

**The Advisory Council on Ethics  
for the Government Petroleum Fund**

**To the Ministry of Finance**

*Recommendation of 14 November 2005*

(Unofficial English translation)

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## 1 Introduction

On 13 April 2005, the Petroleum Fund's Advisory Council on Ethics received a letter from the Ministry of Finance requesting the Council to consider whether investments in Total, due to the company's operations in Burma, are contrary to the Petroleum Fund's ethical guidelines.

As of 31 December 2004, Norges Bank held shares worth NOK 5.7 billion in Total, equivalent to an ownership interest of 0.67 per cent. Norges Bank also holds bonds worth NOK 105.5 million in the company.

Total is accused of complicity in human rights violations in connection with the construction of the Yadana gas pipeline in the period 1995-1998. Total is also accused of complicity in Burma's ongoing human rights violations, one of the grounds being that Total's operations generate revenues for the regime. Allegations of human rights violations have been put forward by a number of national and international NGOs.<sup>1</sup> Total denies complicity in human rights violations.<sup>2</sup>

The Council recognises that Burma is governed by a military regime which for many years has been responsible for very serious and systematic violations of human rights. Moreover, the Council considers it likely that these violations will continue in the foreseeable future. It is, however, beyond the Council's mandate to assess whether exclusion of companies could contribute to improving the political situation within a state.

The Council considers it likely that Total was aware that human rights violations were taking place in connection with the construction of the pipeline in the period 1995-1998, and that the company did little to prevent such violations. This, however, does not in itself provide a basis for exclusion from the Fund, as it is only the risk for present or future violations of the guidelines which can prompt exclusion. In order to establish the existence of a risk of complicity in present or future human rights violations, there must, under the guidelines, be a direct linkage between the company's activities and the relevant human rights violations. Moreover, the violations must be perpetrated to secure the company's interests, and the company must be aware of the violations and still refrain from taking steps to seek to prevent them. The Council does not consider these conditions to be met in the present case.

The Council concludes that the ethical guidelines do not provide a basis for determining that the Fund is currently contributing to Burma's human rights abuses through its ownership interest in Total, and does not recommend exclusion of the company.

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<sup>1</sup> Among them Earth Rights International (<http://www.earthrights.org/>), The Burma Campaign UK ([www.burmacampaign.org.uk](http://www.burmacampaign.org.uk)), La Fédération des droits de l'Homme ([www.fidh.org](http://www.fidh.org)), The Norwegian Burma Committee ([www.burma.no](http://www.burma.no)).

<sup>2</sup> Total's web pages, [www.total.com](http://www.total.com).

## 2 Background

### 2.1 TOTAL's operations in Burma

Total SA (hereafter referred to as Total) started operations in Burma in 1992 when the company signed a production sharing contract with the Burmese public corporation Myanmar Oil and Gas Enterprise (MOGE) to develop the Yadana gas field and lay a pipeline to bring the gas ashore and onwards to the Thai border.<sup>3</sup> Total established a subsidiary, Total Myanmar Exploration and Production, in that connection.

Total subsequently sold off interests in the project to Unocal (28 per cent of the shares), the Thai company PTT-EP (Petroleum Authority of Thailand Exploration & Production (25 per cent), and further interests to MOGE (15 per cent). Total retains the largest stake of 31 per cent of the shares. The same consortium owns Moattama Transportation Company (MGTC) which was responsible for constructing the pipeline from the gas field to Thailand.

Total is among the largest foreign actors in Burma today. Total states that the company is also involved in oil and gas exploration in areas adjacent to the Yadana field together with, among others, Petronas (from Malaysia) and Daewoo (from Korea).

The Yadana field is a large gas field situated in the Andaman Sea off the south-west coast of Burma. The gas is transported by pipeline to Thailand. The pipeline runs undersea from the Yadana field to shore, thereafter 63 km across Burmese territory into Thailand. Work on the gas pipeline started with field surveys in 1994, infrastructure was built between 1995 and 1997 (including landing pads for helicopters, roads, buildings, etc), while the pipeline itself was laid in 1996 and 1997. Construction was completed in May 1998, and the pipeline came on stream in July 1998. Production was up to full speed in 2001. Total states that overall investments amount to USD 1.2 billion, including close to USD 1.2 billion for the pipeline.<sup>4</sup>

In conjunction with the other participants in the consortium Total initiated a social development programme in the region in 1995, in tandem with the construction of the pipeline. The programme encompassed 13 villages closest to the pipeline route, but was extended to 23 villages in 2001 and now covers a population of some 45,000 in the pipeline area. The programme focuses on building up health services, education, local industry and commerce and micro credits, along with infrastructure development.<sup>5</sup> The social development projects are funded by Moattama Gas Transportation Company (MGTC) which is owned by Total and the other consortium participants. According to Total it spent just under USD 13 million on the programme between 1995 and 2004.<sup>6</sup>

### 2.2 In brief about Burma

Burma is ruled by a military junta, the so-called *State Peace and Development Council* (SPDC). The regime is notorious for its violations of basic human rights and its suppression of all political opposition, including the country's largest opposition party,

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<sup>3</sup> [www.total.com](http://www.total.com).

<sup>4</sup> [www.total.com](http://www.total.com).

<sup>5</sup> Total 2004: Sharing our energies. Corporate Social Responsibility Report, available at [www.total.com](http://www.total.com)

<sup>6</sup> [www.total.com](http://www.total.com)

the NLD (National League for Democracy), which is headed by Aung San Suu Kyi. The regime maintains its power through oppressive measures such as strict censorship, suppression of individual rights and persecution of minorities. Among the human rights abuses of which the regime is accused are systematic and widespread resort to forced labour including in connection with infrastructure building, forced relocation of large population groups along with atrocities such as torture, rape, murder and use of child soldiers by the military forces. The regime appears to have dealt particularly harshly with the numerous ethnic minorities in Burma. A number of NGOs have reported on the regime's outrages against the population.<sup>7</sup> The UN Commission on Human Rights and the International Labour Organization (ILO) has in several contexts reported on and condemned the regime's systematic violations of human rights<sup>8</sup> and use of forced labour.<sup>9</sup>

Through a network of companies including both public corporations and private firms, the regime controls virtually all sections of the formal economy.<sup>10</sup> The government has secured control over 12 key economic sectors, including mining and energy.<sup>11</sup> State-run companies are also major participants in the transport, trade and manufacturing sectors. Gas exports provide the main export revenues and account for 25-30 per cent, or an estimated USD 600 – 800 million, of the country's official exports.<sup>12</sup>

The regime has done little to develop the economy, and Burma ranks among the world's poorest countries. Due to isolation from the world at large and a dearth of economic policy incentives, few foreign countries have opted to invest in Burma, and many of those which have done so have withdrawn. The oil and gas sector is the only one to offer substantial growth potentials. Foreign companies, mostly Asian, now dominate this sector.

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<sup>7</sup> Among the many are Human Rights Watch, Amnesty International, Earth Rights International, the Burma Campaign UK.

<sup>8</sup> See for example resolutions from the UN Commission on Human Rights: Situation of human rights in Myanmar. 61st Commission on Human Rights, UN doc.:E/CN.4/RES/2005/10 and E/CN.4/RES/2005/L.29.

<sup>9</sup> See for example International Labour Conference 2005: Provisional Record 22, Ninety-third Session, Geneva, 2005; available at [www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/pr-22.pdf](http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/pr-22.pdf).

<sup>10</sup> Robertson Jr, Philip S 2003: Sanctions are working in Burma. Article in "The Irrawaddy", available at [www.irrawaddy.org/com/2003/com31.html](http://www.irrawaddy.org/com/2003/com31.html).

<sup>11</sup> "The State-Owned Economic Enterprise Law" from 1989 secures state control over the following key areas: a) extraction of teak and sale of the same in the country and abroad; b) cultivation and conservation of forest plantation with the exception of village-owned fire-wood plantations cultivated by the villagers for their personal use; c) exploration, extraction and sale of petroleum and natural gas and production of products of the same; d) exploration and extraction of pearls, jade and precious stones and export of the same; e) breeding and production of fish and prawns in fisheries which have been reserved for research by the Government; f) Postal and Telecommunications Service; g) Air Transport Service and Railway Transport Service; h) Banking Service and Insurance Service; i) Broadcasting Service and Television Service; j) exploration and extraction of metals and export of the same; k) Electricity Generating Services other than those permitted by law to private and co-operative electricity generating services; l) manufacture of products relating to security and defence which the Government has, from time to time, prescribed by notification. Available at [www.mpt.net.mm/mpt\\_jointinv.html](http://www.mpt.net.mm/mpt_jointinv.html).

<sup>12</sup> Economist Intelligence Unit: Burma Country profile 2004.

### *Chronological overview of key events related to this recommendation*

1982	Gas deposit discovered in the Andaman Sea (later the Yadana field).
1988	Burmese authorities announce a tender for development of the gas field.
June 1992	Total sign production sharing contract with MOGE.
July 1992	Total sign agreement of intent with MOGE.
1991-1996	Military forces move into the projected route of the pipeline, establish military camps and clear the areas along the route. Reports of forced relocation, forced labour and atrocities against the local population committed by the military forces.
1995	Total start their social development programme in 13 villages in Burma.
February 1995	Commercially viable finds at the Yadana field. The authorities in Burma and Thailand sign a 30-year contract for gas sales from the Yadana field.
October 1995	Pipeline construction starts. Allegations of forced labour and other outrages committed by the security forces continue.
1998	Pipeline completed and comes on stream.
2000	Commercial production starts up at the Yadana field.
2001	Yadana field in full production.
2001	Total's social development programme extended to include 23 villages along the pipeline route.
2002	US court rules that Unocal could be sued by Burmese citizens for complicity in human rights abuses. (Unocal and Total are partners in Burma.)
February 2005 -	A number of NGOs, among them <i>The Burma Campaign UK</i> and FIDH in France, launch international campaigns against Total accusing it of complicity in human rights abuses.
March 2005	Unocal reaches a compromise with the plaintiffs involving payment of damages.

### 2.3 The international community's condemnation of Burma

The international community has adamantly distanced itself from the Burmese military dictatorship. Many western countries have called for sanctions, although international

agreement on such action has not been reached. Numerous countries and organisations have cut back their cooperation with Burma.

In 1997 the *USA* prohibited new investments in Burma, while allowing existing investments to run their course. In 2003 the US sanctions were broadened to include bans on imports and financial transactions.

In 1989 the *World Bank* and the *International Monetary Fund (IMF)* introduced sanctions against Burma. Burma has also repeatedly been condemned by the *ILO* for the country's systematic resort to forced labour.

In the past 15 years the *European Union* has introduced a number of sanctions against Burma, including an arms embargo and a ban on investments by EU enterprises in specific Burmese public corporations.<sup>13</sup> In the spring of 2004 the EU adopted a Common Position on Burma. This involves a combination of measures including a ban on entry visas to the EU for Burmese military officers and other political leaders, a freeze on the regime's assets in the EU, and a general call on European enterprises not to invest in Burma. Assistance to the public health system, measures to alleviate poverty, and emergency aid are maintained.

The EU's position can be perceived as a reaction to the failure of the sanctions policy to contribute to significant changes. Among the reasons cited for this failure are that sanctions have generally proven ineffective against totalitarian regimes and that sanctions are in any case unlikely to be effective as long as neighbouring states fail to support them. China, India and Thailand are all engaged in extensive collaboration with Burma.

#### ***Norwegian policy on Burma***

Norway has endorsed the EU sanctions, and during his first period in office, the then prime minister Bondevik called on Norwegian industry to refrain from investing in Burma. Norway has been an important mainstay for the Burmese opposition through its support to the exile community and contributions to civil society in Burma. In his statement to the Storting in February this year, however, the minister of foreign affairs stated that "neither the sanctions approach nor the policy of engagement has led to changes in the regime's policies. We must therefore continually assess what means are most suitable for supporting democratisation in the country. Measures to promote dialogue will be essential in this connection."<sup>14</sup> At a meeting with NGOs engaged in Burma the then state secretary Vidar Helgesen signalled greater emphasis on contact and constructive dialogue with the regime in combination with a systematic policy for change and continued support to the opposition.<sup>15</sup>

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<sup>13</sup> An overview of EU policy in this area can be found at [http://europa.eu.int/comm/external\\_relations/myanmar/intro/](http://europa.eu.int/comm/external_relations/myanmar/intro/)

<sup>14</sup> Statement to the Storting on Foreign Policy, 15 February 2005, available at [http://odin.dep.no/ud/norsk/aktuelt/taler/minister\\_a/032171-090340/dok-bn.html](http://odin.dep.no/ud/norsk/aktuelt/taler/minister_a/032171-090340/dok-bn.html) .

<sup>15</sup> Summary of state secretary Vidar Helgesen's meeting with the Burma organisations on 10 May 2005 (in the secretariat's archive).

### 3 What the Advisory Council on Ethics has to consider

The Advisory Council has to consider whether the Petroleum Fund can be said to contribute to unethical actions in Burma through its ownership interest in Total. The Council's mandate is confined to concrete assessments of whether the company's conduct falls within or outside the scope of the guidelines.

The ethical guidelines paragraph 4.4, second sentence, first alternative states:

*“The Council shall issue recommendations on the exclusion of one or more companies from the investment universe because of acts or omissions that constitute an unacceptable risk of contributing to: Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation.”*

The Council will consider the question of excluding Total according to this rule. The other alternatives in paragraph 4.4 regarding violations of individual's rights in war or conflict, severe environmental degradation, gross corruption or violation of other ethical norms, are considered less relevant to the issue of Total's operations in Burma.

Assessing whether exclusion of one or more companies might contribute to a better political development in Burma would go beyond the Council's mandate. This is clear from the preparatory work which contains the following statement: *“The committee presumes that the majority of our foreign policy objectives will be better achieved with existing policy instruments than by imposing guiding principles on the Petroleum Fund's investment strategy.”*<sup>16</sup>

#### 3.1 Further details on paragraph 4.4, second sentence, first alternative

##### ***Human rights***

Paragraph 4.4, second sentence, first alternative contains a general reference to *human rights*. NOU (Norwegian Official Report) 2003: 22 states: *“Companies' contributions to serious or systematic violation of human rights and labour rights should, in the Committee's opinion, be encompassed by the proposed exclusion mechanism.”*<sup>17</sup> The Council thus takes as its point of departure that the reference to human rights pertains to internationally recognised human rights and labour rights. It is clear from the wording of this provision that the specific human rights violations listed in point 4.4 are examples of such violations and not an exhaustive list.

##### ***Serious and systematic violations***

Not all human rights violations or breaches of international labour rights standards fall within the scope of the provision. Paragraph 4.4 states that human rights violations must be “serious or systematic”. The Graver Committee recommends *“fairly restrictive criteria for deciding which companies should be subject to possible exclusion ...”*<sup>18</sup> The Council assumes that a determination of whether human rights violations qualify as

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<sup>16</sup> NOU 2003: 22, page 91.

<sup>17</sup> NOU 2003: 22, page 166.

<sup>18</sup> NOU 2003: 22, page 34.

serious or systematic needs to be related to the specific case at hand. However, it seems clear that a limited number of violations could suffice if they are very serious, while the character of a violation need not be equally serious if it is perpetrated in a systematic manner.

### ***Who can be held responsible?***

Only states can violate human rights directly.<sup>19</sup> Companies can, as indicated in paragraph 4.4, contribute to human rights violations committed by states. The Fund may in its turn contribute to companies' complicity through its ownership. It is such complicity in a state's human rights violations which is to be assessed under this provision.

### ***The company's acts or omissions***

Paragraph 4.4 states that the Council may recommend exclusion of companies "*because of acts or omissions that constitute an unacceptable risk of contributing to...*" This wording must be understood in such a way that it is the actions or omissions of the *company* in question that can provide a basis for exclusion, not those of the state concerned.

### ***Unacceptable risk***

The acts or omissions must constitute "*an unacceptable risk of (the Fund) contributing to...*". This means that it is not necessary to prove that such contribution will take place – the presence of an unacceptable risk suffices. The term *unacceptable risk* is not specifically defined in the preparatory work. NOU (Norwegian Official Report) 2003: 22 states that "*Criteria should therefore be established for determining the existence of unacceptable ethical risk. These criteria can be based on the international instruments that also apply to the Fund's exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion.*"<sup>20</sup> In other words, the fact that a risk is deemed *unacceptable* is linked to the seriousness of the act.

The term *ris* is associated with the degree of probability that unethical actions will take place in the future. The NOU states that "*the objective is to decide whether the company in the future will represent an unacceptable ethical risk for the Petroleum Fund.*"<sup>21</sup> The wording of paragraph 4.4 makes it clear that what is to be assessed is the likelihood of contributing to "present and future" actions or omissions. The Council accordingly assumes that actions or omissions that took place in the past will not, in themselves, provide a basis for exclusion of companies under this provision. However, earlier patterns of conduct might give some indications as to what will happen ahead. Hence it is also relevant to examine companies' previous practice when future risk of complicity in violations is to be assessed.

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<sup>19</sup> Human rights are legally binding rules regulating the relationship between the state and the individual and are designed to ensure that everyone within the jurisdiction of a state is guaranteed all political, civil, economic, social and cultural rights by that state. States are the only subjects of legal duties under the international human rights conventions, and are thus, as the general rule, the only parties able to guarantee and hence also violate the human rights of individuals.

<sup>20</sup> NOU 2003: 22, page 35.

<sup>21</sup> NOU 2003: 22, page 35.

### 3.2 More about the term *complicity*

The term *complicity* is used in many different contexts, *inter alia* both as legal and ethical categorisation of acts. The Council considers that the term *complicity* in paragraph 4.4 of the guidelines must be interpreted on the basis of the preparatory work and in light of perceptions of national and international law and practice.

#### *The Fund's complicity in human rights violations*

Paragraph 4.4 assumes that the *Fund* may contribute to unethical actions through *owning* shares in companies that are responsible for unethical actions or omissions. The question of whether the Petroleum Fund, through its ownership interest in Total, is implicated in human rights violations in Burma depends on how the term *complicity* is defined. Since human rights violations are at issue here, *complicity* must be assessed at several stages. It must be decided to which extent the *Fund* contributes to *Total's* possible *complicity* in human rights violations committed by the Burmese authorities.

#### *Companies' complicity in human rights violations*

NOU 2003: 22 deals with the issue of *complicity* in several places. The following appears under the heading "Complicity and delimitation of companies' liability":

*"In order (for an investor) to be complicit in an action, the action must be possible to anticipate for the investor. There must be some form of systematic or causal relationship between the company's operations and the actions in which the investor does not wish to be complicit. Investments in the company cannot be regarded as complicity in actions which one could not possibly expect or be aware of or circumstances over which the company has no significant control."*<sup>22</sup>

The above describes, first, the *Fund's* *complicity*. The company's unethical conduct must be expected by the *investor*. Moreover, there must be a link between the *company's* operations and the unethical actions. It is explicitly stated that *circumstances beyond the company's control* cannot entail *complicity* on the part of the investor. This must indirectly also be taken to mean that the company itself cannot be considered to be *complicit* in ethical norm breaches that are beyond the company's control or which the company could not possibly expect or be aware of.

NOU 2003: 22 also addresses more specifically the issue of *complicity* in states where human rights violations take place:

*"Particular problems arise in connection with companies operating in states where severe human rights violations occur. Such violations can also occur in connection with the companies' operations, for example through the use of security forces that commit abuses to protect the company's property and installations, deportation of people and environmental damage to facilitate the company's projects, or arrest and persecution of workers seeking to promote trade union rights. A company may be regarded as complicit to such actions only when those actions are taken in order to protect the company's property or investment and the company has not taken reasonable measures to prevent the abuses."*

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<sup>22</sup> NOU 2003: 22, page 164-165.

The Council's view is that the above paragraph describes responsibility for complicity for both the Fund and the company in question. In other words, it is only when the unethical actions are carried out in order to protect or to facilitate a company's activities, *and* the company has failed to "*take reasonable measures to prevent the abuses*", that the company, and thus also the Fund, can be held liable for complicity under the guidelines. If the company (and the Fund) is aware of unethical actions carried out in the company's interest but choose to remain passive, this may be regarded as complicity.

NOU 2003: 22 thus appears to imply that companies cannot justify plain passivity if they could have taken steps to prevent unethical conduct. The requirement of taking "reasonable measures" is assumed to refer to circumstances over which the company has *control*. The question is whether the responsibility is limited to this. It would be natural to interpret "reasonable measures" as also applying to circumstances where the company has a *genuine possibility to exert influence*, even though it does not necessarily have *control*.

Under Norwegian criminal law the main rule is that *passive* complicity is not a criminal offence.<sup>23</sup> In certain criminal cases under international law it has been assumed that complicity can encompass passivity if the accused was *aware* that his passivity aided the main perpetrator's commission of the criminal act.<sup>24</sup> International law was for example applied in a case under the *Aliens Tort Claims Act* (ATCA) in the USA. Here complicity in human rights violations in Burma was discussed in a procedural ruling.<sup>25</sup> The case was also of direct significance for Total, which collaborated closely with Unocal in Burma in the period in question. This ruling is consequently of great interest for the Council's deliberations. The District Court deemed it unlikely that Unocal had been complicit in human rights abuses because the company's actions/omissions did not constitute what the court termed "active participation" in breaches of international norms, despite their undoubted knowledge of the abuses perpetrated by the military. This view, however, was not shared by the Court of Appeals whose conclusion was that there existed sufficient evidence of complicity on the part of Unocal to warrant judicial consideration of the merits of the case.

The case was resolved by settlement and the merits of the case were therefore not considered, although the judges came close to presuming Unocal's complicity in human rights violations in connection with the construction of the pipeline. This was based on Unocal allegedly having paid for the use of Burmese military forces to attend to pipeline security and construction of infrastructure along the pipeline route, and that they undoubtedly knew that these forces resorted to forced labour and were guilty of murder,

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<sup>23</sup> See i.a. Andenæs, *Alminnelig strafferett (General Criminal Law)*, 5th edition 2004, Matningsdal and Rieber-Mohn, page 329.

<sup>24</sup> See i.a. Cassese, *International Criminal Law*, 2003, page 165 et seq.

<sup>25</sup> Doe I vs. Unocal Corp. (United States Court of Appeals for the Ninth Circuit, Nos.00-56603, 00-57197, D.C. No.CV-96-06959-RSWL). The ruling permitted judicial consideration, under the Alien Tort Claims Act, of UNOCAL's alleged complicity in the Burmese authorities' human rights abuses in connection with the construction of a gas pipeline. However, the facts of the case were not reviewed since a compromise was subsequently reached. Available at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/.3D534390583B882F88256C380004FE18/\\$file/0056603.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/.3D534390583B882F88256C380004FE18/$file/0056603.pdf?openement)

rape and so forth.<sup>26</sup> The decision was partly based on testimony of witnesses and reports that persons in the company's management, on several occasions, had acknowledged that they knew of abuses in connection with the construction project.

According to the grounds for the finding in the above-mentioned Unocal case, Total is presumed to have had the same knowledge of, and responsibility for, the human rights violations in connection with the pipeline construction as Unocal. The Council accepts this as a fact. There were procedural reasons why the complaint, which originally referred to Total, Unocal and MOGE alike, only was raised against Unocal.<sup>27</sup> Actions for damages have been brought against Total in Belgium and France in connection with their activities in Burma. No such action has been subject to final judgment.<sup>28</sup>

### 3.3 Summary

Based on the preparatory work to the guidelines the Council accepts as a fact that the Fund, through its ownership interests in companies, can be said to contribute to companies' complicity in states' human rights violations. The guidelines are principally concerned with *existing* and *future* breaches of the ethical guidelines, although earlier breaches might give an indication of future conduct. The point is that there must exist an unacceptable risk of breaches taking place in the future. Complicity includes actions carried out to protect or to facilitate the company's activities, and refers to circumstances which are under the company's control or circumstances which the company could have been in a position to countervail or to prevent.

Based on the guidelines' preparatory work, the Council lists the following criteria which constitute decisive elements in an overall assessment of whether there exists an unacceptable risk of the Fund contributing to human rights violations:

- There must exist some kind of linkage between the company's operations and the existing breaches of the guidelines, which must be visible to the Fund.
- The breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company.
- The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.
- The norm breaches must either be ongoing, or there must exist an unacceptable risk that norm breaches will occur in the future. Earlier norm breaches might indicate future patterns of conduct.

## 4 The allegations against Total

The allegations against Total can be divided into two main categories. The first category covers events in connection with the construction of the Yadana pipeline in the period 1995-1998. The second covers current events.

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<sup>26</sup> See for example Doe I vs. Unocal Corp., para 14.

<sup>27</sup> Doe I v. Unocal Corp., D, 14205, states: "*The District Court later denied the Doe-plaintiffs' motion for class certification and dismissed their claims against Total for lack of personal jurisdiction.*"

<sup>28</sup> One action brought against Total was recently denied in Belgium on procedural grounds.

### ***Allegations connected with the construction of the Yadana pipeline in the period 1995-1998***

Total is accused of having hired, through MOGE, military units to provide security services during the construction of the Yadana pipeline. The specific content of the accusations connected with this construction is inter alia that:<sup>29</sup>

- Total knew of the security forces' abuses against the local population in the pipeline area, but did not seek to prevent them. The abuses included:
  - Forced labour in connection with construction of military camps
  - Forced labour in connection with construction of infrastructure
  - Forced relocation/deportation of villages
  - Arbitrary abuses by the security forces against the local population

### ***Allegations connected with Total's present operations***

Total is accused of contributing to the regime's human rights violations through its collaboration with the Burmese state (through MOGE). The substance of the accusations is as follows:

- Through its presence Total generate revenues for the Burmese state. Total is thereby helping to fund the regime's activities, including the latter's violations of human rights.
- Through its close collaboration with MOGE, Total is complicit in the regime's human rights violations.
- Total is complicit in human rights violations in as much as the same forces that presently attend to security within the pipeline area are committing abuses against the local population outside the pipeline area.

In order to shed light on the two above-mentioned categories of allegations against Total, the Council has obtained information from a number of sources, including various NGOs engaged in Burma, Total itself, academic circles, the United Nations, the ILO and other international organisations, persons with particular knowledge of Burma including John Jackson, Anna Roberts and Mark Farmaner (The Burma Campaign UK), Vibeke Hermanrud and Marte Graff Jensen (The Norwegian Burma Committee), David Arnott (Online Burma/Myanmar Library), Luc Zandevliet (Collaborative Development Project), Professor Robert Taylor (University of Buckingham, UK), along with a number of persons who for various reason do not wish to be named.

The Council will consider these accusations in light of the four main criteria for complicity outlined above.

#### **4.1 Accusations of complicity in human rights violations connected with the construction of the Yadana pipeline (1995-1998)**

Under the guidelines the Council is required to assess the likelihood that companies' *previous unethical conduct* will continue in the future. Against this background the Council briefly discusses Total's possible complicity in human rights violations

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<sup>29</sup> See for example The Burma Campaign 2005: Total Oil: Fuelling the oppression in Burma, available at [www.burmacampaign.org.uk](http://www.burmacampaign.org.uk) .

connected with the construction of the Yadana pipeline in the 1990s. These aspects are frequently highlighted as particularly reprehensible where Total's role in Burma is concerned.

The Council notes that there is considerable disagreement between NGOs and Total about what actually happened in the period from 1992 up to completion of the pipeline project, both as regards the role of the military, abuses against the civilian population and Total's responsibility.<sup>30</sup>

#### **4.1.1 Use of military troops as security forces**

The Yadana pipeline was laid in an area populated by minorities who for several decades have been engaged in armed conflict with the military regime.<sup>31</sup> Military forces are said to have moved into the area in the period 1990-1992 and started to establish military bases in the area where the pipeline was to be laid. The organisation *Earth Rights International* (ERI) reports that at least 16 battalions were stationed in or controlled the area between 1991 and 1996.

The militarization was intended to secure the area, and to secure full control over the local population, which was essential to enable the development to go ahead.<sup>32</sup> According to the contract between Total and MOGE, MOGE was to assure security and that the area was available for the pipeline that was to be built.<sup>33</sup>

There is no disagreement that the Burmese military saw to security and other services during construction of the pipeline. However, Total is accused of having paid the Burmese military, through MOGE, to deliver these services.<sup>34</sup> In the Unocal case the Court of Appeals sites internal memos from the companies and minutes of meetings, as well as Total's contract with MOGE which states: "*MOGE shall assist and expedite*

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<sup>30</sup> The organisation Earth Rights International and Southeast Asian Information Network issued a report entitled *Total Denial* in 1996 describing systematic atrocities against inhabitants along the pipeline route, ahead of and during the first phase of construction. The organisations claim to have illegally entered Burma where they carried out hundreds of interviews with people living along the route and the adjacent areas, as well as at refugee camps in Thailand. The same organisations followed this up with a new report in 2000, *Total Denial Continues*. La Fédération des droits de l'Homme (FIDH) from France published a similar report in 1996: *La Birmanie, Total et les droits de l'Homme: dissection d'un chantier* (Burma, Total and Human Rights: dissection of a project). Together with a number of other French NGOs, they have continued the campaign against Total and published in July 2005 a report entitled *Total pollutes democracy – Stop TOTALitarianism in Burma*. Prior to this *The Burma Campaign UK* had issued a report entitled *TOTALitarian Oil; Total Oil: fuelling the oppression in Burma*. Total has made known its version of the project in *Total in Myanmar – a Sustained Commitment*. In addition they have allowed independent organisations to visit the pipeline route to carry out interviews with the population in the area, after construction was completed. Four such field studies have been carried out by the organisation The Collaborative for Development Action (CDA) which has so far reported on four of these visits.

<sup>31</sup> Earth Rights International 2000: *Total Denial Continues*, p. 16-17, available at <http://www.earthrights.org/>.

<sup>32</sup> Earth Rights International 2000: *Total Denial Continues*, p.39, 43.

<sup>33</sup> Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area between Mynamar Oil and Gas Enterprise and Total Myanmar Exploration and Production (PSC), (in the secretariat's archive).

<sup>34</sup> DOE I vs Unocal Corp. states for example: "There is also evidence sufficient to raise a genuine issue of material fact whether the Project hired the Myanmar Military, through Myanmar Oil, to provide these services, and whether Unocal knew about this.", Point B, 14195.

*Contractor's execution of the Work Programme by providing at cost, facilities, supplies and personnel including, but not limited to, supplying at making available ..., security protection, and rights of way and easements as may be requested by Contractor and made available from the resources under MOGE's control.”*<sup>35</sup>

Total denies that the company has at any time directly or indirectly hired Burmese military troops as security forces.<sup>36</sup>

#### *4.1.2 Knowledge of violations committed by the security forces*

The regime in Burma has a long history of outrages against the population which have also been documented by a number of international organisations. The NGOs assert that Total must have known that laying the pipeline through an area populated by ethnic minorities would entail a security risk and consequently a high level of military arms build-up in the area.<sup>37</sup> Given the reputation of the Burmese army, Total must also have been aware of the consequences this could entail in the form of forced labour and other abuses against the local population.<sup>38</sup>

The abuses of which the security forces are accused include:

- Forced relocation of villages
- Forced labour in connection with construction of military camps and infrastructure
- Arbitrary abuses on the part of the security forces against the local population

#### **Forced relocation of villages**

Several villages were forcibly relocated on security grounds and to clear the way for the pipeline. The NGO reports assert that the majority were relocated in the period 1991-1993, several also after the contract with MOGE was signed.<sup>39</sup> According to a report from the International Federation of Human Rights Leagues (FIDH), a total of 30,000 people in the area were forcibly relocated.<sup>40</sup>

Total claim that they had nothing to do with the forced relocation. Their perception was that the area was untouched when they entered in 1994.<sup>41</sup>

#### **Forced labour in connection with construction of military camps and infrastructure**

According to the NGOs FDHI and ERI, forced labour was employed on an extensive and systematic basis throughout the period 1992-1998 with the local population being forced

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<sup>35</sup> Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area between Mynama Oil and Gas Enterprise and Total Myanmar Exploration and Production § 17.1 (c) Rights and Obligations of Moge and Contractor.

<sup>36</sup> Total 2002: Press release dated 8 May 2002, available at [www.total.com/en/finance/fi\\_press\\_releases](http://www.total.com/en/finance/fi_press_releases)

<sup>37</sup> Earth Rights International 2000: Total Denial Continues, p. 17.

<sup>38</sup> Earth Rights International 2000: Total Denial Continues, p. 69.

<sup>39</sup> The contract was signed in 1992. See also Earth Rights International 1996: Total Denial, Earth Rights International 2000: Total Denial Continues, International Federation of Human Rights Leagues 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report.

<sup>40</sup> La Fédération des droits de l'Homme 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report, p. 23.

<sup>41</sup> Total 2003: Total in Myanmar, p. 6, 16.

to build military camps and infrastructure in connection with the pipeline route, including landing pads for helicopters, roads along the pipeline route for the project, buildings, and clearing the actual route of the pipeline.<sup>42</sup>

In the previously mentioned ruling regarding Unocal, the court held that it could be proved that Total and Unocal both knew that the military were in fact employing forced labour in the Yadana project, and that the companies were aware of the abuses. The court also held that there were grounds for assuming that Total collaborated with the military on security in the area.<sup>43</sup>

Total admit that they were aware of the regime's use of forced labour in general, but deny that the company has employed forced labour in connection with the work on the gas pipeline. Total also assert that they demanded at every opportunity that security forces should not resort to forced labour for the benefit of the gas pipeline project.<sup>44</sup> In those cases where Total became aware that the military employed forced labour, Total took care to provide financial compensation, even though the company bore no direct responsibility. Total also deny having provided any form of support to military operations, whether financial or in any other manner.<sup>45</sup>

#### ***Other abuses***

Other accusations of atrocities on the part of the security forces against the civilian population include violence, torture, summary executions of what the military regard as ethnic rebels, punishment and violence during forced labour, including against women and children.<sup>46</sup> Moreover, land appears to have been expropriated on a large scale in a number of named villages in the areas along the pipeline route in order to acquire area for the pipeline and for establishing military camps.<sup>47</sup> Total assert that they provided ample compensation in cases where land areas were expropriated for the pipeline, but according to the FIDH, among other organisations, the funds were as a rule confiscated by the security forces.<sup>48</sup>

Total were aware that the security forces' presence could have negative consequences for the area's inhabitants, and assert that they did everything possible to prevent abuses by the military.<sup>49</sup> Total also refer to the social development programme that was implemented for 13 villages along the pipeline route which they claim helped to raise the inhabitants' living standard considerably.<sup>50</sup>

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<sup>42</sup> Earth Rights International 2000: Total Denial Continues, p.84-87, La Fédération des droits de l'Homme 2005: Total Pollutes Democracy, p. 26.

<sup>43</sup> Doe vs. Unocal Corp., 11, 14221.

<sup>44</sup> Total 2003: Total in Myanmar. A sustained commitment, p. 17.

<sup>45</sup> Total 2003: Total in Myanmar. A sustained commitment, p. 16.

<sup>46</sup> Earth Rights International 2000: Total Denial Continues s.100-121, La Fédération des droits de l'Homme 2005: Total pollutes democracy, p. 28.

<sup>47</sup> International Federation of Human Rights Leagues 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report.1996, p. 26.

<sup>48</sup> See footnote 47.

<sup>49</sup> Total 2003: Total in Myanmar. A sustained commitment, p. 17.

<sup>50</sup> See footnote 49, p. 21-27.

### 4.1.3 The Council's assessment

The Council must assess the above based on whether the circumstances described are covered by paragraph 4.4 of the ethical guidelines, according to its interpretation as summarised in the four bullet points above in section 3.3.

There appears to be no doubt that Burma's security forces committed abuses against the local population in the area where the pipeline was laid in the period of its construction. It also seems fairly clear that there has been a *link* between some of the reported human rights violations and Total's activity in connection with the construction of the pipeline. The military forces' use of forced labour in connection with security services and construction of infrastructure in connection with Total's operations also appears to be well documented. Moreover, it seems clear that parts of the activities of the Burmese authorities was a step in *facilitating* the operations, inter alia by ensuring security in the pipeline corridor in the construction period.

The previously mentioned decision from the USA built on the assumption that the Unocal oil company was probably aware of and accepted human rights violations in connection with the construction of the pipeline.<sup>51</sup> Total's own role in this has not been established, but it is highly likely that Total had the same knowledge as Unocal. The two companies collaborated closely on this gas project in the period in question. As mentioned above, there were procedural reasons as to why only Unocal and not Total was the object of this lawsuit in the USA. It is unlikely that the court would have dealt differently with Total than with Unocal concerning the allegations of complicity. Hence it is likely that Total knew of the accusations of gross abuses perpetrated by the security forces. Moreover, it is likely that they were aware, for example, that forced labour was directly employed in connection with the construction of the pipeline. What action the companies took to prevent human rights violations in connection with the construction of the pipeline in this period is disputed and unclear.

According to the guidelines, companies should not be excluded on the basis of previous actions. The rationale for excluding companies is to avoid complicity in unethical actions now and in the future. Hence the question is to which degree Total's previous patterns of conduct can be expected to continue at present and in future.

Several factors indicate that Total's own focus on the human rights situation for those affected by the work along the pipeline route has changed since the construction period. The company now has a visible public profile focusing on human rights and social responsibility. Their commitment to improving living conditions for the inhabitants within the pipeline area indicates a will to prevent governmental abuses in those areas where they exert influence. The question is whether this human rights focus is credible, since the actual construction of the pipeline is complete. The period during which forced labour is presumed to have taken place coincided with the construction period. It might be asserted that it is simpler to maintain good standards at the present stage in as much as ongoing operations are limited to maintenance etc.

It is difficult to make any certain statement about future patterns of conduct. In the case at hand the Council nonetheless presumes that in future construction projects Total is hardly

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<sup>51</sup> Doe I vs. Unocal Corp., para 11 – 15, 14220 – 14228.

likely to put itself in a situation in which it is associated with the use of forced labour. Any financial gain accruing to Total thanks to forced labour is assumed to be far outweighed by the negative light in which the accusations have placed the company. The Council considers it unlikely that Total will go ahead with projects in the future without ensuring that the company does not find itself in a situation akin to the one that arose in the period 1995-1998. Hence the Council is of the view that there is not an unacceptable risk that Total will repeat its previous pattern of action in the future.

The Council accordingly concludes that there is no basis for excluding Total on grounds of complicity in human rights violations committed by the Burmese authorities in the period 1995-1998.

#### 4.2 Accusations of complicity in human rights violations today

As to Total's present operations in Burma, the company is accused of, through its collaboration with the Burmese state, being complicit in the regime's human rights violations. The accusations can be summarised as follows:

- Through its presence Total is generating revenues for the Burmese state. By this means Total is helping to fund the regime.
- Through its close collaboration with MOGE, Total is complicit in the regime's human rights violations.
- Total is complicit in human rights violations in as much as the same forces that presently attend to security within the pipeline area are committing abuses against the local population outside the pipeline area.

##### 4.2.1 Complicity through being present and generating revenue

The Yadana project is without doubt generating substantial revenues for the regime in Burma. Total does not disclose what it pays in taxes and duties to the Burmese state, and in recent years the Burmese authorities have not provided information on royalties, tax revenues or sales revenues they earn on gas produced at the Yadana field.

Estimates of the authorities' earnings on gas production from the Yadana field vary from USD 200 to USD 450 million per year.<sup>52</sup> In addition to MOGE's revenues from gas sales there are royalties and taxes payable to MOGE by the consortium participants. Terms established in the contract suggest that signature bonuses and production bonuses to MOGE between production start-up and the present time amount to somewhere in the region of USD 40 million.<sup>53</sup> There are also royalties from Total's sales of gas and corporate taxes.<sup>54</sup> In 1996 Total put this at about USD 200 million at full production at the Yadana field.<sup>55</sup> The Council has been unable to establish what this figure amounts to today.

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<sup>52</sup> La Fédération des droits de l'Homme 2005: Total pollutes democracy, p. 19.

<sup>53</sup> Production Sharing Contract between MOGE and Total (in the secretariat's archive).

<sup>54</sup> See footnote 52.

<sup>55</sup> Newspaper article in *The Nation*, 19.10.96, available at <http://www.geocities.com/jdfahn/Yadana--total.html>.

#### **4.2.2 The Council's assessment**

The question is whether Total is *complicit* in the regime's human rights violations exclusively through its presence and generation of tax revenues for the regime. The guidelines require the company's conduct to be assessed in concrete terms. The Council considers that presence cannot in itself provide a basis for exclusion under the four criteria which according to the preparatory work must be met.

An affirmative answer to this question would moreover raise questions about whether the human rights situation of other regimes is sufficiently bad to warrant the same considerations. This entails an assessment of *states*, which the guidelines do not require the Council to embark on.

The Council accordingly concludes that there is no basis for excluding Total on grounds of the company's presence and generation of tax revenues in Burma.

#### **4.2.3 Complicity through cooperation with MOGE and the Burmese authorities**

Myanmar Oil and Gas enterprise (MOGE) is a 100 per cent state-run corporation owned by the Energy Ministry. MOGE is responsible for oil and gas extraction and gas supply, including construction of gas pipelines, and is the regime's tool for control over production of the country's oil and gas resources.

Foreign companies wishing to engage in petroleum extraction in Burma need to establish collaboration on production sharing with MOGE, which is the only state corporation entitled to enter into such contracts in the petroleum sector. Total has signed such a contract with MOGE.

Apart from the official web pages, little information on MOGE is available. It has not been possible to ascertain the degree of the company's influence over the security forces. Interviews conducted by the secretariat on behalf of the Council suggest that any party wishing to influence the security forces has to do so via the Energy Ministry which in turn takes the matter up with the Defence Ministry. Some observers have been uncertain as to what authority the Energy Ministry itself wields in such matters.

MOGE is Total's partner in the Yadana project. According to the NGOs this in fact adds up to a collaboration with the regime since MOGE is a 100 per cent state corporation owned and controlled by the military regime. At the same time this is the only possible avenue for cooperation open to an international oil company wishing to engage in petroleum extraction in Burma.

#### **4.2.4 The Council's assessment**

The actual basis for the collaboration between MOGE and Total – the Joint Venture Agreement – is not publicly available, but is known to the Council. The presumption is that most of Total's business in Burma has to be approved by MOGE, and thus indirectly also by the military regime. The question is whether a partner in a Joint Venture is responsible for the other participants' actions. This will depend on what influence, if any, the individual partner exerts on the others. In the present case, in which all companies operating in Burma routinely have to enter into Joint Venture agreements with the regime, it is unlikely that the companies wield any significant influence on the state. Where Total is concerned, investments in the gas field and the pipeline have already been

made. Hence it would be economically advantageous for the Burmese state if Total withdrew from Burma, enabling all revenues from the field to accrue to the state.

A further question is whether the collaboration between Total and MOGE might also provide a basis for exclusion under the four criteria listed above under section 3.3.

It is not easy to see any form of direct linkage between the company's operations today and the human rights violations committed by the regime. There is little to suggest that the human rights violations taking place in Burma are perpetrated with a view to securing Total's interests or that they serve to facilitate the company's projects. According to the information underlying the Unocal case, such a linkage may have been present in period of the pipeline's construction. It does not however appear to be the case today. It would probably be more advantageous for Total if the regime did not violate human rights to such an extent.

The degree to which Total is in a position to influence the regime as regards human rights violations taking place in areas outside the pipeline route is disputed. The same goes for the degree to which they make use of any such influence. The Council cannot see that the guidelines' preparatory work require an assessment of a company's possible obligation, to take action in areas beyond their control.<sup>56</sup>

The Council accordingly concludes that Total cannot be excluded because of its collaboration with MOGE.

#### **4.2.5 Complicity through knowledge and passivity**

Available information on present conditions in the pipeline corridor suggests that abuses against the civilian population in the areas included in Total's social development programme are insignificant. Some observers have surmised that different rules apply to the area along the pipeline route and outside this area, and that Total's insistence that forced labour and other abuses should not take place in this area appears to have won through.<sup>57</sup>

MOGE have a representative in the area of the pipeline route whose job is to ensure contact between Total and the local authorities, including the military.<sup>58</sup> Any undesired events are investigated by a team from Total. Where necessary, direct contact is made with the Energy Ministry which in turn contacts the Defence Ministry as the responsible ministry. The Defence Ministry is responsible for taking the matter up with the local commander.<sup>59</sup>

According to interviews conducted by the organisation CDA, the local population assert that the army's behaviour is more disciplined inside the pipeline area than outside it. The CDA assume that this is because Total have made certain that unacceptable behaviour is

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<sup>56</sup> The preliminary works include the following statement: "*investments in the company cannot be regarded as complicity in actions which it could not possibly expect or be aware of or circumstances over which neither the company nor an investor has significant control.*", NOU 2003: 22, page 164-165.

<sup>57</sup> CDA 2003: Corporate Engagement Project, Field Visit Report. Second Visit. Yadana - Gas Transportation Project, p.4, available at [www.cdianc.org](http://www.cdianc.org). Interviews conducted by the secretariat.

<sup>58</sup> CDA 2002: Field visit: October 18-30, 2002. Yadana – Gas Transportation Project p. 5, available at [www.cdianc.org](http://www.cdianc.org)

<sup>59</sup> Interviews conducted by the secretariat.

rectified, and that the local commander has been ordered to see to it that troops conduct themselves in an acceptable manner.<sup>60</sup>

This is not to say that abuses are non-existent. In 2004 Earth Rights International reported cases of abuse in the pipeline area. Inhabitants are said to have been ordered to pay a levy in return for not having to provide services, watch duty and food supplies to the soldiers.<sup>61</sup> *The Burma Campaign UK* also reports sporadic abuses in the pipeline area.<sup>62</sup> None the less the main impression appears to be that systematic abuses are not taking place in the pipeline area, and that Total have procedures in place for dealing with such abuses when they arise and have established routines for preventing abuses from taking place.<sup>63</sup>

Several NGOs, among them *The Burma Campaign UK*, are concerned that even though abuses against the local population are not taking place within the pipeline area, serious abuses and instances of forced labour are still in evidence *outside* the pipeline area and elsewhere in the country. This has been documented by the ILO and international and national human rights groups. According to *The Burma Campaign UK* the same battalions that ensure security within the pipeline area are responsible for abuses perpetrated outside the area (in addition to other battalions).<sup>64</sup>

Total claim that no forms of forced labour are in evidence in the area in which Total operate, and that they regularly raise their concern over the regime's use of forced labour with the authorities.<sup>65</sup>

#### **4.2.6 The Council's assessment**

In order for passivity to be censurable there must exist an obligation or encouragement to take positive action. As mentioned earlier, the preparatory work is clear on this point when it comes to companies' operations in states where human rights violations take place: "*Complicity on the part of the company can be invoked only if direct action is taken to protect the company's property or investment and if the company has not taken reasonable measures to prevent the abuse.*"<sup>66</sup>

Hence, in order to ascertain the Fund's complicity there must be a *linkage* between the company's operations and the human rights violations in Burma. The Council expects the human rights violations in Burma to continue, cf. the UN Commission on Human Rights' resolution from 2005 expressing deep concern over: "*the ongoing and systematic violation of human rights, including civil, political, economic, social and cultural rights of the people of Myanmar, in particular discrimination and violations suffered by persons belonging to ethnic minorities, women and children, ... harassment of members of the National League for Democracy ..., forced relocation, ... forced labour, including child*

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<sup>60</sup> See footnote 57.

<sup>61</sup> Available at <http://earthrights.org/burma/fltrends.shtml>

<sup>62</sup> Interviews conducted by the secretariat.

<sup>63</sup> CDA 2003: Corporate Engagement Project, Field Visit Report. Second visit. Yadana – Gas Transportation Project, p. 15, Interviews conducted by the secretariat.

<sup>64</sup> Interviews conducted by the secretariat.

<sup>65</sup> Total's response to the Burma Campaign, available at [http://burma.total.com/en/news/p\\_5\\_1.htm](http://burma.total.com/en/news/p_5_1.htm)

<sup>66</sup> NOU 2003: 22, page 36.

*labour, ... denial of freedom of assembly, association, expression and movement, ... wide disrespect for the rule of law and lack of independence of the judiciary”*<sup>67</sup>

There is no obvious direct linkage between these serious violations of human rights and Total’s operations today. There appears to be general agreement, also within NGO circles, that human rights violations are not a significant feature in the pipeline area today. The Council is unable to see any direct linkage between Total’s present operations and the human rights violations taking place elsewhere in Burma. Nor is the Council able to see that the human rights violations in Burma, which are largely perpetrated by the military and security forces, are designed to *protect* the company’s interests or to *facilitate* the company’s projects.

It seems obvious that Total must have ample knowledge of the abysmal human rights situation in Burma. Moreover, it is highly likely that the security forces responsible for security in the pipeline area on behalf of the state authorities perpetrate acts which would necessarily be classified as human rights violations in areas outside the pipeline area. It has therefore been asserted that Total should be held responsible for complicity in the security forces’ abuses in areas outside the pipeline corridor.

The Unocal ruling was based on the notion that the company’s *knowledge* of the security forces’ abuses could entail complicity. However, a crucial difference in relation to Total’s possible complicity in abuses taking place today is that Unocal’s awareness concerned abuses carried out in direct connection with the construction of the company’s pipeline. The ruling states: “*Unocal’s weak protestations notwithstanding, there is little doubt that the record contains substantial evidence creating a material question of facts as to whether forced labor was used in connection with the construction of the pipeline.*”<sup>68</sup> It goes on to state that “*Unocal knew, or should have known, that forced labour was being utilised and that the Joint Venturers benefitted from the practice...*”<sup>69</sup>

Thus it was not merely knowledge of human rights violations in general that led to the presumption that Unocal might be guilty of complicity; it was a knowledge that the abuses were perpetrated in direct connection with the construction of the company’s own pipeline, and that the abuses were therefore in the company’s own interest. Nor is it possible, based on the Unocal ruling, to institute any obligation for companies to actively prevent violations of human rights in states in which they are operating. Any such obligation is confined to measures to prevent abuses carried out to protect the company or facilitate its projects. In this respect the complicity assessments underlying the Unocal decision have little value as comparison to Total’s situation in Burma today.

The Council accordingly finds that Total cannot be said to be complicit in Burma’s human rights abuses outside areas in which they are assumed to wield influence.

## **5 Conclusion**

Having assessed the content of the accusations against Total SA in light of paragraph 4.4 in the ethical guidelines, the Petroleum Fund’s Advisory Council on Ethics will not

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<sup>67</sup> *Situation of human rights in Myanmar*, UN Doc.E/CN.4/2005-10, 11 April 2005.

<sup>68</sup> Doe I vs. Unocal Corp., 14220, para 10.

<sup>69</sup> Doe I vs. Unocal Corp., 14220, para 13.

recommend the company's exclusion from the Petroleum Fund on grounds of the company's operations in Burma.

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Gro Nystuen	Andreas Føllesdal	Anne Lill Gade	Ola Mestad	Bjørn Østbø
(Chair)	(sign.)	(sign.)	(sign.)	(sign.)