example through those already detained, and that further grave human rights violations will occur. These are not merely questions for Telenor, M1 Group or Norway or Lebanon: the practical reality is that the Telenor sale is inextricably linked to the global response to the coup in Myanmar, and each state is well placed to engage with the international community in meaningful discussion over remediation. At this stage, there are powerful arguments for postponing the sale for a much fuller inquiry into the risks, responsibilities, and alternatives, including potential adaptations to the sanctions regime for Telenor Myanmar to operate in a sanctions-compliant manner.

B. INTERNATIONAL LAW ISSUES

B.1 State Responsibilities under the UN Guiding Principles on Business and Human Rights

45. Business and human rights as a legal issue has international momentum. The UN Human Rights Council has unanimously endorsed the UN Guiding Principles on Business and Human Rights (**the Guiding Principles**), which comprise three pillars:
- (a) Pillar 1 - the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication.
 - (b) Pillar 2 - the corporate responsibility to respect human rights, which means to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and
 - (c) Pillar 3 - the need for greater access by victims to effective remedy, judicial and non-judicial.
46. The Guiding Principles do not create new international law obligations or limit existing legal frameworks. They rather provide an authoritative statement on the relationship between business and human rights as well as standards for preventing and addressing the risk of adverse human rights impacts linked to business activity.
47. Access to an effective remedy is a core component of the Guiding Principles. Principle 1 requires States to take "appropriate steps to prevent, investigate, punish and redress" business-related human rights abuses within their territory and/or jurisdiction. Principle 22, in Pillar II, provides that where "business enterprises identify that they have caused *or contributed to*⁷¹ adverse impacts,

⁷¹ emphasis added

they should provide for or cooperate in their remediation through legitimate processes". Principle 25, in Pillar III on access to remedy, reminds States to "take appropriate steps to ensure" that those affected by business-related human rights abuses within their territory and/or jurisdiction "have access to effective remedy". The Guiding Principles envisage effective remedies through state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms.⁷²

48. **Principle 4** supports the business activities of State-controlled enterprises, or enterprises that enjoy substantial support and services from the State. Because Telenor is majority-owned by the Norwegian state, "States should take additional steps to protect against human rights abuses" by enterprises of this kind, "including, where appropriate, by requiring human rights due diligence". It would also be appropriate for the State to intervene using existing powers under Norwegian company law as majority shareholder.
49. The Norwegian Ministry of Foreign Affairs' own *Business and Human Rights: National Action Plan for the implementation of the UN Guiding Principles* reports at page 21 that the state has certain expectations of enterprises in which it has a direct ownership interest, including expectations based on the UN Guiding Principles.⁷³ Given that the Norwegian NCP for the OECD Guidelines for Multinational Enterprises has accepted a complaint on Telenor's proposed sale of Telenor Myanmar to M1, the conclusion is unavoidable that there is at least some cause for concern that the actions of Telenor have deviated from the Norwegian state's expectations and that the 'comply or explain' principle should be triggered, especially in circumstances such as these where an entire population's telecommunications fate can be determined by Telenor's last major decision making process in respect of Telenor Myanmar: therein lies the materiality. On that basis, the UN Guiding Principles should trigger greater scrutiny by the Norwegian state of its compliance or explanation with human rights obligations, either through executive action or through judicial oversight. For example, the 'comply or explain' principle in the UN Guiding Principles can be substantially effected by a Court by requiring disclosure of due diligence documents and/or seeking an explanation for the decision to sell to M1 (or to sell at all).
50. Fundamental to interpreting the Guiding Principles is that states should be responsible for their actions and human rights obligations, in addition to protecting human rights in a commercial context. For example, states have responsibility in accordance with **Principle 7**, which provides that:

⁷² OHCHR, 'Access to Remedy', <<https://www.ohchr.org/EN/Issues/Business/Pages/AccessToRemedy.aspx>>, date accessed 16 February 2022.

⁷³ Norwegian Ministry of Foreign Affairs, 'Business and Human Rights: National Action Plan for the implementation of the UN Guiding Principles', <<https://globalnaps.org/wp-content/uploads/2017/10/NAP-Norway.pdf>>, no date, date accessed 11 February 2022.

Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses including by... (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation.

51. Principle 7 operates on two key assumptions: firstly, that the host state may be “unable to protect human rights adequately due to effective control”,⁷⁴ and secondly, in the absence of human rights protection and leadership by the host state, the other state party to business dealings has the responsibility to “assist... to ensure that businesses are not involved in human rights abuses”.⁷⁵ It is the Norwegian state’s own established position that the government it recognises, the National Unity Government (NUG), does not exercise sufficient control over Myanmar to prevent human rights abuses. In fact, the NUG has issued the following statement on 10 February 2022:

In our cabinet meeting, the National Unity Government of Myanmar decided that the sale of Telenor Group is not acceptable and should not be approved. Telecom data contains sensitive data and a sale would constitute a risk to the security and lives of 18.3 million Telenor’s faithful customers in Myanmar.

We, the National Unity Government of Myanmar, therefore, kindly ask the Royal Norwegian government to use your majority position in Telenor and place a request to ignore any decisions made by the illegitimate military regime, and reverse or defer the decision of selling its Myanmar unit in order to stop pushing over 18 million customers into the hands of the military regime.

We would like to request the Norwegian Government to help respect the decision of the legitimate government of Myanmar, the NUG and the will of the Myanmar people.⁷⁶

52. The military regime has been denounced by the Special Advisory Council for Myanmar as a terrorist organisation. Its priorities in Myanmar render it unable to adequately protect the human rights of its citizens and residents; it has a demonstrated and well-documented record of violent repression, human rights abuses, and international crimes.

⁷⁴ United Nations Human Rights Office of the High Commissioner, ‘Guiding Principles on Business and Human Rights’, <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>, 2011, page 9, date accessed 11 February 2022.

⁷⁵ United Nations Human Rights Office of the High Commissioner, ‘Guiding Principles on Business and Human Rights’, <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>, 2011, page 9, date accessed 11 February 2022.

⁷⁶ Letter from National Unity Government acting President Duwa Lashi La to the Prime Minister of Norway, <<https://www.facebook.com/NUGmyanmar/posts/249648644005033>> 10 February 2022, accessed 14 February 2022.

53. The Norwegian state and potentially the state of Lebanon through the Mikati family connections have financial interests in the sale of Telenor Myanmar. It therefore falls to those state to ensure that Telenor does not become further involved in human rights abuses. Put shortly, there is a serious risk that sale/ purchase would facilitate human rights abuses rather than mitigate them, for which Telenor, M1 Group and the two states could be responsible given their constructive knowledge of the host state environment.

B.2 Corporate Responsibilities under the UN Guiding Principles on Business and Human Rights

54. Principles 13, 17, 18, and 19 on Corporate Responsibility create obligations for Telenor itself. For example, **Principle 13** provides that:

The responsibility to respect human rights requires that business enterprises:

- i. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- ii. 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.

55. To comply with Principle 13, it is incumbent on Telenor and M1 Group to avoid contributing to further adverse human rights impacts, when it is clearly within their contemplation that Telenor Myanmar's interception technology will be activated upon sale, and that Telenor Myanmar's customer data will be available for the Myanmar junta to track down and silence protesters, and customer revenue will likely flow into the coffers of the Myanmar military. Its compliance with previous data requests from the Myanmar junta has already caused harm. Arguably, a responsibility has already arisen for Telenor to address previous actions that have adversely impacted Myanmar citizens' rights, including public figures who spoke out against the coup and were forced to go into hiding because they could be tracked using Telenor data disclosed to the junta.⁷⁷ This observation is consistent with OHCHR Interpretive Guidance on the Corporate Responsibility to Respect Human Rights.⁷⁸

56. For Telenor to then irresponsibly disengage from Telenor Myanmar by selling to a company that

⁷⁷ Aung Naing, 'Telenor has shared sensitive customer data with military since the coup: industry sources', *Myanmar Now*, <<https://www.myanmar-now.org/en/news/telenor-has-shared-sensitive-customer-data-with-military-since-the-coup-industry-sources>>, 7 February 2022, date accessed 11 February 2022.

⁷⁸ OHCHR, 'Interpretive Guidance on the Corporate Responsibility to Respect Human Rights', <https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>, page 17, date accessed 16 February 2022.

has connections to known human rights abuses would have the opposite effect of the purpose it claims to be achieving from the disengagement. Such an action does not mitigate the adverse impact.

57. Principles 17 and 18 of the Guiding Principles relate to an organisation's responsibility to conduct ongoing assessments to fulfil due diligence requirements. **Principle 17** requires that human rights due diligence:
- (a) should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
 - (b) will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
 - (c) should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.⁷⁹
58. Neither Telenor nor M1 Group have disclosed any human rights due diligence that would permit a frank assessment of whether they have acted consistently with the UN Guiding Principles. The commentary to Principle 17 also requires human rights due diligence to be exercised as early as possible in relation to a given action. Telenor's public announcements have only ever nominated M1 as a prospective, and now actual, purchaser, in the face of thorough findings of M1's complicity in telecommunications-related human rights abuses around the world. Moreover, Telenor has publicly confirmed that historical call data forms part of the sale, over which the GDPR apply. From the opposition of experts, investigators, victims, Telenor Myanmar employees, and the NUG, it would appear that Telenor should account for its actions and decisions to date: for example, how human rights due diligence into both the purchaser and the consequences of sale was conducted, which factors were taken into account and which were given more weight than others, what alternatives were considered, and ultimately how it came to the conclusion to sell to M1 given its track record and connections with Shwe Byain Phyu.
59. Similarly, M1 Group has a great deal of work to do for it to be seen as a trustworthy operation and it needs to engage independent consultants to improve its business practices.
60. Pending such disclosure by both operations, including through all the various claims we have listed above, there are grounds to suggest that Telenor should not be permitted to complete the sale of Telenor Myanmar, at least for interim relief until this exercise is undertaken and M1 Group should be publicly identified as an operation that lacks trust and transparency such that its

⁷⁹ OHCHR, 'Interpretive Guidance on the Corporate Responsibility to Respect Human Rights', <https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>, pages 17-18, date accessed 16 February 2022.

products ought to be avoided.

61. As the commentary to Principle 17 suggests, failure to conduct proper human rights due diligence can raise “questions of complicity”⁸⁰ in both civil and criminal claims. In France at least, the pathway has been cleared to investigate criminality based on complicity;⁸¹ international criminal law also permits modes of liability based on knowing complicity. This can be relevant to corporate liability for human rights abuses long term as well as individual responsibility for international crimes.
62. There is already enough evidence available in investigative findings and civil society complaints that, if the sale of Telenor Myanmar proceeds, it will risk Telenor and its majority shareholder, the Norwegian state, facilitating or being complicit in harmful acts which may well be contrary to international criminal law and potentially create tensions as between states, particularly in the EU where there is broad commitment to human rights principles, and undermining executive decision-making via the Norwegian NCP for the OECD Guidelines. Such risks must be evaluated before the sale is completed by both seller and prospective purchaser. In the 21st century these old-fashioned opaque business practices should be publicly abhorred.

B.3 The OECD Guidelines for Multinational Enterprises

63. Lebanon is not an OECD member but that does not make the OECD ineffective. OECD nations have the opportunity not to engage in Lebanese business that does not act in accordance with OECD norms and ought to take it.
64. As a member of the OECD, Norway adheres to the OECD Guidelines for Multinational Enterprises. The Norway NCP for the OECD Guidelines has currently accepted two complaints relating to Telenor, both currently under review. In a complaint filed in December 2019, the Committee Seeking Justice for Alethankyaw allege that Telenor:

breached the OECD Guidelines by failing to carry out due diligence before expanding into northern Arakan, despite risks of the company’s involvement in the unfolding crimes against the Rohingya ethnic minority group. The complaint asserts that security forces used a Telenor cellular network tower as a vantage point from which to shoot at

⁸⁰ OHCHR, ‘Interpretive Guidance on the Corporate Responsibility to Respect Human Rights’, <https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>, page 18-19, date accessed 16 February 2022.

⁸¹ France24, ‘France probes banking giant BNP Paribas for alleged complicity in Sudan crimes’, <<https://www.france24.com/en/20200924-france-probes-banking-giant-bnp-paribas-for-alleged-complicity-in-sudan-crimes>>, 24 September 2020, date accessed 16 February 2022.

fleeing Rohingya men, women and children as they tried to escape Alethankyaw during the last week of August 2017.⁸²

65. Secondly, in a complaint filed in July 2021, the Centre for Research on Multinational Corporations (SOMO) on behalf of 474 Myanmar-based civil society organisations alleged that:
1. Telenor has failed to conduct appropriate risk-based due diligence and has failed to seek to prevent or mitigate adverse human rights impacts potentially arising from the sale of its Myanmar operations.
 2. Telenor has failed to meaningfully engage with relevant stakeholders in relation to the sale of Telenor Myanmar to M1 Group, including the Myanmar-based civil society organisations endorsing the complaint.
 3. Telenor has not been transparent in relation to its decision to disengage from its Myanmar operations.⁸³
66. Given that the second complaint refers to an action of Telenor that is ongoing but not yet completed, the victim-complainants would be denied an effective and timely remedy if the sale of Telenor Myanmar were permitted to continue. Albeit the NCP is not a Norwegian domestic judicial organ, there is the risk that permitting the sale of Telenor Myanmar to proceed on 15 February 2022 will undermine the legitimacy of the NCP as an executive organ of the Norwegian state. Such mechanisms need to be able to conduct their reviews to preserve and permit the exercise of executive power and compliance with international principles to which Norway has committed and M1 Group has said it is committed to.
67. The ongoing and future risks of permitting the sale of Telenor Myanmar are also present for Telenor and M1 Group. For example, the ANZ granted a loan for a sugar plantation established by Phnom Penh Sugar, displacing local families from their farms. It had been the subject of public accusations of corrupt business relationships and poor labour practices since before the loan was granted. ANZ's own report commissioned to examine the environmental and social impacts of the project reportedly recommended a more thorough investigation in advance of making the loan.⁸⁴ It really is not unusual to expect such a risky sale to be more thoroughly examined. To do so is consistent with the OECD guidance and the UN Guiding Principles on Business and

⁸² OECD Watch, 'Committee Seeking Justice for Alethankyaw vs. Telenor', <<https://www.oecdwatch.org/complaint/committee-seeking-justice-for-alethankyaw-vs-telenor/>>, 16 December 2019, date accessed 11 February 2022.

⁸³ OECD Watch, 'SOMO representing 474 Myanmar CSOs vs. Telenor ASA', <<https://www.oecdwatch.org/complaint/somo-representing-474-myanmar-csos-vs-telenor-asa/>>, 27 July 2021, date accessed 11 February 2022.

⁸⁴ Charlotte Grieve, 'Important precedent': ANZ pays Cambodian families hurt by project it funded', *The Sydney Morning Herald* <<https://www.smh.com.au/business/banking-and-finance/important-precedent-anz-pays-cambodian-families-hurt-by-project-it-funded-20200227-p544tw.html>>, 27 February 2020, date accessed 11 February 2022.

Human Rights and avenues to assess risk of harm more generally.

68. The Australian NCP for the OECD Guidelines for Multinational Enterprises received and investigated the ANZ complaint. It commented that it was difficult to reconcile ANZ's decision to fund the sugar plantation with the risks the project faced. It found that ANZ's loan to Phnom Penh Sugar was inconsistent with both ANZ's own policies and the OECD's ethical business guidelines. ANZ faced significant reputational, legal, and financial consequences because of failing to conduct sufficient due diligence in advance of the loan. The then-CEO of ANZ testified at a widely reported parliamentary committee hearing about breaching the OECD guidelines and publicly admitted to considering compensation. He was grilled again by shareholders at ANZ's 2019 annual meeting and publicly admitted that the bank had failed to conduct proper due diligence on the project. ANZ reached a settlement with the affected families to donate the gross profits made by it from the \$40 million loan. It also sold its 55 per cent stake in the ANZ Cambodia branch, which had been established as a joint venture,⁸⁵ and "has committed to establishing a mechanism that is accessible to communities affected by the bank's clients operating around the world, and which meets international human rights standards for effectiveness".⁸⁶
69. The ANZ case settled in 2020. It set a precedent in the OECD context for companies paying a heavy price for insufficient due diligence. It is likely to have ripple impacts on similar action taken by community members to hold companies accountable for human rights abuses. A similar OECD complaint was filed in 2019 against Dutch bank ING Group for financing alleged palm oil abuses, one of the first of its kind to allege that it had "contributed to" human rights abuses rather than being "linked to" them.⁸⁷
70. Telenor has already admitted that it commissioned the tower that Myanmar military have used as a sniper point, connecting its activities to acts of genocide and giving rise to the first OECD

⁸⁵ Charlotte Grieve, 'Important precedent': ANZ pays Cambodian families hurt by project it funded', *The Sydney Morning Herald* <<https://www.smh.com.au/business/banking-and-finance/important-precedent-anz-pays-cambodian-families-hurt-by-project-it-funded-20200227-p544tw.html>>, 27 February 2020, date accessed 11 February 2022.; Shaun Turton, 'Australia's ANZ to compensate Cambodian families over land loss', *Nikkei Asia* <<https://asia.nikkei.com/Business/Companies/Australia-s-ANZ-to-compensate-Cambodian-families-over-land-loss>>, 28 February 2020, date accessed 11 February 2022; Inclusive Development International, 'ANZ agrees to landmark settlement with Cambodian farmers displaced by sugar company it financed', <<https://www.inclusivedevelopment.net/cambodia/anz-agrees-to-landmark-settlement-with-cambodian-farmers-displaced-by-sugar-company-it-financed/>>, 26 February 2020, date accessed 11 February 2022.

⁸⁶ Inclusive Development International, 'Cambodia: Securing compensation for ANZ-backed land grab', <<https://www.inclusivedevelopment.net/cases/cambodia-sugarcane-land-grabs/>>, no date, date accessed 11 February 2022.

⁸⁷ Business & Human Rights Resource Centre, 'NGOs file OECD complaint against Dutch bank ING for financing alleged palm oil abuses; incl. company comments', <<https://www.business-humanrights.org/en/latest-news/ngos-file-oecd-complaint-against-dutch-bank-ing-for-financing-alleged-palm-oil-abuses-incl-company-comments/>>, 10 July 2019, date accessed 11 February 2022.

Guidelines complaint against it.⁸⁸ Given the allegations in the second OECD Guidelines complaint, a cognate complaint to the Norwegian Data Protection Authority regarding data privacy over the data to be sold as part of the Telenor Myanmar deal,⁸⁹ and the strong advocacy of Myanmar's civil society organisations, the positioning of Telenor's sale arrangements appear significantly more serious with greater consequential risks if it proceeds with the sale of Telenor Myanmar. It is worth repeating that its due diligence should extend broadly together with due diligence disclosure to affected parties. Scrutiny is a core necessity in advance of such a sale, as accountability post-event will be too late for those affected. At present the level of consideration by Telenor is unknown. In turn, the Norwegian state shareholder risks being the subject of findings that it did not require Telenor to conduct proper and sufficient due diligence, or that it voted for the sale without assuring itself that the proper due diligence has been conducted.

71. A further complaint has already been filed with the Australian NCP in September 2021 claiming irresponsible disengagement from Myanmar, arguing that the sale of Australian multinational enterprise Myanmar Metals' (MYL) 51 per cent share to Myanmar company Win Myint Mo Industries Co. Ltd failed to meet the standards of responsible disengagement in the following ways:

- (a) MYL has failed to conduct appropriate risk-based human rights due diligence in relation to the divestment, including by failing meaningfully to engage with stakeholders.
- (b) MYL has failed to seek to prevent or mitigate adverse human rights impacts that may arise after the sale of its interest in the joint venture.
- (c) MYL has failed to be transparent in relation to its decision to disengage from the joint venture.

72. The complaint is currently under review. This and other complaints on divestment from Myanmar suggest that expertise is already developing around irresponsible disengagement in the Myanmar context. The MYL complaint only relates to a mine where physical human rights abuses would be in large part contained to the mine and its immediate surrounds; the proposed sale of Telenor Myanmar is exponentially worse because call data can immediately be used nationwide as a tool of repression. Telenor would not be able to avoid reputational and financial consequences, and to permit the sale of Telenor Myanmar to proceed now would only exacerbate

⁸⁸ OECD Watch, 'Committee Seeking Justice for Alethanyaw vs.Telenor', <<https://www.oecdwatch.org/complaint/committee-seeking-justice-for-alethanyaw-vs-telenor/>>, 16 December 2019, date accessed 11 February 2022.

⁸⁹ Joseph Wilde-Ramsing, 'Myanmar citizen files data protection complaint against Telenor for dangerous breach of privacy', *Centre for Research on Multinational Corporations*, I<<https://www.somo.nl/myanmar-citizen-files-data-protection-complaint-against-telenor-for-dangerous-breach-of-privacy/>>, 8 February 2022, date accessed 11 February 2022.

its future accountability.

73. M1 Group ought to face increased isolation from global business if it continues to ignore OECD approaches. OECD states are in a good position to issue guidance to publicly indicate the lack of support for M1 Group's business practices.

B.4 Duty of Care for Employees and Customers of Telenor Myanmar

74. In addition to purchaser and sale due diligence, it also seems to us that there is a major question over the future risk of harm to millions of people who are employees and / or customers of Telenor Myanmar. It is not clear whether the future risks of harm to people and the risks of liability to Telenor, M1 Group or indeed the two states have been properly assessed.
75. In the context of human rights abuses, claims for historical conduct by corporations and states can lead to litigation and settlement decades after the event. It is not at all clear to us that divesting of Telenor Myanmar will absolve Telenor or M1 Group of their responsibilities to employees and the wider customer base. At the very least these risks ought to be mapped and assessed.
76. There is at least arguably some adoption of a duty of care though the rigorous way in which Telenor has worked to resist the worst pressures of the Myanmar military. The CEO of Telenor himself claims that "key elements in [Telenor's] assessment were human rights, privacy, and the safety of [Telenor] employees".⁹⁰ This may well be beyond mere principle and based on concerns for customers. It would be useful to have disclosure of Telenor decision making at the times of such decisions, as well as in relation to the decision to sell.
77. Violations of the right to privacy alone may have cascading, negative impacts on other human rights. The absolute right to life may be engaged alongside those that may be derogable but not in such highly charged circumstances. Again, consideration of the arrangements between Telenor Group and the Norwegian state, M1 Group and the Lebanese political frameworks would be useful in this context to assess liability. For example, both Lebanon and Norway are States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Genocide is also a crime under Norwegian domestic legislation since 2008.⁹¹

⁹⁰ Sigve Brekke, no title, <<https://www.linkedin.com/feed/update/urn:li:activity:6898250930639499264/>>, 13 February 2022, date accessed 16 February 2022.

⁹¹ Permanent Mission of Norway to the United Nations, No title, <https://www.un.org/en/ga/sixth/63/Addtl_Prot_TEXT/Norway.pdf>, 2 June 2008, date accessed 11 February 2022.

Similarly, Lebanese law seems to have an applicable framework for a range of criminal liability.⁹²

78. Given that historical call data from registered customers is proposed to be part of the Telenor Myanmar sale, it is not inflammatory to suggest that the risk of serious issues for complicity in genocide ought to be assessed before sale. The widely publicised actions of the Myanmar military since the coup and the strident advocacy of civil society activists since certainly raise awareness of alleged genocidal intent. We note that the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* is ongoing and orders have been handed down requiring provisional measures on Myanmar arising from its duty to prevent genocide. The full hearing on the merits is pending.⁹³
79. The risk of atrocity crimes has been the subject of serious concern in Myanmar:⁹⁴ The Special Advisory Council for Myanmar (SAC-M) has labelled the Myanmar military as a “terrorist group” that should be brought before the International Criminal Court, and funds flowing to it should be cut via a global sanctions regime.⁹⁵
80. The prospect of litigation is also not fanciful: Facebook’s conduct in amplifying hate speech and failing to take down inflammatory posts, potentially contributing to genocidal attacks on the Rohingya people by the Myanmar military is already the subject of litigation. The compensation claims together are worth more than £150 billion.⁹⁶ Selling user data when there is an option not to, in an age when call data can tell us more than ever, in a country where technological repression is growing,⁹⁷ with knowledge that it can be used to commit genocide or other grave human rights abuses, goes to the core of the jurisdictional arrangements of the international courts and commitments to accountability, including for failures to prevent genocide and for facilitation or complicity in other international crimes.

⁹² Special Tribunal for Lebanon, ‘Relevant Lebanese law and case law’, <https://www.stl-tsl.org/en/documents/legal-documents/relevant-lebanese-law-and-case-law>, no date, date accessed 3 March 2022.

⁹³ International Court of Justice, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)’, <<https://www.icj-cij.org/en/case/178>>, no date, date accessed 16 February 2022.

⁹⁴ Asia Pacific Centre, ‘Atrocity Crimes Risk Assessment Series: Myanmar’, <https://r2pasiapacific.org/files/4156/Risk_Assessment_myanmar_vol9_november2019.pdf>, November 2019, date accessed 11 February 2022.

⁹⁵ Ben Doherty, ‘Myanmar military a ‘terrorist group’ that should face international court, advisory council says’, *The Guardian*, <<https://www.theguardian.com/world/2021/mar/30/myanmar-military-a-terrorist-group-that-should-face-international-court-advisory-council-says>>, 30 March 2021, date accessed 11 February 2022.; Special Advisory Council for Myanmar, ‘The Myanmar Military is a Terrorist Organisation Under Law’, <<https://specialadvisorycouncil.org/wp-content/uploads/2021/12/SAC-M-Briefing-Paper-Myanmar-Military-Terrorist-Organisation-ENGLISH.pdf>>, 14 December 2021, date accessed 11 February 2022.

⁹⁶ Dan Milmo, ‘Rohingya sue Facebook for £150bn over Myanmar genocide’, *The Guardian*, <<https://www.theguardian.com/technology/2021/dec/06/rohingya-sue-facebook-myanmar-genocide-us-uk-legal-action-social-media-violence>>, 7 December 2021, date accessed 11 February 2022.

⁹⁷ Free Expression Myanmar, ‘Military’s cyber security bill worse than their previous draft’, <<https://freexpressionmyanmar.org/militarys-cyber-security-bill-worse-than-their-previous-draft/>>, 27 January 2022, date accessed 11 February 2022.

81. Similarly, handing over interception equipment, knowing that the Myanmar military intend to take control of it and activate it in continuation of its physical and internet surveillance⁹⁸ requires an assessment of the risks of facilitation / complicity in any future events, particularly if based on data, including identity data, collected and knowingly supplied by Telenor. We note the BNP Paribas investigation in France, where Sudanese complainants alleged that French bank BNP Paribas was the de facto national bank of Sudan during 2004 and 2008 when it allowed the Sudanese government access to international markets to finance its international crimes. The French Prosecution opened an investigation into “complicity in crimes against humanity, genocide and acts of torture and barbarism” in August 2020.⁹⁹
82. We return briefly to the *Vedanta* litigation referred to above to recall the broad expectation that vicarious liability for the conduct of a subsidiary is capable of being relatively easily found. *Vedanta* presents significant implications for future questions on parent company responsibility for the actions of subsidiaries. Part of the jurisdictional challenge involved a determination of whether the claimants had raised a triable issue, or whether their case had no real prospects of success. *Vedanta* asserted the latter, arguing that nothing it had done gave rise to a duty of care and that it was “merely an indirect owner of KMC, and no more than that”, at [17].
83. We note that in *Okpabi & others v Royal Dutch Shell Plc and another* [2021] UKSC 3,¹⁰⁰ also a negligence claim, the Court emphasised that parent company liability required only the application of well-established and orthodox principles regarding duty of care. The Court also observed that the test to establish duty of care is broad and non-restrictive, and explicitly rejected the narrow formulation that liability can only arise through the exercise of control. This leaves open the question whether liability can arise through inaction, as has been alleged in the sale of Telenor Myanmar.
84. Significantly, the Supreme Court in *Okpabi* emphasised at [102] the importance of full and proper disclosure before dismissing a case against a parent company, given the obvious importance of internal corporate and operational documents to an action of this kind. It is clear that the next frontier for accountability for corporate contributions to human rights abuses is to seek disclosure of Telenor’s internal and operational documents, including but not limited to Telenor and Telenor Myanmar Board minutes, due diligence documents, employee consultation records if

⁹⁸ Myanmar Centre for Responsible Business, ‘Surveillance: Lawful Interception Other Surveillance Methods’, <<https://www.myanmar-responsiblebusiness.org/pdf/SWIA/ICT/Chapter-04.04-Surveillance.pdf>>, no date, date accessed 11 February 2022.

⁹⁹ France24, ‘France probes banking giant BNP Paribas for alleged complicity in Sudan crimes’, <<https://www.france24.com/en/20200924-france-probes-banking-giant-bnp-paribas-for-alleged-complicity-in-sudan-crimes>>, 24 September 2020, date accessed 16 February 2022.

¹⁰⁰ ‘*Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3’, <<https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf>>, 12 February 2021, date accessed 16 February 2022.

any, human rights obligations compliance guidelines or policy documents, and shareholder consultation records.

85. We repeat we are not Norwegian or Lebanese lawyers, but we suspect that review and accountability mechanisms such as the NCP would also be significantly interested in the regulatory frameworks for tackling terrorist financing.
86. The Myanmar Centre for Responsible Business has warned against activating even lawful interception requests without appropriate legal safeguards since at least 2015.¹⁰¹ These warnings should sound even more loudly for Telenor, M1 Group and the two states.

B.5 Sanctions Compliance in Multiple Jurisdictions

87. The purported sale of Telenor Myanmar takes place within a complex web of overlapping sanctions over companies and persons currently or historically linked to Shwe Byain Phyu.
88. Concerns have been raised that Shwe Byain Phyu has links to Myanma Economic Holdings Limited (MEHL).¹⁰² There are reports of previously disclosed business relationships with MEHL importing petroleum, as well as gem mining joint ventures with Myanmar authorities at a time when Myanmar was under a military dictatorship.¹⁰³ MEHL is the subject of sanctions in the US, UK, Canada, and EU.
89. Shwe Byain Phyu subsidiary, Shwe Byain Phyu Gems Company Limited had seven jade licences as of 2017-18, the most recent data available; Shwe Byain Phyu subsidiary Win Paing Kyaw Gems Company Limited had three jade licences; and Shwe Byain Phyu subsidiary Theint Win Htet Gems Company had two.¹⁰⁴ These operate under a joint venture with Myanma Gems Enterprise (MGE), which receives 25 per cent of revenues.¹⁰⁵ MGE is the subject of sanctions in the US, UK, Canada, and EU.
90. There also appear to be links with Mytel, a telecommunications company that is partly controlled

¹⁰¹ Myanmar Centre for Responsible Business, 'Surveillance: Lawful Interception Other Surveillance Methods', <<https://www.myanmar-responsiblebusiness.org/pdf/SWIA/ICT/Chapter-04.04-Surveillance.pdf>>, no date, date accessed 11 February 2022.

¹⁰² Tin Htet Paing, 'Telenor sale to military-linked consortium to be complete in mid-February', <<https://www.myanmar-now.org/en/news/telenor-sale-to-military-linked-consortium-to-be-complete-in-mid-february>>, 4 February 2022, date accessed 11 February, 2022.

¹⁰³ FWP Research, 'Thein Win Zaw', <<https://www.fwpresearch.com/ja/portfolio/thein-win-zaw/>>, no date, date accessed 11 February, 2022.

¹⁰⁴ Myanmar Extractive Industries Transparency Initiative, 'EITI Report 2017-2018', 2020, <<https://myanmareiti.org/en/publication/5th-meiti-report>>, 2020, annex 5, date accessed 11 February 2022.

¹⁰⁵ Myanmar Extractive Industries Transparency Initiative, 'EITI Report 2017-2018', 2020, <<https://myanmareiti.org/en/publication/5th-meiti-report>>, 2020, page 121, date accessed 11 February 2022.

- by military conglomerate Myanmar Economic Corporation (MEC).¹⁰⁶ MEC is the subject of sanctions in the US, UK, Canada, and EU. IGT, the mobile phone tower company that operates phone towers commissioned by Telenor, works for Mytel. M1 is a major shareholder in IGT.¹⁰⁷
91. We also understand that one director, is reportedly a shareholder in Forest Products Joint Venture Corporation (Forest Products), a military controlled company that is sanctioned in the European Union,¹⁰⁸ and also a director of Myanma Energy Sector Development Public Company Limited, a company in which a fellow board member is apparently subject to US and Canadian sanctions.¹⁰⁹ We have further been instructed that Htoo Jewellery Company Limited, shareholder of Mineral Development Bank Public Company Limited, is subject to UK sanctions.¹¹⁰ We understand the chairperson of Shwe Byain Phyu is a central executive committee member of the Myanmar Petroleum Trade Association (MPTA). MPTA’s chairperson is sanctioned in the UK, US, and Canada. MEHL appears to be a member of MPTA and an MEHL official was previously on the central executive committee with the Shwe Byain Phyu chairperson.¹¹¹
92. The Myanmar military is widely reported as having or being connected with companies operated by a small group of well-connected and well-resourced individuals. It seems that Shwe Byain Phyu sits within this opaque web.
93. The US imposed Executive Order 14014 “Blocking Property With Respect to the Situation in Burma”¹¹² in response to the coup of 1 February 2021, freezing current and future US-held or -controlled assets of “any foreign person... determined to operate in the defense sector of the Burmese economy... or to be a political subdivision, agency, or instrumentality of the Government of Burma... or to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person whose property and interests in property are blocked pursuant to this order... or to be owned or

¹⁰⁶ Poppy Mcpherson and Fanny Potkin, ‘Telenor sale of Myanmar unit stalls as junta seeks local buyer participation -sources’, <<https://www.reuters.com/world/asia-pacific/telenor-sale-myanmar-unit-stalls-junta-seeks-local-buyer-participation-sources-2021-11-09/>>, 10 November, 2021, date accessed 11 February, 2022.

¹⁰⁷ Burma Campaign UK, ‘M1 Group’, <<https://burmacampaign.org.uk/take-action/m1-group/>>, no date, date accessed 16 February 2022.

¹⁰⁸ Tin Htet Paing, ‘Telenor sale to military-linked consortium to be complete in mid-February’, <<https://www.myanmar-now.org/en/news/telenor-sale-to-military-linked-consortium-to-be-complete-in-mid-february>>, 4 February 2022, date accessed 11 February, 2022.

¹⁰⁹ Federal Register, ‘Notice of OFAC Sanctions Actions’, <<https://www.federalregister.gov/documents/2022/02/03/2022-02275/notice-of-ofac-sanctions-actions>>, 2 March 2022, date accessed 16 February 2022.

¹¹⁰ Foreign, Commonwealth & Development Office, Foreign Secretary Dominic Raab announces new Myanmar sanctions’, <<https://www.gov.uk/government/news/foreign-secretary-dominic-raab-announces-new-myanmar-sanctions>>, 2 September 2021, date accessed 12 February 2022.

¹¹¹ Justice for Myanmar, ‘Shwe Byain Phyu’s military links exposed’, <<https://www.justiceformyanmar.org/stories/shwe-byain-phyus-military-links-exposed>>, 13 February 2022, date accessed 16 February 2022.

¹¹² Federal Register, ‘Blocking Property with respect to the Situation in Burma (Executive Order of the President of the United States of America) 86(28) Fed Reg 9429’, <<https://www.justice.gov/eoir/page/file/1366931/download>>, 10 February 2021, date accessed 16 February 2022.

controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the military or security forces of Burma or any person whose property and interests in property are blocked pursuant to this order.” These sanctions forbid transactions that have a US nexus with anyone on the US Office of Foreign Assets Control Specially Designated Nationals and Blocked Persons list, including MEHL and MEC. They also prohibit all transactions by US persons or within the US involving property or interests in property of sanctioned persons. The sanctions also empower the US Treasury Department’s Office of Foreign Assets Control to freeze all property and interests in property for sanctioned persons that are in the United States or in the possession or control of US persons.¹¹³ These are far-reaching powers in a globally connected economy.

94. The UK also sanctions entities under the *Global Human Rights Sanctions Regulations 2020*,¹¹⁴ made under the *Sanctions and Anti-Money Laundering Act 2018* (UK)¹¹⁵ in part for the 1 February coup and for serious human rights violations against Rohingya. These Regulations freeze funds or economic resources owned or controlled by sanctioned persons, require reports of any findings or additional information that would facilitate compliance with the Regulations, and require the provision of any information concerning the frozen assets as requested. Information reported to OFSI may be passed on to other regulatory authorities or law enforcement,¹¹⁶ giving rise to the risk of confidential Telenor information being shared without prior notice. These sanctions apply to MEHL, MGE, MEC, and the Htoo Group.
95. Sanctions have also been applied in the EU, under *Council Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma and repealing Regulation (EC) No 194/2008*,¹¹⁷ to freeze the funds and economic resources of sanctioned entities and any entities it owns or controls, and to prohibit directly or indirectly making available any funds or economic resources. These sanctions apply to MEHL, MGE, MEC, and all entities they own or control.¹¹⁸

¹¹³ United States Department of the Treasury, ‘United States Targets Leaders of Burma’s Military Coup Under New Executive Order’, <<https://home.treasury.gov/news/press-releases/jy0024>>, 11 February 2021, date accessed 11 February 2022.

¹¹⁴ *The Global Human Rights Sanctions Regulations 2020* (UK) <<https://www.legislation.gov.uk/uksi/2020/680/made>>.

¹¹⁵ Government of the United Kingdom, ‘UK sanctions list’, <<https://www.gov.uk/government/publications/the-uk-sanctions-list>>, updated 14 February 2022, date accessed 16 February 2022; Office of Financial Sanctions Implementation, ‘Myanmar: Financial Sanctions Notice’, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982603/Notice_Myanmar_290421.pdf>, 29 April 2021, date accessed 16 February 2022.

¹¹⁶ HM Treasury UK, ‘Financial Sanctions Notice: Global Human Rights’, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975437/Notice_Global_Human_Rights_010421.pdf>, 1 April 2021, date accessed 16 February 2022.

¹¹⁷ Eur-Lex, ‘Council Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma and repealing Regulation (EC) No 194/2008’, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0401-20210621>>, updated 21 June 2021, date accessed 16 February 2022.

¹¹⁸ EU Sanctions Map, ‘Restrictive measures against Myanmar/Burma’, <<https://sanctionsmap.eu/#/main/details/8/lists?search=%7B%22value%22:%22myanma%22,%22searchType%22>>

96. Canadian sanctions apply to MEHL, MGE, MEC, and Htoo Group.¹¹⁹ They include:
- (a) a freeze on assets in Canada of any designated Myanmar nationals connected with the Myanmar State, as well as prohibitions on several categories of transactions, services and dealings involving property of designated persons, wherever situated; and
 - (b) an arms embargo, including prohibitions on exporting and importing arms and related material to and from Myanmar, on communicating technical data related to military activities or arms and related material, and on financial services related to military activities or arms and related material.¹²⁰
97. M1 Group itself has been accused of sanctions-busting through its subsidiary companies in Yemen, Afghanistan,¹²¹ and Syria.¹²²
98. Given the many jurisdictions where sanctions apply, their broad powers, and the many sanctioned individuals and entities proven to be associated with Shwe Byain Phyu, there is a real risk that completion of the sale of Telenor Myanmar will hand over a large source of revenue to a company or companies known to have financial and political relationships with sanctioned entities.
99. This can give rise to both corporate and individual liability for sanctions breaches in two ways: accessory liability for the sanctions breach itself, or complicity in sanctions-busting financing of international criminal activity and other human rights abuses. Both can be demonstrated with legal action facing French bank BNP Paribas:
- (a) In 2014, BNP Paribas agreed to a fine of USD\$8.9 billion after pleading guilty in the United States to conspiring to violate American sanctions imposed against Sudan, Iran, and Cuba to the sum of \$30 billion. It knowingly and deceptively made prohibited transactions on behalf of sanctioned entities in Sudan, enabling it to carry out terrorism and human rights abuses.¹²³

[22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D>](#), updated 21 June 2021, date accessed 16 February 2022.

¹¹⁹ Government of Canada, 'Consolidated Canadian Autonomous Sanctions List', <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng>, updated 1 February 2022, date accessed 16 February 2022.

¹²⁰ Government of Canada, 'Consolidated Canadian Autonomous Sanctions List', <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng>, updated 1 February 2022, date accessed 16 February 2022.

¹²¹ Justice for Myanmar, 'Telenor Myanmar's buyers have financed atrocities and cosied up to dictators', <<https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators>>, 9 July 2021, date accessed 16 February 2022.

¹²² The New Arab, 'What is the Lebanese 'M1 Group' that just entered Myanmar's telecom market?', <<https://english.alaraby.co.uk/analysis/what-lebanese-m1-group-just-entered-myanmar>>, 15 July 2021, date accessed 16 February 2022.

¹²³ France 24, 'France probes banking giant BNP Paribas for alleged complicity in Sudan crimes', <<https://www.france24.com/en/20200924-france-probes-banking-giant-bnp-paribas-for-alleged-complicity-in-sudan-crimes>>, 24 September, 2020, date accessed 11 February 2022.; Thomson Reuters, 'French bank BNP Paribas says it wasn't an accomplice of Sudanese genocide', *Westlaw Today*,

- (b) Another investigation has been opened by French magistrates into allegations of complicity in the 1994 Rwandan genocide. BNP Paribas is accused of transferring more than \$1.3 million in funds to finance the purchase of 80 tonnes of weapons by a Rwandan general, allegedly breaching UN sanctions and helping to arm the perpetrators of the Rwandan genocide.¹²⁴
100. Notably, the second investigation involves funds amounting only to \$1.3 million in relation to a purchase limited in scope and time. By analogy, the sale of one of four telecommunications providers in Myanmar is just as capable of giving rise to concerns about undercutting or breaching sanctions, whether that liability rises to the level of civil or criminal liability or not.
101. The question of further sanctions is open, as the Asia Justice Coalition calls for “the UN Security Council to impose a global arms embargo on Myanmar’s security forces including a prohibition on security assistance and the sale of dual-use technology, and targeted sanctions on junta leaders, military-owned companies such as timber, oil, and natural gas companies”.¹²⁵

C. CONCLUSION

102. It must be remembered that this is not merely the future use of the telecoms network, but the handing over of more than seven years of historical call data for what now amounts to over 18 million customers, and the likely flow of customer revenues from Telenor Myanmar to the Myanmar military and its weapons financiers. Both Telenor and M1 Group have stated that they seek to act responsibly and promote human rights in its business operations, but this sale / purchase tends to suggest that these statements cannot be taken seriously.
103. It seems to us that there is a major question over the extent to which Telenor and M1 Group have engaged in any suitable due diligence checks or assessed future risk to employees and customers. Insofar as both Telenor and M1 Group profess to take human rights protections seriously, it would not be logical to seek to sell/ buy a holding without clarifying whether and how employees and customers will be adversely affected by the sale, whether there are less

<[https://today.westlaw.com/Document/I0acb63701fc211eb8fe5ebf38b83970f/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/I0acb63701fc211eb8fe5ebf38b83970f/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default)&firstPage=true)>, 5 November 2020, date accessed 11 February 2022.; Martin Arnold, ‘BNP Paribas under investigation over role in Rwanda genocide’, *Financial Times*, <<https://www.asso-sherpa.org/bnp-paribas-under-investigation-over-role-in-rwanda-genocide>>, 25 September 2017, date accessed 11 February 2022.

¹²⁴ Martin Arnold, ‘BNP Paribas under investigation over role in Rwanda genocide’, *Financial Times*, <<https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2>>, 25 September 2017, date accessed 11 February 2022.

¹²⁵ Asia Justice Coalition, ‘Urgent call for action: One year into Myanmar coup, growing impunity & international indifference’, <https://www.asiajusticecoalition.org/files/ugd/811bc6_b801d7d42d2845e3acdf55ff58e69294.pdf>, 1 February 2022, date accessed 11 February 2022.

harmful alternatives, and whether and to what extent each would be complicit in or aiding and abetting harm.¹²⁶ It may be that a less harmful approach exists that has not been fully considered, such as to not sell Telenor Myanmar at all or to sell to a company that is and will remain financially independent of the Myanmar military, thereby denying the Myanmar military access to historical call data and customer revenues. This should come with a commitment to preserve evidence for future potential accountability action.

104. Overall, it is our view that there is a serious concern that decisions have been made without full examination of the consequences we have outlined above. The proposed sale of Telenor Myanmar merits serious scrutiny by every business that has anything to do with Telenor or M1 Group and all those states who profess to commit to business and human rights principles. This sale is a good test for future business practices that put people at the forefront of safe investments.



Felicity Gerry QC *

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¹²⁶ Myanmar Now, 'Telenor board members and Norwegian authorities may be 'aiding and abetting crimes against humanity' in Myanmar, says top judge', <<https://www.myanmar-now.org/en/news/telenor-board-members-and-norwegian-authorities-may-be-aiding-and-abetting-crimes-against>>, 12 February 2022, date accessed 16 February 2022.

