



WRITTEN TESTIMONY OF

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**SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW**

**HEARING on Extracting Natural Resources: Corporate Responsibility
and the Rule of Law**

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EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of earth rights. We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

* Ka Hsaw Wa is a pseudonym used to protect his ability to investigate human rights abuses and to protect his family members still living in Burma.

Mr. Chairman, Ranking Member Coburn, and members of this subcommittee, thank you for inviting me to testify before this body. I commend you for holding a hearing on the human rights responsibilities of extractive industry companies operating in repressive countries.

INTRODUCTION

Nowhere in the world do the issues of corporate complicity in human rights abuses and resource revenues leading to corruption, poor governance and human rights abuses, come together in a toxic mix more than in military-ruled Burma. In Burma, extractive projects are having a systemic, profoundly negative human rights impact on local communities, and foreign oil and gas companies are quite literally funding and propping up the notorious State Peace and Development Council (SPDC), who in turn commit widespread and systemic abuses against the people of Burma. We thank the Senate Judiciary Subcommittee on Human Rights and the Law for convening this hearing today on the important topic of *Extracting Natural Resources: Corporate Responsibility and the Rule of Law* and support the United States Congress' efforts to promote and protect mechanisms of accountability for corporate complicity in human rights abuses.

Holding corporations accountable for human rights abuses plays a critical role in changing corporate behavior, preventing abuses, and ensuring redress for victims, and the Congress should continue to support measures like the Alien Tort Claims Act (ATCA) that address just such issues. At the same time, Congress should also promote transparency and good governance to ensure that much needed resources do not end up fueling conflict and human rights abuses instead of alleviating poverty and promoting sustainable development.

BACKGROUND ON EXTRACTIVE INDUSTRIES IN BURMA

In military-ruled Burma, also known as Myanmar, large-scale resource extraction projects have directly and indirectly led to systemic and widespread violations of basic human rights by security forces, through the complicity of multinational corporate actors. Publicly held, private, and state-owned companies from China, India, the United States, France, Korea and elsewhere continue to benefit from and are responsible for abuses committed by the Burmese military connected to their investments. In particular, China, Thailand, and India—and by association, the national oil corporations under those governments—continue to rely on Burmese resources as components of their national energy strategies, and pay inadequate attention to the protection of human rights. These abuses are ongoing and there is an unreasonably high risk they will increase as more projects are developed.

BURMA: AUTHORITARIAN RULE AND RESOURCE EXTRACTION

Burma is a country of remarkable ethnic and geographic diversity with an abundance of natural resources, including oil, gas, timber, minerals such as gold, copper, and nickel, gems, and jade. Burma is the largest country in mainland Southeast Asia, with a relatively large western coastline on the Bay of Bengal (1,190 miles), and bordering Bangladesh, India, China, Thailand, and Laos. The country is home to approximately fifty-seven million people who occupy seven divisions

and seven states. The ruling elite and the military largely represent the majority Burman ethnicity, while seven major ethnic nationalities—Arakan, Chin, Kachin, Karen, Karenni, Mon, and Shan—together with at least 130 smaller ethnic tribes¹ comprise approximately 40 percent of the population.² Burma's divisions are generally occupied by Burmans, while states are generally occupied by ethnic nationalities and tribes, although there is considerable diversity within some areas.³

Military rule in Burma began by coup in 1962 when General Ne Win disbanded Parliament, suspended the Constitution, and began the period of intransigent and repressive rule that continues today. The State Peace and Development Council (SPDC) is the state body run by the tatmadaw (military), and the tatmadaw is the country's main political actor—in some ways, the only political actor.⁴ The country is ruled by Senior General Than Shwe.

After 1988, when the military opened fire on pro-democracy protestors, ultimately killing as many as 3,000 civilians,⁵ the tatmadaw grew dramatically, turning the country into the formidable military state it is today. Most sources suggest that the regime spends at least 40% of its budget on the military.⁶ By contrast, the junta's spending on health and education is at absurdly low levels. According to official figures, the SPDC allocated about 1.2-1.5% of its 2007 budget to the Ministry of Health;⁷ this neglect over time has led to an exploding public health crisis.⁸ Likewise, in 2007, the junta allocated little more—only about 4-5% of its budget—on

¹ Myan. Ministry of Hotels & Tourism, The 8 Major National Ethnic Races in Myanmar, <http://www.myanmar.gov.mm/ministry/hotel/fact/race.htm> (last visited May 11, 2008).

² Ethnic Nationalities Council (Union of Burma), <http://www.enburma.org>

³ The Divisions are Irrawaddy, Bago, Magwe, Mandalay, Sagaing, Tennasserim, and Rangoon. The States are Chin, Kachin, Karen, Karenni, Mon, Arakan, and Shan.

⁴ Mary P. Callahan, *Making Enemies: War and State Building in Burma* 2 (2005).

⁵ See Human Rights Watch, *Burma* (1989), available at <http://www.hrw.org/reports/1989/WR89/Burma.htm>.

⁶ E.g., Univ. Cal. at Berkeley Human Rights Center & Johns Hopkins Bloomberg School of Public Health Center for Health & Human Rights, "The Gathering Storm: Infectious Diseases and Human Rights in Burma" at 1 (July 2007) (available at <http://www.hrcberkeley.org/pdfs/BurmaReport2007.pdf>); Emanuela Sardellitti, "Myanmar: Courted by the Asian Players," *Power and Interest News Report* (Mar. 8, 2007) (available at http://www.pinr.com/report.php?ac=view_report&report_id=627&language_id=1); "Misery piled upon misery: Myanmar," *The Economist* (Oct. 6, 2007).

⁷ The U.S. State Department reports that official figures show the Ministry of Health's 2007 budget at 0.3% of Gross Domestic Product (GDP). See U.S. Dep't of State, "2007 Country Reports on Human Rights Practices: Burma" (Mar. 11, 2008) (available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100515.htm>) at 5. Because the SPDC's budget is about 20-25% of GDP, expenditures as a percentage of the budget would be four to five times their percentage of GDP, or about 1.2-1.5% of the budget for health care. See "CIA World Factbook: Burma," *supra* note 2 (calculating the SPDC's budget to be 24.5% of GDP at the official exchange rate); see also "Misery piled upon misery: Myanmar," *The Economist* (Oct. 6, 2007) (noting that the regime is estimated to spend less than 2% of its budget on health).

⁸ See generally "The Gathering Storm: Infectious Diseases and Human Rights In Burma," *supra* note 1.

public education,⁹ with the result that Burma ranks in the bottom 25 countries in the world for student enrollment ratios.¹⁰ While some argue that contributing to Burma's economic development might help to promote democracy and respect for human rights, current and planned extractive projects and revenues simply do not do so. The billions of dollars flowing to the SPDC have enabled the generals to increase military spending, which is directly antithetical to the interests of the people of Burma. Indeed, this is unsurprising, given the wealth of research addressing the "resource curse" that has demonstrated that reliance by developing countries on oil and gas extraction often negatively affects economic growth, democratization and respect for human rights.¹¹

In 2006, the SPDC's total budget was estimated at around \$2.3 billion,¹² making the military's share around \$900 million—enough to be completely funded by the Yadana Project's current revenues. Yadana is the single largest source of revenue for the junta, taking natural gas from the Andaman Sea, through a pipeline in southern Burma, to Thailand. Between 1995 and 2005, the time period when profits from Yadana began flowing in, Burma's estimated annual military expenditures increased dramatically.¹³ The regime maintains military forces disproportionate to its population and strategic dangers. Although it has had no external conflicts since its independence in 1948 and has no external enemies, it maintains the 12th largest active military in the world.¹⁴ In 2005, Burma, with a population of about 56 million people, had an estimated 428,000 active troops in its armed forces.¹⁵ By contrast, Burma's neighbor Thailand, with a population of 63 million, has only about 307,000 active duty troops. The major purpose of Burma's bloated military is not to combat any external security threat, but to suppress internal

⁹ "2007 Country Reports on Human Rights Practices: Burma," *supra* note 7, sec. 5 (noting that official figures show education expenditures at 1.1% of GDP); see also *supra* note 7 (explaining that budget figures are about four to five times the GDP percentages).

¹⁰ United Nations Development Programme, "Myanmar: The Human Development Index – going beyond income," at http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_MMR.html.

¹¹ See, e.g., Nancy Birdsall and Arvind Subramanian, "Saving Iraq From Its Oil," 83 *Foreign Affairs* 77 (July/Aug. 2004); Terry Lynn Karl, "Oil-led Development: Social, Political and Economic Consequences," CDDRL Working Paper (2007); Michael Ross, "Does Oil Hinder Democracy?," 53 *World Politics* 325, 342, 356 (Apr. 2001); Melissa Dell, "The Devil's Excrement: The Negative Effect of Natural Resources on Development," 26(3) *Harvard Int'l Review* (Fall 2004); Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz (eds.), "Escaping the Resource Curse" (2007).

¹² Burma's 2006 GDP was estimated at \$9.3-9.6 billion. See Economist Intelligence Unit, "Country Report: Myanmar 2007-2008" (May 2007); U.S. Central Intelligence Agency, "CIA World Factbook: Burma" (2007) (available at <http://www.umsl.edu/services/govdocs/wofact2007/geos/bm.html>).

¹³ Andrew Cordesman & Martin Kleiber, Center for Strategic & Int'l Studies, "The Asian Conventional Military Balance in 2006: Overview of major Asian powers" at 59 (June 26, 2006) (available at http://www.csis.org/media/csis/pubs/060626_asia_balance_powers.pdf).

¹⁴ *Ibid.* at 32, 35; Jaffee Center for Strategic Studies, "The Middle East Military Balance at a Glance" (May 16, 2004) (available at <http://www.tau.ac.il/jcss/balance/glance.pdf>).

¹⁵ Andrew Cordesman & Martin Kleiber, Center for Strategic & Int'l Studies, "The Asian Conventional Military Balance in 2006: Overview of major Asian powers" at 35 (June 26, 2006) (available at http://www.csis.org/media/csis/pubs/060626_asia_balance_powers.pdf).

opposition and to ensure the regime's stranglehold on power through systematic human rights abuses.

This internal oppression was on display after August 2007, when the junta made an unexpected and fateful decision to remove state subsidies on natural gas, diesel, and other fuels. This led to dramatic price increases and significantly impacted the daily survival of people across the entire country, the result of which was widespread popular protest led by the country's revered Buddhist monks. What followed was a forceful crackdown, widespread repression, and an unknown and disputed number of killings, some of which were captured on video and broadcast internationally over the internet.¹⁶

The U.S. State Department condemned the violent suppression of pro-democracy protests in September 2007 and the thousands of arrests that followed, as well as "custodial deaths...extrajudicial killings, disappearances, rape, and torture," "attacks on ethnic minority villagers," "forced relocations," and "forced recruitment of child soldiers." Human Rights Watch stated their belief that the death toll is "much higher" than the ten deaths originally reported by the regime,¹⁷ and this view has been echoed by others, including the U.N. Special Rapporteur on human rights in Burma, Paulo Sérgio Pinheiro.¹⁸

This spring, the SPDC compounded the devastation of Cyclone Nargis, which wiped-out entire areas in the Irrawaddy Delta, by inhibiting foreign disaster assistance, leading to immense and continued suffering of hundreds of thousands left homeless after the storm.

Just this past week, the SPDC sentenced Thet Wai, an activist, to two years of hard labor in Burma after he gathered evidence for the United Nations about child soldiers and forced labor in Burma. The International Labor Organization, long a vocal critic of the widespread use of forced labor in Burma, has called for his release.

In short, the Burmese junta, one of the most brutal and authoritarian in the world, remains in power through revenues provided by extractive projects, and continues to use these revenues to strengthen its military, and its grip on power, and mercilessly oppress the people of Burma. The junta has systematically ignored the will of the people of Burma, who in 1990 elected a reformist party, the National League for Democracy (NLD), in elections that the junta has failed to honor.

¹⁶ For comprehensive accounts of the protests and the ensuing military crackdown, see Nat'l Coal. Gov't Burma Hum. Rts. Documentation Unit, *Bullets in the Alms Bowl: An Analysis of the Brutal SPDC Suppression of the September 2007 Saffron Revolution* (2008), available at <http://burmalibrary.org/docs4/BulletsInTheAlmsBowl.pdf>; and Human Rights Watch, *Crackdown: Repression of the 2007 Popular Protests in Burma*, 19 Hum. Rts. Watch Rep. 1 (2007), available at <http://www.hrw.org/reports/2007/burma1207/burma1207web.pdf>.

¹⁷ Human Rights Watch, *Burma: Crackdown Bloodier Than Government Admits* (Dec. 7, 2007), available at <http://hrw.org/english/docs/2007/12/07/burma17494.htm>.

¹⁸ See *Burma Death Toll Much Higher: Downer*, ABC NEWS, Sept. 29, 2007, available at <http://www.abc.net.au/news/stories/2007/09/29/2046840.htm> (quoting Australian Ambassador to Burma Bob Davis); *UK Fears Burma Toll "Far Higher,"* BBC NEWS, Sept. 28, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7018920.stm> (quoting British Prime Minister Gordon Brown).

It has arrested the NLD's leader, Nobel Peace Prize winner Aung San Suu Kyi, who has spent over twelve years in detention, where she remains today. The SPDC has committed countless atrocities against democracy activists, ordinary Burmese citizens, and against the ethnic nationalities that comprise about 40% of the population, in long-running campaigns to suppress all forms of dissent.

HUMAN RIGHTS ABUSES DIRECTLY ASSOCIATED WITH EXTRACTIVE PROJECTS

The Yadana Pipeline: Multinational Energy Companies, Security Forces, and Human Rights Abuses

In 1992, the French oil company Total signed the first contract with the Burmese military for the Yadana Project, which would develop offshore natural gas fields and pipe the gas overland to Thailand.¹⁹ From the beginning, the contract provided that at least 50% of the profit would flow directly to the military regime,²⁰ through the Myanmar Oil & Gas Enterprise (MOGE), an arm of the military's Ministry of Energy.²¹ Yadana was the largest foreign investment project in Burma's history and would become the largest source of hard currency for the junta. The advance preparations for the project had begun by 1991, as the military conducted offensives and forcibly relocated villages to ensure that the anticipated pipeline route was secured.²²

The American oil company Unocal, which Chevron acquired in 2005, competed with Total for the original Yadana contract, and became a partner in the project shortly thereafter, in early 1993. It was subsequently joined in 1995 by PTT Exploration & Production (PTTEP), a subsidiary of Thailand's state-owned oil and gas company, PTT, and later that year by MOGE itself, participating as a partner in the project as well as the regulator of the consortium. As the project progressed, the Yadana consortium signed a contract with the buyer of the gas, PTT, to build a pipeline from the offshore field to the Thai border, including a 60-kilometer (40-mile) section across southern Burma.

¹⁹ See generally "Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area Between Myanma Oil & Gas Enterprise and Total Myanmar Exploration & Production" (July 9, 1992), pages 2462-2553 of Ex. 1 to the partial trial of Doe v. Unocal Corp., BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 11, 2003).

²⁰ MOGE takes a 10% royalty from the project's revenues; the value of the gas is then divided between MOGE and the consortium, with MOGE taking a minimum of 40% (depending on price and volume). Of the consortium's share, the regime also takes 30% in income taxes after an initial three-year tax holiday. See "Memorandum of Understanding for the Moattama Gas Project" sec. 4(c) (July 9, 1992), pages UYP 2555-2572 of Ex. 1 to the partial trial of Doe v. Unocal Corp., BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 11, 2003). This is independent of MOGE's 15% participation in the consortium.

²¹ Myanmar Ministry of Energy, "Organization Chart of Ministry of Energy," at <http://www.energy.gov.mm/Organisation%20Chart.jpg>.

²² See EarthRights Int'l, "Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagan Pipelines in Burma" at 13-49 (2d. ed. 2003) (available at <http://www.earthrights.org/files/Reports/TotalDenialContinues.pdf>) at 38-52.

In late 1997 and early 1998, the Burmese military regime was in a financial crisis. International efforts to isolate the junta economically were working. One reporter noted that the junta “was short of cash,” and its foreign exchange reserves “shrank to less than the foreign-currency deposits they are supposed to cover.”²³ In the summer of 1997 the Burmese kyat lost nearly half its value against the dollar in just a few months. By October of that year, foreign exchange reserves fell “to about \$183 million.” In early 1998, one of the junta’s top generals was quoted as acknowledging that the regime was “weak in foreign exchange savings and reserves.” By March, *The Economist* magazine estimated that the regime’s foreign exchange reserves had fallen below \$100 million. This was a staggering drop from late 1996, when reserves were estimated at \$663 million. While the junta could continue to feed and employ soldiers using the local kyat, without hard currency it could not finance imports of fuel, military hardware, or the luxury goods favored by some of the generals.

Then the Yadana Project came online, and everything changed. Initial payments were small because Thailand was not prepared to take the full gas supply; Thailand apparently paid over \$50 million to the Yadana consortium in 1998. This increased to \$230 million in 1999. By 2001, Thailand was importing about 570 million cubic feet of Yadana gas per day, which cost, at reported prices,²⁴ over \$1.5 million every day, or over \$550 million for the year. With the Burmese regime taking the lion’s share of these receipts, Burma’s foreign currency shortage ended—and, along with it, the best hopes that the junta might be isolated economically.

During the construction and early operational period of the Yadana pipeline, reports from refugees and human rights workers in the region indicated that the pipeline area was experiencing a massive increase both in military presence and the human rights abuses that the Burmese military regularly commits. However, the oil companies never fully acknowledged, and in some cases denied that the Burmese military provides security for the Yadana Project. But evidence that surfaced in *Doe v. Unocal* leaves little room for doubt that Burmese army battalions are assigned the task of pipeline security. In an early project memo, a Unocal Vice-President described discussions with Total about “the option of having the [Burmese] Military provide protection for the pipeline construction and operation.”²⁵ A 1996 memo from a Total executive to Unocal acknowledged the “forced labour used by the troops assigned to provide security on our pipeline project.”²⁶ ERI has documented at least fourteen different infantry battalions that have regularly performed pipeline security duties: battalion nos. 25, 104, 273, 282, 401, 402, 403, 404, 405, 406, 407, 408, 409, and 410.²⁷ Battalions 273 and 282 in particular

²³ Bertil Lintner, “Paper Tiger,” *Far Eastern Economic Review* (Aug. 7, 1997).

²⁴ Yadana gas has a known heating value of about 712 BTU/cf. See *ibid.* The price of gas was reported at 175 Thai baht per million BTU (mmBTU) in 2001, see Yuthana Praiwan, “Thai Industry Official Says Unocal’s Gas Price Cut Is Not Enough,” *Bangkok Post* (Oct. 4, 2001), which at then-current exchange rates was about \$3.92/mmBTU, or about \$2800 per million cubic feet of gas.

²⁵ *Doe v. Unocal Corp.*, 395 F.3d 932, 940 (9th Cir. 2002), vacated upon grant of en banc rehearing, 395 F.3d 978 (2003).

²⁶ *Ibid.* at 942.

²⁷ “Total Denial Continues,” *supra* note 22, at 29 (all battalions, especially 273, 401, 402, 403, 404, 405, 407, 408, 409), 72 (battalions 273, 282), 94-95 (battalions 273, 401, 403, 407, 408, 409); “Total Denial,”

have been widely known as “Total battalions.”²⁸ Several other battalions have also operated in the pipeline region, although whether they perform pipeline security functions has not been established.

What is certain is that the pipeline security force was routinely conscripting villagers for severe forced labor projects, including building infrastructure for the project and portering heavy loads for military patrols, as well as committing torture, rape, and murder. These abuses were catalogued in EarthRights International’s first report on the Yadana Project, *Total Denial*, in 1996. The abuses continued as gas began to flow in 1998, and ERI has released several additional reports over the years documenting the harms (including the comprehensive *Total Denial Continues*, released in 2000, and updated and reissued in 2003, along with the most recent report in 2008, *The Human Cost of Energy: Chevron’s Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma (Myanmar)*). These reports included extensive on-the-ground documentation of human rights abuses committed by the military in direct connection to the construction and operation of the pipeline project, including forced labor, rape, torture, and extrajudicial killings.

With no access to justice in Burma, fifteen villagers, represented by ERI and a team of lawyers, sued Unocal in U.S. courts under the Alien Tort Claims Act (ATCA) for complicity in human rights abuses connected to the pipeline project. The strength of the case against Unocal was evidence that the company knew about, abetted, and benefited from the abuse, and did nothing to stop it, and evidence that the abuse was directly connected to the pipeline project. Citing this evidence of complicity, a U.S. federal court of appeals ruled that the case should be allowed to proceed to trial. This was followed by an undisclosed out-of-court settlement in March 2005 between the plaintiffs and the company. Shortly thereafter, Chevron announced that it was seeking to acquire Unocal for U.S. \$18 billion; the deal was finalized in August 2005.

supra note 22, at 13-14 (battalions 273, 401, 406, 407, 408, 409, 410); “Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines,” supra note 23, at 3 (battalions 273, 282); Confidential Interview #23 (2002), on file with ERI (defector confirming pipeline security duties of battalions 104, 273, 282, 401, 403, 405, 409).

²⁸ EarthRights Int’l, “Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma” at 29 (2d. ed. 2003) (available at <http://www.earthrights.org/files/Reports/TotalDenialContinues.pdf>) (all battalions, especially 273, 401, 402, 403, 404, 405, 407, 408, 409), 72 (battalions 273, 282), 94-95 (battalions 273, 401, 403, 407, 408, 409); EarthRights Int’l & Southeast Asia Information Network, “Total Denial: A Report on the Yadana Pipeline Project in Burma” at 13-14 (June 1996) (available at <http://www.earthrights.org/files/Reports/TotalDenial96.pdf>) (battalions 273, 401, 406, 407, 408, 409, 410); EarthRights Int’l, “Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines” at 3 (supplement to “More of the Same: Forced Labor Continues in Burma”) (2001) (available at <http://www.earthrights.org/files/Reports/supp.pdf>); “Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines,” (battalions 273, 282); Confidential Interview #23 (2002), on file with ERI (defector confirming pipeline security duties of battalions 104, 273, 282, 401, 403, 405, 409).

The landmark lawsuit *Doe v. Unocal Corp.* was important for the future of corporate accountability in that it demonstrated that victims of human rights abuses could achieve some measure of justice even where it was otherwise absent in the victims' home country. However, its overall impact on the ground in Burma today is less evident, due in part to the unchanged brutal nature of the military regime and the pipeline battalions, and in part to the companies' continued failure to promote and protect human rights in their project area. Serious human rights abuses connected to the Yadana project continue, including forced labor.

The connection between the Burmese military and the Yadana Project remains as strong as ever. Interviews from 2003-2008 have confirmed that these military battalions still operate in the pipeline region and that the army is still providing pipeline security.²⁹

In 2007, I came to know a villager from Law Ther, a pipeline village, after he was assaulted by members of a pipeline security battalion. In fact, I helped him get care in a hospital for his injuries. According to his story, villagers from Law Ther attempted to stop soldiers from taking wood meant for a local school and were met with violence: "They did not listen to me but instead the officer . . . turned to me and he slapped my face twice, then he punched my stomach and when I tried to cover it he kicked my groin. I fell on the ground . . . I had to wait for a while to be able to walk."³⁰

The security forces assigned to the Yadana Project exhibit all of the typical brutality of the Burmese military. This violence is not justified by any real threats to the pipeline or its personnel; the soldiers continue to kill civilians who pose no danger, and continue to commit rape, torture and other abuses that would be unjustifiable under any circumstances.

My husband was arrested on Monday, August 15, 2005, at noon. LIB 273 ordered him to come . . . After he arrived at the car road, the soldier tied him and they took him to [another villager's] house. On Tuesday they took him to [a factory] and the soldiers tied him and beat him and questioned him there. I went to visit him on Tuesday and I saw that they had tied his legs and feet and were using a log to torture him. I asked him, "What did they do to you?" But he did not tell me; I think he was worried that I would be afraid. But I could see his knees and legs were covered in injuries. When I asked him "Why did they arrest you?" he was about to answer but the soldier came back and ordered me to leave. On Wednesday they took him to Ya Pu village. Then on Thursday they took him to Kanbawk village. On Friday they took him back to Ya Pu and they killed him. Two soldiers from LIB 273 came to my house and they said they need to search my house. . . . They were looking for something in the house, and they looked everywhere, but they could not find anything. After an hour of searching they left without finding anything. I learned that they suspected my husband of having connections with an opposition group because the Burmese soldiers heard it from

²⁹ E.g., Interviews #037 (2003, Zinba), #043 (2005, Kanbawk), #010 (2007, Ya Pu), #050 (2005, Kanbawk), on file with ERI.

³⁰ Interview #016 (2007, Law Ther), on file with ERI.

some other villager. So they came to our house and looked for something but then they could not find anything to support that.³¹

As has been recently documented in separate reports by Human Rights Watch (HRW)³² and the Human Rights Education Institute of Burma (HREIB),³³ the military often takes recruits at a young age; this defector volunteered at age 13. He then went through a systematically brutalizing training process:

During our stay there they are also treating us very badly, like for food they would give us morning glory that grew behind the toilet and they would feed it to us. They also badly hit and punished those who tried to escape from the camp. During my time there I also learnt that some people joined by their will and some were forced to join.³⁴

In 2007, a boy from Shin Ta Pi village was killed by soldiers from battalion 408, one of the pipeline security battalions. Apparently the soldiers had clashed with elements of an armed opposition group, and found the boy on his farm as they searched for the rebels. They captured and killed him.³⁵ These soldiers apparently have not been prosecuted or punished in any way; this is not surprising, as impunity for murder of civilians by soldiers is common in Burma.³⁶

As ERI has documented in the past, rape and other forms of sexual violence are rampant among the Burmese military.³⁷ At least one rape by pipeline security forces has been reported in the past few years, confirmed by two residents of Zinba village, one of the “pipeline villages”. In the summer of 2005, soldiers from pipeline battalion 409 came across a young girl and her older sister bathing in a stream. They captured the girl as her sister ran away to find help; the girl, only six or seven years old, was raped so violently that she required medical attention for a torn vagina.³⁸ ERI has been unable to confirm whether the rapists were punished.

A resident of the village of Michaunglaung described how his village, in close proximity to the Yadana pipeline, continued to be subjected to forced labor:

³¹ Interview #011 (2008, Law Ther), on file with ERI; see also Interview #020 (2007, Law Ther), on file with ERI.

³² Human Rights Watch, “Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma” (Oct. 2007) (available at <http://hrw.org/reports/2007/burma1007/burma1007web.pdf>).

³³ Human Rights Education Institute of Burma, “Despite Promises: Child Soldiers in Burma’s SPDC Armed Forces” (Sep. 2006) (available at <http://www.hreib.com/images/pb/csreport.pdf>).

³⁴ Interview #006 (2008, defector from battalion 273), on file with ERI.

³⁵ Interview #007 (2008, Zinba), on file with ERI.

³⁶ “2007 Country Reports on Human Rights Practices: Burma,” *supra* note 7, sec. 1(a).

³⁷ Betsy Apple, EarthRights Int’l, “School for Rape: The Burmese Military and Sexual Violence” (1998) (available at <http://www.earthrights.org/files/Reports/schoolforrape.pdf>).

³⁸ Interview #007 (2008, Zinba), on file with ERI; see also Interview #012 (2008, Zinba), on file with ERI.

Our village is one of the . . . villages under the Total Company's development zone, but we still have to work on forced labor. The foreigners saw what we have to do but they do not say anything to us. They pass by in their truck while we are building sentry posts and cleaning bushes along the road. But they do not stop to ask us anything. A few times I heard foreigners come to the village and ask whether or not we have to do forced labor. But no one dares say anything about it when they ask because people are afraid of the consequences.³⁹

Forced portering, a signature abuse of the Burmese military in which civilians are ordered to carry heavy loads of arms, ammunition and supplies for soldiers during security operations, has continued in recent years. Villagers are most often conscripted in a semi-regular process, in which the battalions order the village headman to provide them with a specified number of porters. This procedure causes substantial hardship to the villagers:

We have to go porter for them whenever they arrive in the village. We do not have many villagers in the village, so we have to go with them very often. We have no time to work on our job. We have to go with them by rotation and the village head arranges it.⁴⁰

Recently, ERI spoke to a former soldier who had defected from the SPDC about forced labor, including forced portering. He stated:

We ask these people to carry shell ammunition, food and supplies . . . During the portering the soldiers treat porters not so good. I do not want to mention about these bad things so much since I myself I have done it to these people as well at that time.⁴¹

In some cases, villagers who are working in their fields and farms may be seized as porters by any military units they encounter, as one man related:

When we were working in our garden or plantation, and rice farms, we have to be careful of the Burmese soldiers. The best way is to hide ourselves so that we do not have to answer their questions and risk being arrested [for portering].⁴²

Portering trips often take several days or even much longer, in which the porters must often travel over difficult terrain with their heavy loads. Villagers in Michaunglaung were regularly conscripted for two-day portering trips with pipeline security battalions:

We had to do portering for the LIB 409, LIB 407 to the areas. . . where the military is based. Villagers had to go by rotation and had to carry food and

³⁹ Interview #040 (2003, Michaunglaung), on file with ERI.

⁴⁰ Interview #045 (2005, Kaleinaung), on file with ERI.

⁴¹ Interview #006 (2008, defector from battalion 273), on file with ERI.

⁴² Interview #054 (2005, Ahlersekan), on file with ERI.

ammunition for them. The distance was two days and one night. The load was [approximately 40] pounds.⁴³

Unocal's and Chevron's Legal Liability

The conduct of Unocal and its partners in the Yadana consortium led to legal liability in two ways. First, the oil companies were aiding and abetting the Burmese military in committing murder, rape, forced labor, and other abuses; they provided financial, logistical and other support to the soldiers who were routinely violating human rights.⁴⁴ Second, the Yadana consortium used the Burmese military as its agent; hiring the military to provide security for the Project.⁴⁵

Chevron unquestionably still relies on Burmese soldiers to provide security for the pipeline project and remains liable for abuses committed by the military providing pipeline security. Since Chevron purchased Unocal in 2005, their role in the project has remained virtually unchanged and, while the military's forced labor practices have shifted over the years, abuses continue. The Yadana Project, in which Chevron is a partner, remains a highly destructive endeavor. It is the largest source of income for the Burmese military regime, which brutally oppresses its people. The companies continue to rely on Burmese forces for pipeline security, and those forces continue to conscript forced labor and commit serious human rights abuses in the course of their operations. Chevron remains complicit in and liable for human rights abuses that persist today.⁴⁶

EXTRACTIVE COMPANIES AND HUMAN RIGHTS OBLIGATIONS

Binding and Enforceable Mechanisms: The Alien Tort Claims Act

International law accords to the state primary responsibility in the protection of human rights. However, it is also clear that human rights obligations apply to non-state actors. Multinational corporations bear rights and duties under international law, and have a legal obligation to respect, protect, and promote human rights. Multinational corporations are also bound by domestic legislation in the United States, including the Alien Tort Claims Act (ATCA), 28 USC §1350 (2000). ATCA is a critical tool for holding corporations accountable for gross human rights abuses committed abroad. ATCA allows non-citizens to sue in U.S. federal courts for gross human rights abuses, and has served to hold both individual and corporate perpetrators accountable in a credible court of law.

⁴³ Interview #024 (2007, Michaunglaung), on file with ERI.

⁴⁴ *Doe v. Unocal Corp.*, 395 F.3d 932, 952-53 (9th Cir. 2002).

⁴⁵ *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1194, 1306 (C.D. Cal. 2000).

⁴⁶ See EarthRights International's most recent report on Chevron's activities in Burma, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma (Myanmar)*, is available at http://www.earthrights.org/campaignfeature/yadana_pipeline.html. This report details the on-going abuses committed against the people of Burma by the Burmese military on behalf of the consortium of multinational energy companies involved in the Yadana project, including U.S.-based Chevron, Corporation.

The elements of an ATCA claim at first glance appear simple: the plaintiff must be an alien alleging a tort, and the alleged tort must be a violation of the law of nations or a treaty of the United States.⁴⁷ A tort is in violation of the “law of nations” when it violates a norm of customary international law.⁴⁸ Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁴⁹ While determining when a practice has become general and consistent is not simple, it is clear that only the most egregious abuses, such as war crimes,⁵⁰ crimes against humanity,⁵¹ genocide,⁵² summary execution,⁵³ torture,⁵⁴ forced labor,⁵⁵ and cruel, inhuman and degrading treatment,⁵⁶ meet the standard.

The Supreme Court’s 2004 decision in *Sosa v. Alvarez-Machain* confirms that only the most heinous violations are actionable.⁵⁷ In *Sosa*, the Court clearly enunciated that victims of the most serious human rights abuses, those that rise to the level of violations of customary international law (the law of nations), may continue to seek redress in United States’ courts under ATCA.

Sosa v. Alvarez-Machain ensures that there will neither be an explosion of ATCA cases, nor will ATCA become a general corporate accountability measure. Rather, it will serve as a tool for corporate liability—and justice for victims—in a limited set of circumstances. As such, ATCA will continue to deter corporate complicity in severe human rights crimes anywhere in the world.

However, ERI remains concerned that corporations outside the jurisdiction of U.S. courts continue to commit human rights abuses with impunity, on their own and through security services. Therefore, we encourage Congress to work with their parliamentary counterparts abroad to encourage adoption and enforcement of legislation that promotes accountability for human rights abuses committed by corporations in the course of their extractive operations abroad.

Soft Laws – The Voluntary Principles on Security and Human Rights

In 2000, a number of extractive companies, NGOs, and governments came together to develop what came to be known as the Voluntary Principles on Security and Human Rights, to “guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.”

⁴⁷ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

⁴⁸ See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Filartiga*, 630 F.2d at 884; *Forti*, 694 F. Supp. at 709.

⁴⁹ Restatement (Third) of Foreign Relations Law § 102(2), cmt. c (1987).

⁵⁰ See *Kadic*, 70 F.3d at 242–43.

⁵¹ See *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986).

⁵² See *Kadic*, 70 F.3d at 241–42.

⁵³ See *Marcos*, 25 F.3d at 1475.

⁵⁴ See *Filartiga*, 630 F.2d at 884.

⁵⁵ See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

⁵⁶ *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992).

⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

EarthRights International recognizes that it was high time transnational corporations publicly acknowledge the importance of respecting human rights when carrying out drilling, pipeline, mining, and other extractive resource projects. However, these voluntary standards fall far short of what we should expect from corporations claiming to engage in responsible business practices. We need mandatory requirements-laws, not voluntary codes-that force ALL transnational corporations to protect the human rights of citizens in their host countries. This "soft law" can play a role in promoting respect for human rights, but it must be strengthened with additional resources and oversight, and should exist in conjunction with binding, enforceable mechanisms for accountability and transparency.

Chevron, ExxonMobil, Shell, British Petroleum, Conoco, Freeport McMoRan, Rio Tinto and others agreed, in a pledge signed with the British and U.S. governments, to try to ensure that security forces, either their own or those contracted with local governments, respect the human rights of local citizens. Specifically, the corporations promise to encourage private and police security forces comply with the rule of law. This includes insisting that security forces use minimum necessary force, not hire known human rights violators, and respect local people's right to demonstrate and collectively bargain.

It sounds good. Unfortunately, it sounds better than it is.

First, the standards are purely voluntary. There is no mechanism for their enforcement, and no remedy for their infraction. No government will monitor these corporations' compliance, and a failure to comply will subject them to the court of public opinion, and no other court. And that is assuming the public learns of any infractions.

Second, these standards are "soft," at best. Companies will "attempt to ensure" that security guards do not have records as abusers; they "should" report human rights abuses to the local government and "urge" investigations. Trying to ensure that peoples' human rights are protected in the course of these projects is insufficient; making sure they are protected is what we should demand.

And third, these voluntary standards do not cover all corporations-only those that choose to sign on. Granted, one can imagine corporations from extractive industries rushing to sign this code of conduct, but not necessarily because they are committed to human rights protection. By signing the voluntary code, corporations may be seeking to fend off a tougher challenge: legislation that requires them to behave responsibly. International Right to Know legislation, for example, requiring corporations to disclose information about their human rights, environmental, and labor practices abroad, exposes corporations to real scrutiny.

Transnational corporations that extract resources for a living claim that they do not have the luxury of only doing business with "good" governments. They have to go where the resources are, they say, and it so happens that resources co-exist alongside repressive regimes and brutal military forces in some cases.

Unfortunately, indigenous groups and NGOs, working in partnership, have learned a hard lesson: voluntary assurances are not enough. Responsible corporate behavior requires public scrutiny, which in turn requires transparency. We must develop laws, not voluntary standards, that require corporations in extractive industries to make their human rights, environmental, and labor practices visible to citizens. Once the public and stakeholders can see what is happening, they can demand accountability.

LEGISLATIVE INITIATIVES

The United States and other countries should enact and strengthen legal and regulatory mechanisms that promote transparency, normative frameworks and harmonization across systems. The goals of such mechanisms must be to promote stability for corporations operating internationally, allow for corporate liability and accountability for complicity in abuses abroad, and enable access to justice for survivors of abuses abroad. Civil society organizations and citizens of these countries should advocate for legislation to create such mechanisms.

Pending Legislation

Extractive Industry Transparency Disclosure Act (EITDA) (S. 3889/HR6066):

Senator Charles Schumer (D-NY) and Congressman Barney Frank (D-MA) introduced Extractive Industry Transparency Disclosure Act (EITDA). Mr. Chairman, I want to thank you for cosponsoring this important legislation, which would increase the transparency of payments by extractive companies to host governments. EarthRights International fully supports passage of the EITDA. Disclosure of payments to host governments will assist citizens, investors and other stakeholders in holding governments accountable for resource revenue expenditures. By requiring companies registered with the Securities and Exchange Commission to publish payments made to foreign governments for oil, gas and minerals, EITDA can protect investors seeking to understand risk and help foster stability in the resource-rich countries that are the core of the energy industry, while at the same time, leveling the playing field for companies worried that "going it alone" on transparency could place them at a competitive disadvantage. We believe transparency in resource payments can lead to increased government accountability and contribute to a reduction in poverty, civil conflict and human rights abuses. While EITDA does not address specific human rights abuses by corporations, transparency and accountability go hand-in-hand in addressing the root causes of these abuses, and therefore, solutions must address both issues.

The cost to extractive companies of reporting payments should be minimal as companies already conduct internal audits and have revenue information available. The requirement would simply mean that companies need to incorporate reporting requirements into their integrated auditing.

Likewise, the cost for the U.S. government would be minimal, thus providing high impact at a low cost. Associated costs would include creating a Treasury website and any necessary oversight or enforcement.

Legislative Recommendations

Protect and Defend the Alien Tort Claims Act (ATCA)

It is crucial that Congress send a clear message that human rights matter, and U.S. courts have an important role to play in their promotion and protection. EarthRights International believes that as a result of the Alien Tort Claims Act, U.S. corporations and those under the jurisdiction of U.S. courts understand their legal obligations and liabilities under the law, and as such, are more likely to respect fundamental human rights in their operations.

Consider International Right to Know (IRTK) Legislation

We urge Congress to consider enacting legislation creating an International Right to Know. "Right to Know" laws take two forms: Community Right to Know and Workplace Right to Know. Each grants certain rights to those groups, and primarily cover toxic chemicals and also aspect of workplace safety. Other aspects of operations, such as the employment of children or the conduct of security firms, may not require disclosure but are regulated in the US.

International Right to Know legislation would promote corporate accountability by providing information about companies' environmental, labor, and human rights practices at home and abroad. IRTK could require companies based in the U.S. or traded on U.S. stock exchanges and their foreign subsidiaries and major contractors to disclose information on overseas operations along the lines of domestic disclosure standards. IRTK would allow governments, civil society, and the public to evaluate corporations' behavior and empower them to take steps to end current and prevent future abuses. In addition, the transparency compelled by IRTK could prompt companies to avoid perpetrating the kinds of abuses detailed on the Yadana pipeline project above.

Consider Banking Sanctions

EarthRights International supports economic sanctions that are effective in restricting meaningful revenues to the SPDC and cover the major resource companies investing in Burma. While the current U.S. sanctions regime⁵⁸ prohibits new investment in Burma, we have seen a flood of investment by extractive industry state-owned and non-state owned companies into Burma from China, India, Thailand, Korea and others that threaten to render the U.S. sanctions regime purely symbolic. At the time of the 1997 sanctions legislation, major revenue flows to the SPDC from the Yadana and Yetagun pipelines had not come on-line, and there was a severe deterioration in the foreign currency reserves of the SPDC. The sanctions were having the desired effect. Then the Yadana Project came online, and everything changed. By 2001, Thailand was importing about 570 million cubic feet of Yadana gas per day,⁵⁹ which amounted to over \$550 million for the year. With the Burmese regime taking the lion's share of these receipts, Burma's foreign currency shortage ended—and, along with it, the best hopes that the junta might be isolated economically.

While Yadana revenues remain the largest single source of revenue for the Burmese military regime,⁶⁰ a new natural gas project, the Shwe project, scheduled to come on-line in 2012, will

⁵⁸ Title 31 Part 537 of the U.S. Code of Federal Regulations.

⁵⁹ Paul Hueper, "Gas exports up and running," *Petroleum Economist* (Aug. 1, 2001).

⁶⁰ ERI's calculations, based on statements from the companies and documents released in the partial trial of *Doe v. Unocal*, suggest that at the end of 2007 the Yadana Project was taking in over U.S. \$ 3.5 million daily, or nearly U.S. \$ 1.3 billion annually. Nearly 75% of this income goes to the military

surpass Yadana in its income-generating potential for the junta. Currently South Korean company Daewoo is the operator of the project, with partners from India, China and Burma. At 5.7-10 tcf of gas, the deposits will earn the junta an estimated U.S. \$12-17 billion, according to Shwe Gas Movement (SGM),⁶¹ and they will earn Daewoo approximately U.S. \$90 million per year for the estimated twenty-year life of the project.⁶²

EarthRights International encourages Congress to consider additional measures that limit resource revenues from accruing to the SPDC until such time as a full transition to a system of government that allows for all of Burma's people to fully participate in development decisions and freely determine their own future. Access to U.S. capital markets is a powerful tool to ensure compliance, and we look forward to working with members of Congress to identify specific legislation that will prevent receipt of these resource funds to the SPDC.

CONCLUSION

Human rights abuses, including systemic use of forced labor, is endemic throughout Burma. The U.S. State Department's latest report on human rights in Burma notes that the junta's human rights record is worsening, that forced labor is a "widespread and serious problem particularly targeting members of ethnic minority groups," and that "forced labor by children continue[s] to be a serious problem." Transnational extractive companies doing business in Burma continue to provide critical funding that supports the military junta, which in turn denies the most basic human rights to the people of Burma. These projects also lead directly to widespread abuses by security forces, including forced labor, forced relocations, murder, torture, rape, and other violations.

EarthRights International supports the development and expansion of mechanisms which promote revenue transparency, restrict the flow of resource revenues to the SPDC, and provide tools to hold corporations that are responsible for human rights abuses accountable. We look forward to continuing to work with Congress to address these important goals.

Thank you for the opportunity to testify today before the Judiciary Subcommittee on Human Rights and the Law on this important issue.

Sincerely,

regime—\$969 million annually, based on fuel prices at the end of 2007, and conceivably much more if these prices continue to rise. See EarthRights International, The Human Cost of Energy 21 (2008) available at http://www.earthrights.org/files/Burma%20Project/Yadana/HCoE_pages.pdf.

⁶¹ The Shwe Gas Movement (SGM) is a movement of civil society organizations that currently includes the Arakan Oil Watch (AOW), the Shwe Gas Campaign Committee-India, SGM Bangladesh, the All Arakan Student and Youth Congress (AASYC), and EarthRights International (ERI).

⁶² See Shwe Gas Movement (SGM), Supply and Command 2, 51 (2006), available at <http://www.shwe.org>.

A handwritten signature in blue ink, appearing to read 'Ka Hsaw Wa', with a long horizontal flourish extending to the right.

Ka Hsaw Wa
Co-Founder and Executive Director
EarthRights International