



Under Review: Burma's Failure to Comply with the Convention on the Rights of the Child

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Introduction

In 1991, Burma ratified the Convention on the Rights of the Child (CRC). Every seven years, the Committee for the CRC (Committee) does a review to assess whether member states have adhered to the principles of the Convention. Burma will come up for review in 2012. After the government submitted a report to the Committee in 2009, a group of organizations called the Child Rights Forum of Burma submitted a "Shadow Report" detailing the challenges currently facing children in Burma. Subsequently, the Child Rights Forum requested that the Burma Lawyers' Council do a legal analysis of the status of children in Burma. This analysis, focusing primarily on issues related to the Committee's recommendations from 2004 following Burma's last review, the 2008 Constitution and concerns about the rule of law in Burma, was then submitted to the Committee for a pre-sessional hearing on 24 June 2011. This article details the main points that were raised in the submission to the Committee.¹

Implementation of 2004 Recommendations

Over the last seven years, the Burmese government has failed to implement the vast majority of recommendations from the 2004 review. Even where initiatives have been undertaken, they have been largely inadequate. As a result, the situation for children, as related to the Committee's recommendations, has not improved and the rights of children have not been advanced.



In 2004, the Committee recommended that the *Village Act* and the *Town Act* be amended so that they no longer permit the use of forced labor. Though an order was issued in 2005 banning the relevant provisions, the Acts were not repealed. As a result, the 2005 order could simply be supplanted or withdrawn by a new directive.

The Committee recommended that Section 66(d) of the *Child Law*, permitting the use of corporal punishment against children, be repealed. This provision has not been repealed. Therefore, the provision forbidding the willful maltreatment of a child still contains an exception for "a parent, teacher or a person having the right to control the child" where the admonition is "for the benefit of the child." The vagueness of the terms "person having the right to control the child" and "for the benefit of the child" provides for excessive interpretive discretion. As a result, and despite the 2004 Committee recommendations, the *Child Law* continues to license the use of corporal punishment.

The Committee also expressed concern with the fact that the *Child Law* distinguishes between children (individuals under the age of 16) and youth (between the ages of 16 and 18). The government suggests that preparations to amend the age of a child to anyone 18 years or younger are "underway." However, these changes have not materialized and, absent the promised changes, children between the ages of 16 and 18 are deprived of protections that should be afforded to them under the CRC.

The Committee pointed to the wide variety of international human rights instruments that the government of Burma has failed to ratify. The CRC and the Convention on the Elimination of All Forms of Discrimination Against Women remain the only international human rights agreements Burma has ratified. In contrast to recommendations by the Committee, the government has failed to ratify any other relevant human rights instruments.² This failure limits the ability of the international community to monitor the status of children in Burma.

The Committee made several recommendations with respect to the inadequacies of the National Committee for the Rights of the Child. The Burmese government has described the National Committee as the "main instrument for implementation" of the CRC with a mandate to "implement effectively and successfully" the provisions of the *Child Law*. According to Section 4 of the *Child Law*, the Chairman of the National Committee is the Minister for Social Welfare, Relief and Resettlement. The "Heads of relevant Government departments and organizations" are also members of the Committee. The *Child Law* stipulates that Committee members include "representatives from non-governmental organizations" and "voluntary social workers." However, domestic



lawyers and researchers describe the Committee as being "invariably" composed of only "SPDC supporters."

Following the disbanding of the SPDC and the subsequent election in November 2010, the Ministry for Social Welfare, Relief and Resettlement has merged with the Ministry of Labor under Chairman U Aung Kyi. Other members of the National Committee include the heads of relevant government departments and organizations. However, since the election, the government has not disclosed any information regarding the identity of the other Committee members. Nonetheless, it is understood that the Committee continues to have strong ties to the current government, consequently preventing it from acting as an unbiased watchdog.

In its report, the government highlighted the existence of Child Rights Committees at the Township level. These Committees were formed in accordance with the Rules and Regulations for the *Child Law* enacted in 2001. However, to date only ten Committees have been established.³ Even where Committees have been established, they have failed to advance the interests of children in their designated localities. For example, when a lawyer in Dagon Township reported child rights violations with respect to a child who had been trafficked and a child who had been abused, he received no response from the local Committee. Lack of awareness as to the existence of the Committees also contributes to their inefficacy. In many cases, people are not aware that they have been established at all.

The Committee noted that Burmese domestic law fails to provide sufficient protections for all children from sexual exploitation and trafficking. The government takes the position that children are comprehensively protected by existing law, pointing to a number of provisions in the *Child Law*, the *Burmese Penal Code* and the *Anti-Trafficking in Persons Law* to make this case. However, the safeguards contained in these laws fail to adequately protect children.

First, the *Child Law*, as noted above, defines a child as an individual under the age of 16. Therefore, individuals between the ages of 16 and 18 are left largely unprotected by domestic legislation.

Second, convicted offenders face relatively light sentences. Section 65 of the *Child Law* lays out the punishments for a number of child exploitation offences. Acts such as inducing a child to escape from a training school, home, temporary care facility or custodian and harboring, concealing, or preventing a child from returning to where he or she was taken, carry a prison term of up to six months and a fine of up to 1, 000 kyat (US \$1.35). Under Section 66, acts such as employing a child to beg for personal benefit and willfully mistreating a child



carry a maximum sentence of two years imprisonment and a 10,000 kyat (US \$13.50) fine. In neighboring Thailand, offenders of comparable offences under the *Anti-Trafficking in Persons Act* face imprisonment of between four and ten years and a fine of between 80,000 and 250,000 baht (US \$2,626 – 8,206).

According to the government "the Ministry of Home Affairs has planned to organize a special police force for child protection under the Myanmar Police Force in collaboration with UNICEF." However, this police force has not been established. In addition, no supplementary training for dealing with cases related to child rights violations have been provided to officers in the Myanmar Police Force.

Further, the implementation of strategies combating the exploitation and trafficking of children has been insufficient. The government alleges that "great care" has been taken, and "great emphasis" has been placed on trafficking issues. The government points to Section 6 of its report as evidence of these efforts. However, there is no evidence of preventative measures taken to deal with the root causes of trafficking in this section. The only discussion of implementation is that "repatriation, rehabilitation and follow-up programmes for trafficked children have been systematically carried out." The government's report goes on to state that in 2006 nine trafficked victims under six years of age were "repatriated" and "reintegrated." This section of the government's report is problematic for two reasons.

First, it fails to provide the information necessary to gauge the government's performance. Instead of detailing the number of people who have been prosecuted under anti-trafficking and anti-exploitation laws, it looks retrospectively at repatriation of trafficked persons. Judicial opinions would also be extremely helpful in illustrating how child rights offenders are treated under domestic law. However, in Burma, while judges provide oral and written opinions for their judgments, this information is not made public. Lawyers involved in a case receive registered copies but they are not allowed to publish them. Because most proceedings are conducted in a closed court, there is little awareness as to how the aforementioned offences are prosecuted so as to protect the rights of children. Such information would clearly indicate the effectiveness of the government's anti-trafficking and anti-exploitation measures.

Second, the number of trafficking victims indicated in the government's report fails to account for the seriousness of trafficking in Burma. In the same timeframe in which the government acknowledged nine trafficked victims under six years of age, the "Shadow Report" documented 133 cases of human trafficking from Kachin and Northern Shan State alone, a quarter of whom were children. The CRC is meant to address the challenges faced by all children,



not just those under six years of age. The numbers presented by Burma inadequately reflect the seriousness and breadth of human trafficking in Burma.

The problems highlighted above are exacerbated by the government's failure to follow the Committee's aforementioned 2004 recommendation to change the definition of a child to include all children under the age of 18. As a result, many children are left unprotected by Burmese domestic law. However, even where protections are in place, they fail to comprehensively address the challenges faced by children in Burma.

The Committee also made several recommendations with respect to the inadequacies of Burma's juvenile justice system. The government suggests that the juvenile justice system, laid out in Sections 37-49 of the *Child Law*, sufficiently addresses issues associated with children accused of committing crimes. Unfortunately, there are several serious shortcomings with these provisions. First, they afford an unacceptable amount of discretion to relevant state actors. For example, when referring to the speed at which juvenile cases are to proceed to trial, Section 37 stipulates that this is to happen "as soon as possible." Section 40 ("may establish") suggests that it is optional for the Supreme Court to establish juvenile courts. Also, Section 46 does not provide a framework to determine what is required to find that a "child is of so unruly or depraved a character or absolutely uncontrollable" so as to justify a sentence of imprisonment.

Of equal concern is the inadequate implementation of Section 40, which provides for the establishment of juvenile courts. Though juvenile courts have been established in Rangoon and Mandalay, they serve just 25 of Burma's 325 townships. Judges in other Burmese townships have been "entrusted with special powers to try juvenile cases," but there is no evidence that judges have received the requisite training to effectively manage issues related to child offenders. Though the government argues that trainings have taken place, lawyers from inside Burma suggest that these trainings have not been provided to most Township judges. These lawyers also take the position that most judges follow no special procedure (as stipulated by the *Child Law*), and demonstrate no expertise when dealing with accused children. Given that there are only two juvenile courts covering a mere eight percent of Townships and limited training has been offered to judges presiding in those courts, the government has failed to implement adequate protections for children in the juvenile justice system."

Even if cases involving accused children were tried in accordance with the relevant provisions of the *Child Law*, there would be serious shortcomings with the juvenile justice system. Section 43(b) stipulates that juvenile courts have the power to "continue the case in the absence of the child, notwithstanding the stage of inquiry or trial of the case, if it is considered that the presence in the



court of the accused child is not necessary." This provision fails to provide adequate legal protections to the accused child. It does not explain what is meant by the child's presence not being "necessary." Further, it leaves several opportunities for infringing on the child's legal rights. For example, there could be a clear conflict of interest if an absent child was represented by a government-appointed lawyer.

Section 43(d) states that the Court may announce and/or use photographs revealing the identity of a child accused of having committed an offence, or a child who is participating as a witness in any case, on the radio, television, newspapers and other publications if it is believed to benefit the child. The potential publication of the name or photo of an accused child runs in sharp contrast to the principles of the CRC (namely, Article 40(vi), which guarantees the right to privacy at all stages of the proceedings). This is particularly concerning given the wide discretion afforded to judges.

There are several shortcomings with respect to the implementation of the *Child Law's* juvenile justice provisions. In most instances, juvenile cases are tried in the same courtrooms as all other cases. Contrary to the *Child Law*, there are reports of children being detained with adults where they face increased risk of physical and sexual abuse. Section 619 of the *Manual of Rules for the Superintendence and Management of Jails in Burma* (the *Jail Manual*) stipulates that "in jails where there is no separate ward [for juvenile offenders], juvenile prisoners who are detained... shall be confined at night in separate sleeping places and, during the daytime, shall be kept rigorously under the eye of an elderly and responsible warder." Keeping them "rigorously under the eye" of a warder provides insufficient protection to detained youth. Instead, separate facilities or areas should be guaranteed at all times to ensure that other detainees cannot victimize children.

In contravention of Section 41(c) of the *Child Law* there have been multiple instances of child offenders not being offered bail. In addition, the facilities used to house street children who are rounded up by the authorities have been found by researchers to lack "sufficient food, water, toilets, clothes, space and safety provisions." Under Section 628 of the *Jail Manual*, which states that "juveniles, under 16 years of age, shall not be punished by reduction of diet," the use of food restrictions as a mechanism for punishment remains an option for children aged 16-18.

Though Section 68 of the *Child Law*, instructing the Court to determine whether an accused individual is a youth before commencing a trial, refers to "youth," many of the aforementioned juvenile justice provisions in the *Child Law* refer only to "children." Further, judges continue to treat children between the ages of



16 and 18 as adults. In one case, where an 18 year-old was charged for alleged crimes committed during the Saffron Revolution, a judge stated his understanding that the accused should be tried by a juvenile court but then denied a request by the defendant to do so. Even for those protected by the relevant provisions of the *Child Law*, the provisions inadequately reflect the considerations and measures that must be taken in order to have an effective juvenile justice system that reflects the principles of the CRC.

The Committee also noted the fact that the *Child Law* contained no provisions that ensure legal assistance for children who break the law. In 2004, the government stated that there was an existing requirement that a lawyer be appointed at the government's expense when the child cannot afford one. Unfortunately, there are no available statistics on how often and under what circumstances the government has provided a lawyer to an accused child. Lawyers from inside Burma have suggested that they have never seen the government provide a child with a lawyer. Instead, most children appear in court unrepresented.

Finally, the Committee recommended that the minimum age of criminal responsibility be increased. The government suggests that preparations are "being made" to amend the *Child Law*, changing the age of criminal responsibility from seven to 10 years under Section 28(a) ("nothing is an offence which is done by a child under 7 years of age") and to 12 under Section 28(b) ("nothing is an offence which is done by a child above 7 years of age and under 12 who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion"). However, at the time of reporting these changes have not been made. In accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the age of criminal responsibility should be set to reflect "emotional, mental and intellectual maturity." Though many countries have an equally low age for criminal responsibility, it is particularly problematic in a country such as Burma, where most information on how juvenile offenders are treated is unavailable and the efficacy of the justice system remains an ongoing problem.

2008 Constitution

In 2004, the government pledged that a new constitution would "contribute to the establishment of democratic institutions and to major political, economic and social advances." The Committee recommended that the government expedite the drafting process and incorporate child rights into the new Constitution.



On 10 May 2008, Burma held a referendum on the new Constitution. Though there was widespread criticism about the legitimacy of the referendum process, the Constitution was approved and put into force. Unfortunately, the new Constitution is a flawed document that does more to entrench the power of the current government than it does to protect the rights and freedoms of the Burmese people.

First, the new Constitution significantly limits the fundamental freedoms of children in Burma. For example, Article 354 guarantees the rights to "express and publish freely," "assemble peacefully" and "form associations and organizations." However, these rights are curtailed by a clause stating that they apply only where they are executed in a manner "not contrary to the laws [that are] enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality." Similarly, Article 407 of the Constitution states that political parties "shall have no right of continued existence" where they are "declared an unlawful association under existing law." These clawback clauses enable the government to arbitrarily override rights guaranteed by Articles 13 and 15 of the CRC. They also represent a departure from Section 13 of the *Child Law*, stipulating that "every child has the right to express his or her own views in matters concerning children." These Constitutional provisions fail to entrench child rights in domestic law, and instead expand the powers afforded to the ruling government.

Second, most provisions in the Constitution afford rights only to citizens. Article 345 stipulates that in order to be a citizen one must be "born of parents both of whom are nationals of the Republic of the Union of Myanmar" or already be "a citizen according to law on the day this Constitution comes into operation." These restrictive terms exclude many individuals and groups. Most dramatically, and in sharp contrast to the Committee's recommendation, the Constitution fails to provide a path to citizenship for the Rohingya people.

Where it does not conflict with the Constitution, the *1982 Burma Citizenship Law* is still applicable. This means that the "Council of State may decide whether any ethnic group is national or not." Given the government's history of hostility towards the Rohingya, it is unlikely the Council of State would make a determination favorable to this population. The plight of stateless Rohingya people is further aggravated by Section 43 of the *Citizenship Law*, allowing only those with: (a) "parents, one of whom is a citizen and the other a foreigner," (b) "parents, one of whom is an associate citizen and the other is a naturalized citizen to apply for naturalized citizenship," (c) "parents, one of whom is an associate citizen and the other a foreigner," (d) "parents, both of whom are naturalized citizens" or (e) "parents, one of whom is a naturalized citizen and the other a foreigner" to apply for citizenship. For children, it is particularly troublesome that naturalized citizens must be 18 years of age. Since many of



the rights afforded to children in the Constitution are afforded only to citizens, those without citizenship continue to be denied the rights they are guaranteed under the CRC.

Third, though there are provisions related to child rights in the 2008 Constitution, they have been largely disregarded by the government. Article 32 stipulates that the Union shall "care for mothers and children, orphans, fallen Defence Services Personnel's children, the aged and the disabled." Article 351 states that "mothers, children and expectant women shall enjoy equal rights as prescribed by law." Article 367 states that "every citizen shall, in accord with the health policy laid down by the Union, have the right to healthcare." Article 22(c) states that the Union shall assist "to promote socio-economic development including education, health, economy, transport and communication, so forth, of less developed National races." The government's failure to advance the interests of children with respect to education and healthcare is well documented by the "Shadow Report." As a result of extensive use of clawback clauses, limited access to the protections afforded by the Constitution and ignorance for the provisions in the Constitution guaranteeing access to essential social services, the 2008 Constitution has failed to advance the rights of children in Burma.

Rule of Law

Laws protecting rights have very little meaning when they are not enforced. Problems caused by the government's refusal to submit to the rule of law may be one of the most difficult challenges facing Burma's children. The government has taken a number of measures that would, in theory, advance the interests of children in Burma. Child's Rights Committees have been formed at the National and Township levels, legislation and amendments to legislation have been passed and a new Constitution has been entrenched in domestic law. However, as a result of the government's failure to show deference to the rule of law, children have not benefited from these measures.

For example, the Tatmadaw continues to use child soldiers despite the existence of the Committee Forbidding Recruitment of Children and associated provisions in domestic law. While there has been a degree of cooperation with the International Labor Organization to demobilize some child soldiers, the widespread recruitment of child soldiers continues with impunity. Similarly, despite having signed the ILO Convention 29 and having voided provisions in the *Village Act* and the *Town Act*, Burmese authorities continue to use forced labor.

Article 445 of the Constitution states that "[n]o proceeding shall be instituted against the said Councils [SPDC and SLORC] or any member thereof or any



member in the Government, in respect of any act done in the execution of their respective duties." This provision effectively grants total immunity to members of the military junta for violations of international and domestic law committed against civilians, including children, over the past two decades.

A key indicator of the pervasiveness of the rule of law is the strength of civil society. In Burma it is very difficult for civil society to act in an effective and constructive manner due to extensive governmental restrictions. For example, following Cyclone Nargis the government heavily restricted the actions of community based organizations and international NGOs as they attempted to provide aid to affected populations.

Finally, corruption is pervasive throughout the judicial system in Burma. Lawyers from inside the country report that though there is an appeals process, judges typically only hear cases at the appellate level when bribed. With respect to children, Section 49 of the *Child Law* provides a mechanism for appealing the decision of a court of first instance. However, it is reported that appeals are seldom accepted for cases involving children and children are left without anyone to help navigate Burma's corrupt judicial system.

These examples illustrate the degree to which the rule of law fails to guide legal and political processes in Burma. By showing no respect for the rule of law, the government has failed to advance the interests of children in Burma.

Conclusion

In failing to implement the recommendations provided by the Committee in 2004, the government continues to be in serious contravention of the principles and provisions of the CRC. As a result, the situation for children in Burma continues to be characterized by insecurity and vulnerability. These problems are exacerbated by a Constitution that fails to protect the interests of all children and the government's lack of respect for, and deference to, the rule of law. Since ratifying the CRC in 1991, the status of children in Burma has not improved. Instead, the government has continued to rule oppressively with no regard for how its actions impact the rights of children. Consequently, Burma's children are being deprived of the rights and protections afforded to them by the CRC.

(Endnotes)

1. Note: for access to the full text of the submission provided to the Committee or to the "Shadow Report" please contact leslieble@gmail.com

2. These instruments include the: *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, *Optional Protocol on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, *Hague Convention*



on the Protection of Children and Cooperation in Respect of Intercountry Adoption, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial; Discrimination, the Convention Against Torture, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention Relating to the Status of Refugees, 1954 Convention on the Status of Stateless Persons, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Convention Against Transnational Organized Crime and the Convention Against Transnational Organized Crime.

3. Township Committees have been established in: Dagon Township, Thanlyin Township, Shwepyithar Township, Hlaingtharya Township, Htantabin Township, Twantay Township, Thaketa Township, Mingaladon Township and Hmawbi Township.

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