

How Big Oil in Myanmar Uses the Language of Human Rights to Justify Complicity in Atrocity Crimes

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The year 2021 marks the 10th anniversary of the U.N. Guiding Principles on Business and Human Rights.¹ Most of the world's leading multinational corporations and governments have agreed in principle to follow this international standard. However, the military coup that began in Myanmar in February 2021 has become an important test case for whether the U.N. Guiding Principles can prevent business-related abuses in complex human rights situations where widespread atrocities are ongoing.

So far, the U.N. Guiding Principles are failing, at least with respect to the oil and gas industry. Rather than using the Principles to act responsibly, oil and gas companies like Chevron and TotalEnergies are co-opting the language of business and human rights to justify their decision to fund the Myanmar military and its human rights atrocities.

Revenues from Myanmar's offshore gas projects are the military junta's largest source of foreign revenue — they fund its atrocities. Every month, Big Oil including TotalEnergies, Chevron Corporation, and Posco International order or facilitate the transfer of millions of U.S. dollars of payments for gas revenues from their offshore projects.

Contractually, Big Oil is supposed to make these payments to the Government of Myanmar, but Myanmar does not have a recognized government. Instead, the revenues are received by an illegal, criminal junta that has taken control of government bank accounts and is actively misappropriating state assets.

In a recent judgment relating to payments from a multinational company to ISIS, the French Courts held that "one can be complicit in crimes against humanity even if one doesn't have the intention of being associated with the crimes committed." It added that "Knowingly paying several million dollars to an organization whose sole purpose was exclusively criminal suffices to constitute complicity, regardless of whether the party concerned was acting to pursue a commercial activity."²

1 U.N. Office of the High Commissioner for Human Rights, "Stocktaking on the 10th anniversary of the UNGPs," <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPS10.aspx>.

2 Al Jazeera, "France: Lafarge loses ruling in Syria crime against humanity case," 7 Sept. 2021, <https://www.aljazeera.com/news/2021/9/7/frances-lafarge-loses-ruling-in-syria-crimes-against-humanity>.

A closer look at the oil and gas industry's public messaging shows that it has acknowledged the risk of being associated with the junta's crimes by referring to a "humanitarian dilemma" but justified its complicity with statements of concern, claims to have carried out Human Rights Due Diligence, and misinformation on both its leverage to stop revenues and the impacts of doing so.

What Big Oil said:

We'd have to stop production and would be replaced by companies that don't share our values.

Myanmar gas is vital to Thai energy security.

Myanmar needs the gas for electricity production.

Our staff would be in danger.

The reality:

These companies have contractual rights that give grounds to divert revenues to protected accounts, but they have not tried to use them.

Total and Chevron are expected to exit Myanmar around 2025 when their Yadana project's gas runs out. This imminent shut-down means they could make a takeover commercially unviable. While the remaining revenues from this project are relatively insignificant to these companies, they could provide a lifeline to the junta as it consolidates power.

Thailand can import more LNG to replace Myanmar gas, so it is not vital.³ Despite voicing concerns over Thai energy, Chevron is curtailing production from Thailand's biggest gas field over a commercial dispute.⁴

According to a recent survey, the overwhelming majority of people inside Myanmar would prefer gas revenues to be stopped, even if it means a reduction in electricity.⁵ Half of the population is not even connected to the national grid.

Chevron has a 'non-operational stake' in its Yadana project — it has little or no staff in Myanmar. Staff of Total and its subcontractors have repeatedly called for revenues to be cut off.⁶

3 EarthRights International, Analysis: Impacts of a Disruption of Myanmar Gas Imports on Thailand's Energy Security, Sept. 2021, <https://earthrights.org/publication/analysis-impacts-of-a-disruption-of-myanmar-gas-imports-on-thailands-energy-security>.

4 Yuthana Praiwan, "PTTEP stepping up search for additional gas supply," Bangkok Post, 28 June 2021, <https://www.bangkokpost.com/business/2139487/pttep-stepping-up-search-for-additional-gas-supply>.

5 Justice for Myanmar, "Oil & Gas Survey," May 2021, available at <https://twitter.com/JusticeMyanmar/status/1398247592719372288>.

6 Myanmar Now, "Yadana workers urge Total to stop military receiving gas revenue," 26 May 2021, <https://www.myanmar-now.org/en/news/yadana-workers-urge-total-to-stop-military-receiving-gas-revenue>.

Here are some of the falsified messages that these companies are using to suggest that the junta is the legitimate government of Myanmar and to claim that the companies must stop production entirely to stop revenues from reaching the junta:

What Big Oil said:

We are dealing with Myanmar's state-owned oil company, MOGE, as we were before the coup.

We'd be in breach of Myanmar law and our contracts.

All of the payments come from the gas buyer, not from us. They are "in-kind" payments. We can't stop them.

Dividend payments from the pipeline company are not within our control.

The reality:

MOGE is nothing more than a government department within the Ministry of Electricity and Energy. Myanmar has two parties claiming to be the government: the National Unity Government led by elected lawmakers and a criminal junta. Big Oil is choosing the junta, even though the international community has not recognized the junta as the government.

The companies' contracts are with the Government of Myanmar. Accordingly, they can assert that paying state assets to an illegal criminal organization is a breach of Myanmar law and their contracts.

The buyers of the gas, including the Thai government, make these payments because gas companies order them to do so each month. The uncertainty over the rightful Government of Myanmar enables gas companies to order payments into protected accounts.

Some and arguably all of these payments are revenues that the gas buyers owe to companies like Chevron and Total. The companies ask the buyers to transfer funds to the junta to meet their contractual obligations to the Government of Myanmar. Total effectively admitted this in a public response to a Publish What You Pay report.⁷

Gas companies' contracts allow them to suspend dividends (which, for example, are about 10 percent of revenues from the Yadana gas project). After initially stating that dividend payments could not be stopped, Chevron did just that, but the other 90 percent of revenue payments continue. Posco has not suspended dividends.

⁷ Publish What You Pay, Financing the Military in Myanmar: Analysis of Gas Revenues, June 2021, <https://www.pwyp.org/pwyp-resources/financing-the-military-in-myanmar-analysis-of-gas-revenues>.

Consistent with the U.N. Guiding Principles and international law obligations, the risk of complicity in atrocity crimes means that gas companies in Myanmar must use all reasonable efforts to stop revenues from reaching the junta. This includes using all contractual leverage to direct funds into protected accounts. Myanmar civil society has clearly stated that if this fails, companies should divest. Big Oil has done neither — after 10 years of the U.N. Guiding Principles, it is clear that companies would rather co-opt the U.N. language rather than take meaningful action.

Background

The Myanmar military has an extensive track record of human rights abuses and mass atrocities. In 2018, the U.N. Independent International Fact-Finding Mission concluded that the military “systematically targeted civilians, including women and children, committed sexual violence, voiced and promoted exclusionary and discriminatory rhetoric against minorities, and established a climate of impunity.”⁸ It found that senior generals—including Min Aung Hlaing, the leader of the military coup—should be prosecuted for genocide against the Rohingya in Rakhine state. It also found that war crimes and crimes against humanity had taken place in Shan and Kachin states.

In 2018, Myanmar was a country that appeared to be in transition after decades of military rule. The 2015 elections saw the National League for Democracy (NLD) government take power, albeit under the constraints of the military-drafted 2008 Myanmar Constitution and amidst ongoing armed conflict with ethnic groups across Myanmar. With these signs of progress, multinationals and U.N. bodies continued their activities in Myanmar, often in partnership with companies owned by or linked to the military. The World Bank even continued to rent offices owned by the military itself.⁹

On February 1, 2021, the Myanmar military overturned the NLD’s 2020 landslide election victory and launched a brutal crackdown on democracy and the rule of law that has continued unabated. Security forces are carrying out extrajudicial killings and widespread torture.¹⁰ Over 1,290 people have been killed and thousands more have been arbitrarily detained,¹¹ while some have been convicted and sentenced to death.¹² The U.N. Special Rapporteur on the Situation of Human Rights in Myanmar concluded that there is “a compelling case that the military junta was committing crimes against humanity.”¹³ The U.N. High Commissioner for Human Rights concluded that ongoing violations may amount to crimes against humanity.

8 United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar, <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>.

9 Justice for Myanmar, “Shangri-La Financing Crimes Against Humanity,” 16 Apr. 2021, <https://www.justice-formyanmar.org/stories/shangri-la-financing-crimes-against-humanity>.

10 Victoria Milko & Kristen Gelineau, “Myanmar military uses systemic torture across country,” AP News, 28 Oct. 2021, <https://apnews.com/article/myanmar-torture-military-prisons-insein-abuse-390fe5b49337be82c-e91639e93e0192f>.

11 AAPP (Burma), Daily Update, last accessed 23 Nov. 2021, https://twitter.com/aapp_burma/status/1463131541794476032.

12 Radio Free Asia, “At Least 64 Myanmar Protesters, Two of Them Underage, Sentenced to Death by Military Courts,” 25 June 2021, <https://www.rfa.org/english/news/myanmar/courts-06252021194754.html>.

13 U.N. Office for the High Commissioner for Human Rights, “Special Rapporteur on the Situation of Human Rights in Myanmar to the Human Rights Council: there is a Compelling Case that the Military Junta in Myanmar is Committing Crimes against Humanity,” 22 Sept. 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27516&LangID=E>.

Many businesses have acted responsibly, continuing operations where it is possible to avoid bankrolling the coup leaders and suspending operations where this is not possible. Others have divested or are considering doing so. Responsible divestment brings its own challenges. In some sectors such as the garment industry, some civil society leaders within Myanmar have asked businesses to stay. Civil society has asked others not to divest irresponsibly. For example, civil society has urged Norwegian telecommunications company Telenor not to hand over the data of human rights activists to the junta as part of its exit.

However, Myanmar's protest movement, civil society, and elected lawmakers have universally demanded that gas revenues be stopped from reaching the junta. A public statement from 462 Myanmar civil society organisations stated that if revenues cannot be stopped "either through sanctions that allow production to continue or through companies taking action directly, the companies must divest rather than lining the pockets of the junta."¹⁴

This call is based on the understanding that these revenues, at around 1.5 billion U.S. dollars annually, are being paid into bank accounts hijacked by the junta and are now the junta's largest source of vital foreign exchange. Fossil fuel companies including TotalEnergies, Chevron Corporation, and Posco International continue to make these payments, knowing with certainty that the revenue is falling into the hands of the junta.

These payments are made to the Myanma Oil and Gas Enterprise (MOGE), which is known as a "state-owned enterprise." While state-owned enterprises often act at arm's length from the government in many countries, this is not the case in Myanmar. MOGE is in fact a government department, hijacked by the junta. The European Union, United Kingdom, and United States governments have declared that payments to Myanmar's state-owned enterprises in the extractives sector are funding the military and its atrocities. In the words of a lobbyist for the junta, gas revenue are "pretty important" to them "because they don't have that many revenue streams right now."¹⁵

14 Progressive Voice Myanmar, "CSO Statement: While people of Myanmar demand sanctions on junta run gas enterprise, Chevron and Total bankroll abuses," 2 Aug. 2021, <https://progressivevoicemyanmar.org/2021/08/02/cso-statement-while-people-of-myanmar-demand-sanctions-on-junta-run-gas-enterprise-chevron-and-total-bankroll-abuses>.

15 Kenneth P. Vogel & Lara Jakes, "Chevron Lobbies to Head Off New Sanctions on Myanmar," New York Times, 16 Sept. 2021, <https://www.nytimes.com/2021/04/22/us/politics/chevron-myanmar-sanctions.html>.

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