



International
Labour
Organization

A legal review of national laws and regulations related to child labour in Myanmar in light of international laws and standards

International
Programme
on the Elimination
of Child Labour
(IPEC)

Fundamental Principles and Rights at Work Branch (FUNDAMENTALS)

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First published 2015

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A legal review of national laws and regulations related to child labour in Myanmar in light of international laws and standards / International Labour Office, International Programme on the Elimination of Child Labour (IPEC) - Geneva: ILO, 2015.

ISBN: 978-92-2-130158-5 (Print); 978-92-2-130159-2 (Web PDF)

International Labour Office; ILO International Programme on the Elimination of Child Labour

child labour / international labour standards / labour legislation / regulation / comment / application / Myanmar – 13.01.2

ILO Cataloguing in Publication Data

Acknowledgements

This publication was elaborated by Natsu Nogami (Consultant) for IPEC and coordinated by Selim Benaissa for the Myanmar Programme on the Elimination of Child Labour (My-PEC) – ILO Yangon Office. Comments, contribution and support were provided by Piyamal Pichaiwongse, Saw Hsar Ka Baw, Hnin Wuit Yee from ILO-Yangon Office, Simrin Singh from ILO Regional Office for Asia and the Pacific, Yoshie Noguchi, Bharati Pflug and Jose-Maria Ramirez Machado from ILO Headquarters.

Funding for this ILO publication was provided by the United States Department of Labor (Project MMR/13/10/USA).

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ABBREVIATIONS

CEACR	Committee of Experts on the Application of Conventions and Recommendations (ILO)
Convention No. 29	ILO Convention No. 29 on Forced Labour, 1930
Convention No. 138	ILO Convention No. 138 on Minimum Age, 1973
Convention No. 182	ILO Convention No. 182 on Worst Forms of Child Labour, 1999
CRC	Convention on the Rights of the Child
GoRUM	Government of the Republic of the Union of Myanmar
ILO	International Labour Organization
MOLES	Ministry of Labour, Employment and Social Security
MOLIP	Ministry of Labour, Immigration and Population
My-PEC	Myanmar Programme on the Elimination of Child Labour
TWG-CL	Technical Working Group on Child Labour
NGO	Non-Governmental Organization
UNICEF	United Nations Children's Fund
WFCL	Worst Forms of Child Labour

INTRODUCTION

Background context

International laws and standards related to child labour

Elimination of child labour is a fundamental principle of the International Labour Organization (ILO). In fact, in historical perspectives, labour legislation originated from child protection legislation which protected children against exploitation and harsh working conditions during the industrialization process. The right of children to protection from economic exploitation has been recognized as a fundamental and universal human right in the international community. For these reasons, the ILO has adopted a number of International Labour Standards related to children since its inception,¹ and among them, there are two core Conventions relating to the elimination of child labour and protection of adolescent workers: i.e. ILO Convention No. 138 on Minimum Age, 1973, and the ILO Convention No. 182 on Worst Forms of Child Labour, 1999. The ILO Convention No. 138 requires political commitment towards gradual but total elimination of child labour, and enactment and enforcement of a legal system of minimum age for admission to work. The ILO Convention No. 182 requires political commitment and immediate action to give priority to the prohibition and elimination of the worst forms of child labour, including slavery, human trafficking, sexual exploitation, illicit activities or hazardous work that is harmful to the safety, health and morals of children.

The United Nations has adopted a number of Conventions and Covenants which complement the ILO's child labour standards.² The most comprehensive of these is the Convention on the Rights of the Child, 1990 (CRC), which has achieved almost universal ratification status. The CRC provides that the child has the right to be protected from economic exploitation and from any hazardous work or work that interferes with the child's education (Art. 32 (1)). It also requires legislative, administrative, social and educational measures to be taken to ensure implementation (Article 32).³ There are a number of other international instruments which are related to child rights, child labour, human rights and sectors related to child labour, and Table 1 below lists those that Myanmar is signatory to.

Myanmar is a signatory to CRC (ratified in 1991). It also recently ratified the ILO Convention No. 182 in December 2013⁴ and expressed political commitment to eliminate worst forms of child labour. Myanmar is also a signatory to ILO Forced Labour Convention, 1930 (No. 29), which is another important international instrument relevant to eliminating

¹ The first relevant Convention was the ILO Convention No. 5 on Minimum Age (Industry), 1919, which fixed the Minimum Age for Admission of Children to Industrial Employment.

² IPEC: *Eliminating the worst forms of child labour: a practical guide to ILO Convention No. 182* - Handbook for parliamentarians No 3, p. 35 (Geneva, ILO, 2002). Available at: www.ilo.org/ippec/Informationresources/WCMS_IPEC_PUB_1200/lang--en/index.htm.

³ Other relevant provisions are: Article 33 (requiring measures to prevent the use of children in illicit production and trafficking of drugs); Article 34 (requiring protection against sexual exploitation); Article 35 (requiring prevention of abduction, sale and trafficking of children for any purpose); Article 36 (requiring protection against all other forms of exploitation prejudicial to any aspects of the child's welfare); Article 28 (confirming a child's right to education); and Article 39 (providing for measures to promote the physical and psychological recovery and social integration of child victims).

⁴ The first government report is due in 2015.

child labour in its worst forms. The government declared that it will end forced labour by 2015, and “The existing Memorandum of Understanding on Forced Labour, signed in March 2012 between the Government of the Republic of the Union of Myanmar (GoRUM) (Ministries of Labour, Employment and Social Security (MOLES)) and the ILO (and witnessed thereof by the Ministry of Defence) provides a clear framework for ILO support towards this objective, based on seven concrete Action Plans that are being monitored by the Joint Working Group.⁵ The MoU makes reference to the Understanding between the ILO and the GoRUM establishes the Commitment of the parties thereof to end forced labour, the 1998 Recommendations of the Commission of Inquiry appointed under Article 26 of the ILO Constitution, and an unprecedented Supplementary Understanding (SU) on complaints mechanism for forced labour abuses that was established in 2007, aimed at giving victims of forced labour the opportunity to channel their complaints through the services of the Liaison Officer to the competent authorities with a view to seeking redress.⁶ The SU mechanism has received over 1,900 complaints.⁷ It is expected that the number of forced labour practice will steadily reduce over time, even if further media and communication efforts may initially increase the number of complaints.⁸ The obligation under the 2012 MOU is a basis of the subsequent agreed time-bound programme to eliminate force labour by 2015.

Table 1: Relevant conventions – Myanmar human rights obligations⁹

Convention protocol name	Date signed	Date ratification/ascension
ILO Convention No. 182 on Worst Forms of Child Labour, 1999	Dec-13	
ILO Convention No. 6 on Night Work of Young Persons (Industry), 1919	1921	
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	14-Mar-56	
Slavery Convention	29-Apr-57	
Protocol amending the Slavery Convention	14-Mar-56	29-Apr-57
UN Convention Against Organized Transnational Crime		30-Mar-04
Protocol Against the Smuggling of Migrants by Land, Sea and Air		30-Mar-04
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children		30-Mar-05
Geneva Conventions (I-IV)		25-Aug-92
Convention on the Rights of the Child (CRC)		15-Jul-91

⁵ The GoUM’s Order No. 29/2012 dated 10 April 2012 with regard to the Forming of the Joint Strategic Implementing Working Committee for Absolute Elimination of Forced labour. The Committee comprises of high level members of Ministry of Labour, Home Affairs, Defence at Deputy Minister level, and Supreme Court, Attorney General, Foreign Affairs, Land Record, Attorney General office, at Director-general level.

⁶ ILO: *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part B), International Labour Conference, 101st Session, pp. 119. (Geneva, 2012).

⁷ Ibid.

⁸ Ibid.

⁹ ILO My-PEC, “Mapping of Policies, Programmes and Institutions Related to Child Labour in Myanmar” (draft), November 2014, at 5. [hereinafter My-PEC Mapping Report].

Convention protocol name	Date signed	Date ratification/ascension
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography		16-Jan-12
Convention Concerning Forced and Compulsory Labour		4-Mar-55
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)		22-Jul-97
Convention on the Rights of People with Disabilities (CRPD)		7-Dec-11
Optional Protocol the CRPD		12-Jan-12

Definition of child labour

Children may engage in various forms of work for variety of reasons, but not all forms of work performed by children should necessarily be regarded as child labour that needs to be eliminated.¹⁰ For the purpose of legal analysis in this paper, “child labour” is defined as “any work undertaken by: a) children under the legal minimum working age; and b) children above the legal minimum age but under the age of eighteen and working in activities or under the conditions in contravention of the international treaties, in particular slavery-like practices, hazardous work, or other worst forms of child labour; this is in line with what is defined and accepted internationally.¹¹ And the term “young workers” used in this paper refers to children who are above the legal minimum working age but under the age of 18 years and are working under the conditions permitted by the international treaties.

Child labour in Myanmar: current situations

Child labour is reported to be widespread across Myanmar. According to the Labour Force Survey published by the Ministry of Labour, Immigration and Population (MOLIP) (formerly known as MOLES) in 2015, there were more than 1.1 million children aged between 5 and 17 years engaged in child labour; and more than half of them (i.e. 616,815) were engaged in hazardous work. .¹² “Children in Myanmar usually take part in their family household business although the types of work and their roles may differ, such as cleaning, cooking, babysitting, helping at farms.”¹³ The GoRUM is of the view that, by participating in family household business,¹⁴ “they learn various skills and sense of responsibility and dignity of work”.¹⁵ However, while this may be true to some extent, even where such tasks

¹⁰ See ILO’s International Programme on the Elimination of Child Labour (IPEC) website section “What is child labour”, available at: <http://www.ilo.org/ipec/facts/lang--en/index.htm>. Accessed on 28 January 2015.

¹¹ See, for instance paragraph 13 of the Report of the Secretary-General to the General Assembly, *Status of the Convention on the Rights of the Child*, dated 27 July 2009, A/64/172. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F64%2F172&Submit=Search&Lang=E

¹² MOLIP: “Myanmar labour force, child labour and school to work transition survey 2015: executive summary report”.

¹³ GoRUM: Third and Fourth periodic reports of State parties due in 2008, submitted for consideration by the Committee on the Rights of the Child, 14 July 2009 [CRC/C/MMR/3-4], at paragraph 310. [Hereinafter the GoRUM state party report to CRC 2008].

¹⁴ Presumably, the GoRUM is mixing up economic activities in family business/farms on the one hand, and household chores (cleaning, cooking, etc.) within the child’s own household on the other. Note that the latter does not fall within child labour legal framework, unless they last very long hours or are very hazardous.

¹⁵ *Ibid* at para. 311.

undertaken by children in the family businesses are not dangerous, work can be still damaging in that it prevents them from going to school or engaging in recreation and play.¹⁶ Children are also found to be working outside such family businesses “at an early age or in dangerous conditions, in food-processing, street-vending, refuse-collecting and light-manufacturing industries, restaurants, teashops and family agricultural activities, as well as in large-scale development projects”.¹⁷

Commercial and sexual exploitation of children is reported to occur, despite the legal restrictions: one study conducted in 2010 found a disturbing result that out of 58 female workers under 25 years of age in three cities, 12 per cent to be aged 10-14 years and another 33 per cent to be aged 15-19.¹⁸ These workers reported verbal, physical, sexual and financial abuse from their clients, pimps and others as well as stigma, discrimination and verbal abuse from others in their communities, which could isolate them from social networks.¹⁹ Furthermore, the Committee on the Rights of the Child expressed its deep concern that children engaged in prostitution may be prosecuted²⁰ as opposed to be protected as victims of sexual exploitation.

On human trafficking issue, according to the Trafficking in Persons Report 2013 issued by the U.S. Department of Labor, Myanmar is a source country for men, women, and children subjected to forced labour, and for women and children subjected to sex trafficking in other countries.²¹ Many Burmese men, women, and children who migrate for work to Thailand, Malaysia, Indonesia, Singapore, the United States, China, Bangladesh, India, South Korea, and Qatar are subjected to conditions of forced labour or sex trafficking in these countries.²² One available data indicates that children form a considerable proportion of trafficked persons both within and outside Myanmar: for instance, in 2009, 21 per cent of the trafficked victims who were rescued and 10 per cent of those repatriated were children.²³ Given that the vast majority of trafficking cases go unreported,²⁴ the actual number of trafficking children could be assumed to be much higher.

The involvement of children in armed conflicts is another longstanding serious problem in Myanmar. During the decades of internal conflicts between the Myanmar governments and the ethnic minorities, a number of children have been reported forcibly

¹⁶ UNICEF: *Situation Analysis of Children in Myanmar*, pp. 115. (Myanmar, 2012). Available at http://www.unicef.org/eapro/Myanmar_Situation_Analysis.pdf. Accessed on 20 December 2014. [Hereinafter UNICEF Situation Analysis].

¹⁷ United Nations: Convention on the Rights of the Child Concluding Observations: Myanmar, [CRC/C/MMR/CO/3-4], adopted on 3 February 2012 and published on 14 March 2012, para. 85(a). Committee on the Rights of the Child, Fifty-ninth Session, 16 January-3 February. [Hereinafter CRC Concluding Observations 2012].

¹⁸ UNICEF: Situation Analysis, *supra* note 17 at 116.

¹⁹ *Ibid.*, at 117.

²⁰ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 89(d).

²¹ U.S. Department of Labor: *Trafficking in Persons Report 2013*, “Burma” pp. 111-114, at pp. 111. Myanmar (i.e. Burma in its report) is listed on the Tier-2 Watch List for the second consecutive year. Available at: <http://www.state.gov/documents/organization/210738.pdf>. Accessed on 05 June 2014.

²² *Ibid.*

²³ UNICEF: Situation Analysis, *supra* note 17 at 118.

²⁴ *Ibid.*, at 117.

recruited into both the armed forces (the Tatmadaw) and the non-state armed groups. The Committee on the Rights of the Child, while noting the efforts of the Government and the Committee on the Prevention of Military Recruitment of Underage Children to prevent and halt the recruitment and use of child soldiers and also the Government's cooperation with ILO to return underage recruits, expressed its deep concern in 2012 over, among others:

- The on-going recruitment of child soldiers, both in the military and by non-State actors.
- The use of forced child labour in support of military garrisons or military operations and of non-State armed groups, in activities such as portering, sentry or guard duty and camp-security-fence construction, in particular in ethnic or religious minority regions.²⁵

The nationwide ceasefire talks continue, with all parties appearing to be committed to a successful outcome; however, at this stage agreement is elusive. This is a reflection of the complexity of the issues and the low levels of trust between the stakeholders. The signing of Deed of Commitment in February 2015 continues to reflect that the Military and the Government remains the different entity, in that the GoRUM as well as the ethnic armed groups' attempts to hold a parallel political dialogue alongside with the negotiation of national-wide ceasefire agreement continued to be rejected by the military. In the interim, the bilateral ceasefire agreements, while generally being respected, remain fragile and serious armed conflict continues between government forces and the non-state armies which have not, as yet, achieved ceasefires.

National policies and laws against child labour and Myanmar's international commitments and obligations

The GoRUM "regards children as leaders of the future"²⁶ and has implemented a number of important national policies and programmes for children, including the Myanmar National Plan of Action for Children (2006–2015), the Millennium Development Goals (MDGs), A World Fit for Children (WFFC), Education for All National Action Plan (2003-2015), Rural Development Plan (2011-2015) and Myanmar Second Five-Year National Plan of Action to Combat Human Trafficking (2012-2016). The National Plan of Action on the Worst Forms of Child Labour is now being developed with ILO assistance. The GoRUM has also taken measures to make national laws and policies in line with the international laws and standards, in particular the Convention on the Rights of the Child (CRC) which Myanmar ratified in 1993. Among others, the Myanmar National Committee on the Rights of the Child set up a 10-member Task Force on 20 May 1999 to review the Child Law, 1993 and assess whether the provisions of the Child Law are in conformity with the provisions of the CRC.²⁷ The recommendations of the Task Force are that some provisions of the Child Law be amended to bring them in line with the CRC and were forwarded to the Ministry of Social Welfare, Relief and Resettlement and the Office of the Attorney General.²⁸ And these two bodies have decided to make as many amendments as possible in the Rules relating to the Child Law,²⁹ and the Child Law is currently under review with the assistance from UNICEF. The ILO has

²⁵ United Nations: CRC Concluding observations 2012, *supra* note 18 at para. 81.

²⁶ GoRUM state party report to CRC 2008, *supra* note 14 at para. 7.

²⁷ *Ibid.*, para. 8.

²⁸ *Ibid.*, para. 9.

²⁹ *Ibid.*

provided comments on the provisions relevant to eliminating child labour and protecting child workers. Please see Chapter III (Summary of Issues, Gaps and Recommendations for National Statutes Related to Child Labour) for the specific recommendations for the Child Law.

National laws and policies that are specifically related to child labour are also being reviewed in light of ILO Conventions with the technical assistance from the ILO. Myanmar has ratified some of the ILO Conventions relevant to the elimination of child labour and protection of young workers, including the ILO Convention No. 6 on Night Work of Young Persons (Industry), 1919, (ratification: 1921), the ILO Convention No. 29 on Forced Labour, 1930 (ratification: 1955) and the ILO Convention No. 182 on Worst Forms of Child Labour, 1999, (ratification: 2013), declaring its political commitment to eliminating worst forms of child labour. The Government has requested the ILO to support the reform of labour-related laws. The ILO has thus far been supporting the Government, both in a comprehensive review of the existing labour-related laws which will require a few years, and in response to requests for assistance in the urgent review of specific pieces of legislation including the Factories Act, the Shops and Establishments Act and the Occupational Safety and Health Act, etc. Alongside this overall labour law review, ILO's "Myanmar Programme on the Elimination of Child Labour (MY-PEC)" Project (ILO-MyPEC) is carrying out a more detailed assessment of the legislation related to child labour, identify gaps between the existing laws and regulations and the international laws and standards and provide recommendations for amendment. This present review is part of MY-PEC's important contribution in this process.

While Myanmar is committed to and is making significant efforts to adhere to international laws and standards on children, a number of challenges remain nonetheless. Committee on the Rights of the Child, the supervisory body of the CRC, has expressed concerns over the years about the persistent child labour situations in Myanmar. In its recent Concluding Observations in 2012, the Committee expressed its concern about:³⁰

- (a) The widespread use of child labour in unacceptable conditions, including at an early age or in dangerous conditions, in the food-processing, street-vending, refuse-collecting and light-manufacturing industries, restaurants, teashops and family agricultural activities, as well as in large-scale development projects in the extractive and energy industries.
- (b) The minimum legal age for the employment of children (set at 13 years of age).
- (c) The persistence of economic exploitation of children, including low wages, working the same hours as adults and being engaged in dangerous and hazardous forms of work.
- (d) The lack of enforcement of the labour laws.
- (e) The absence of systematic labour inspections.

Therefore, the Committee, recalling its previous concluding observations (CRC/C/15/Add. 237, para. 69), strongly recommended that Myanmar:³¹

³⁰ United Nations: CRC Concluding Observation 2012, *supra* note 18 at para. 85.

³¹ *Ibid.*, para. 86.

- (a) Take immediate and effective measures to eliminate child labour in unacceptable conditions, including at an early age or in dangerous conditions, in food-processing, street-vending, refuse-collecting and light-manufacturing industries, restaurants, teashops and family agricultural activities, as well as in large-scale development projects.
- (b) Implement effective measures to address the deep-rooted socio-economic factors that push children into the workforce.
- (c) Amend legal provisions to increase the minimum age for the employment of children to 16 years.³²
- (d) Strengthen the enforcement of labour laws and the Child Law to protect children and to ensure prosecution of those who make use of forced labour of children, and provide reparation and sanctions.
- (e) Improve labour inspections to ensure that these comprehensively monitor all aspects of the work environment, including the use of child labour.
- (f) Continue to seek technical assistance from the ILO International Programme on the Elimination of Child Labour in this regard.
- (g) Take the appropriate measures to systematize and institutionalize disciplinary processes and/or action against the military officers and civilians responsible for recruiting and using child labour.
- (h) Ratify the ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment and the ILO Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

With respect to legislation in particular, the Committee, “[W]hile noting the indication given by the State party that the 1993 Child Law is being reviewed to integrate some provisions of the Convention, the Committee is concerned that all principles and provisions of the Convention have not yet been fully incorporated into domestic law and that legal provisions contrary to the Convention remain in force.³³ The Committee also expressed its concern about “the application of different sources of law, namely codified and customary laws, which may undermine the State party’s efforts to harmonize its legislation with the Convention.”³⁴ The Committee therefore urged Myanmar “to promptly amend the 1993 Child Law and ensure that it incorporates all principles and provisions of the Convention and undertake a comprehensive review of domestic legislation, namely codified and customary laws, in order to ensure that it is brought into compliance with the Convention.”³⁵ Another serious concern is the fact that the CRC does not have constitutional status in Myanmar.³⁶ This means that its provisions can be overridden in court by existing national rules and laws.³⁷ This

³² Note that the ILO’s position is that this 16-year minimum working age is a long term goal and would be too high as the immediate threshold for child labour in Myanmar. Therefore, the ILO recommendation is to set the minimum age at 14 as the first step.

³³ United Nations: CRC Concluding Observation 2012, *supra* note 18 at para. 9

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 10.

³⁶ UNICEF: Situational Analysis, *supra* note 17 at 4.

³⁷ *Ibid.*

makes revision of all national instruments to ensure conformity with the CRC an important step to enable Myanmar to meet its obligations as a State Party.³⁸

Objectives and methodology

Objectives

This study seeks to assess whether the existing national legislation is comprehensive enough to address child labour issues in Myanmar, with a special attention to the worst forms of child labour. On the basis of the analysis of all relevant laws and regulations, the study aims to identify major issues and gaps and provide recommendations on the revision of national legislation pertaining to child labour, particularly hazardous work for minors, and possible approaches to effectively implement and monitor the laws.

This study will review the existing national laws and regulations in light of the International laws and standards relevant to the elimination of child labour and protection of young workers, in particular its two core Conventions: i.e. ILO Convention No. 138 on Minimum Age, 1973, and the ILO Convention No. 182 on Worst Forms of Child Labour Convention, 1999. It must be pointed out at the outset that Myanmar has not ratified the ILO Convention No. 138 and thus strictly speaking it is not obliged under C138 to apply it in the country. However, the Government is requested to be reminded that the ILO Convention No. 138 is one of the core Conventions on fundamental principles and rights at work, which are upheld in the ILO Declaration on Fundamental Principles and Rights at Work.³⁹ Adopted in 1998, the Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. The Declaration makes it clear that these rights are universal, and that they apply to all people in all States - regardless of the level of economic development.⁴⁰ As such, the present study will examine Myanmar's national legislation not only in light of the ILO Convention No. 182 but also the ILO Convention No. 138. But at the same time, the study also clearly distinguishes what obligations arise out of which Convention, so as to facilitate the legislative process: i.e. obligations arising out of ILO Convention No. 182 are requested to be urgently incorporated into the national legislation, while obligations arising out of ILO Convention No. 138 may be taken note for consideration primarily for future revisions but nevertheless recommended to be incorporated in this revision to the extent possible.

³⁸ Ibid.

³⁹ The subsequent description of the Declaration is the excerpt from the See ILO ILO Declaration on Fundamental Principles and Rights at Work website section "About the Declaration", available at: <http://www.ilo.org/declaration/thedeclaration/lang-en/index.htm>. Accessed on 11 November 2014.

⁴⁰ This commitment is supported by a Follow-up procedure. Member States that have not ratified one or more of the core Conventions are asked each year to report on the status of the relevant rights and principles within their borders, noting impediments to ratification, and areas where assistance may be required. These reports are reviewed by the Committee of Independent Expert Advisers. In turn, their observations are considered by the ILO's Governing Body.

Methodology

The present study adopts the following methodologies to achieve its objectives as mentioned above:

Desk review: The study reviews and analyses the existing national laws and regulations relevant to child labour, including the 2008 Constitution, the Child Law, labour laws and other relevant laws such as the Anti-Trafficking Law. The relevant international instruments and materials were also reviewed, including the UN Convention on the Rights of the Child and the comments of the Committee on the Rights of the Child; ILO Conventions and Recommendations and the comments and reports of the ILO supervisory bodies. Other relevant reference materials include publications by the ILO and other international and national organizations.

Key informant interviews: The study also attempted to collect data through key informant interviews with representatives from the Government, Legislature and Judiciary; organizations of employers and workers; and other key stakeholders including labour lawyers, legal scholars, international and national non-governmental organizations (NGOs). The interviews were conducted between February and April 2015. The list of key informants approached by My-PEC is provided in Annex 1. Overall, the study collected data from 14 stakeholders (Government 5; Workers' organizations 3; labour lawyers for workers' organizations 2; UN agencies 2; and NGOs 2). Data were not collected from other stakeholders either due to time constraint or unavailability of the stakeholders. The interview questionnaire is included in this report as Annex 2.

Validation workshop. The report was validated through a national workshop with key stakeholders including government agencies, workers' organizations, employers' organizations, UN agencies and NGOs. The list of participants to this validation workshop is provided in Annex 3.

CHAPTER I: EXISTING NATIONAL LEGISLATION RELATED TO CHILD LABOUR AND THE LAW REFORM

1.1 Legal system and legislative process in Myanmar

1.1.1 Legal system

“Myanmar’s colonial past and its oscillations between dictatorship and democracy since independence have given rise to a complex legal history. More than half of the country’s 800 or so laws were enacted by the British rulers of India between 1885 and 1948...Most of Myanmar’s other laws are effectively martial decrees, enacted with minimal consultation in order to meet a number of actual or perceived emergencies.”⁴¹

With respect to labour law, currently there is no central piece of labour law providing the overall basis for employment relationship. The existing labour laws are fragmented, in the sense that they are targeted by sector (e.g. factory, shops and establishments, mines, etc.) or by theme (e.g. payment of wages, leave and holidays, etc.). This is the remnant of the old colonial legal system (i.e. Indo-British legal system) which has survived the decades of military era without significant changes to it.⁴²

There are a few serious practical implications of such fragmentary state of labour legislation, in particular from the perspectives of international labour standards and ILO’s decent work agenda. The first and most worrying implication is that the fragmentation of law creates legal vacuum or application gap where certain categories of workers, including children, are either completely excluded from the legal protection (for instance, “homeworkers”⁴³ do not appear to be covered by any of the existing labour laws) or their rights partially protected (for instance, domestic workers are specifically covered under the Labour Organization Law but not by other labour laws, either explicitly or implicitly, including Payment of Wages Law, Leave and Holidays Act, etc.; or, wage protection which is guaranteed under the Payment of Wages Act, 1951 only applies to workers employed in industry). The latter – i.e. partial legal coverage - equally applies to certain categories of agricultural workers

⁴¹ IBAHRI: *The Rule of Law in Myanmar: Challenges and Prospects*, pp.41. (London, 2012). Available at: <http://www.google.co.jp/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDoQFjAB&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DDE0EE11D-9878-4685-A20F-9A0AAF6C3F3E&ei=3RuQU7TvKcOYkQWyi4DIaw&usg=AFQjCNHnAMTXDIGPqEwd04HcuULH38mDXA&sig2=oJ1LNtVanWVy DU0 wgmngA&bvm=bv.68445247,d.dGI>. Accessed 27 December 2014.

⁴² Ngyo Ngyo Thinn: The Legal System in Myanmar and the Foreign Legal Assistance, in *Law and Development Forum*, pp. 395-397 (2006). Available at: http://www.google.co.jp/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fkoara.lib.keio.ac.jp%2Foonips%2Fmodules%2Foonips%2Fdownload.php%3Ffile_id%3D14558&ei=ddiOU_KhDtjk8AXij4HoDA&usg=AFQjCNExR_mffRSgfFj6tkg7Lg7cz7i48Q&sig2=u8Sdliw5MyC3vxaWjBCOjg&bvm=bv.68235269,d.dGc. Accessed on 20 May 2014.

⁴³ ILO Convention No. 177 on Home Work, 1966, defines the term **homework** means work carried out by a person, to be referred to as a **homeworker**, (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used.

(such as farmers employed on farms or plantations), construction workers, seafarers, fishermen, etc.

The second implication is that the persons to whom the laws shall apply - i.e. employers and workers, including children, and their organizations, labour inspectors, labour dispute settlement bodies, etc. – would have difficulty following or implementing the laws. It is important that laws are simple and easy to understand for employers and workers alike. And also for investors and trading partners, as Myanmar opens up its economy and accelerates its integration into the regional and global market. Legal clarity and predictability promotes the development of labour market and prevents unnecessary disputes.

For these reasons, the tripartite partners have agreed to consolidate the existing labour laws into a codified umbrella Labour Law/Labour Code which applies to all employment relationships across industries and sectors.

1.1.2 Legislative process

In Myanmar, the Union Attorney General's office (UAG) is responsible for tendering legal advice to Union-level Government Departments/Ministries. As part of this role, they are required to:⁴⁴

- Provide legal advice to the President's office regarding whether Myanmar should/can sign international conventions.
- Vet draft laws and policies based on existing laws, the Constitution and international standards.

The process is currently as follows:⁴⁵

- Ministry/President requests advice from Union Attorney General's (UAG) office regarding possible signature to international convention.
- UAG provides advice to Ministry/President regarding current status of laws/constitution.
- Ministry drafts law.
- UAG provides comments on draft law.
- Draft law submitted to Pyidaungsu Hluttaw – who assigns to either Pyithu Hluttaw or Amyotha Hluttaw. Law is debated in Hluttaw, UAG is invited to attend. Upon majority across both chambers, the legislation is enacted as Law.

Currently, the UAG faces enormous resource constraints and expressed interest in receiving capacity strengthening from the ILO, in particular in relation to ILO Convention No. 182.⁴⁶ The ILO could provide technical support to UAG in the process of vetting and commenting on the draft labour-related laws and policies to ensure compliance with ILO Convention No. 182. But it is also essential that the ILO works with all the stakeholders in the legislative process, in particular the parliamentarians. ILO's labour law advisory experience in

⁴⁴ My-PEC Mapping report, *supra* note 10 at 11.

⁴⁵ Ibid.

⁴⁶ Ibid.

other countries suggests that if the stakeholders did not understand the ILS, they tend not to incorporate them into their laws. So far as the time allows, it is important for the ILO to repeatedly explain to them ILO's technical inputs in the language they understand; this is also an important process for the capacity-building on labour law in Myanmar.

1.2 Current national laws and regulations related to child labour and the on-going and future law reform

This paper has identified the following national laws related to employment and labour, children's rights, social security, social protection and welfare that are either directly or indirectly related to the elimination of child labour and the protection of young workers. As far as possible, the current state of these laws and the on-going and future revision plans are also indicated. The ILO has been providing technical assistance for the revision of the labour-related laws. The current status of the laws and draft bills (to the author's knowledge as of March 2015) were indicated in the brackets.

Table 2: National statutes related to child labour and young workers

National statutes by sector or by category of workers	National statutes by theme
Constitution The Constitution of the Republic of the Union of Myanmar, 2008 Burma Code (not published) Factory The Factories Act, 1951, amended in 2016 Shops and establishments Shops and Establishments Act, 1951 (No. LIX), amended in 2016 Dock workers The Dock Labourers Act, 1934 [To be repealed] and The Dock Workers (Regulation of Employment) Act, 1948 [To be repealed] Oilfield Oilfield (Welfare of workers) Act, 1951 [To be amended] Seafarers The Myanmar Merchant Shipping Act, 1954 and the Law Amending the Myanmar Merchant Shipping Act, 1954 (The State Peace and Development Council Law No. 4/99) Fishermen Myanmar Marine Fisheries Law (The State Law and Order Restoration Council Law No. 9/1990). Mines The Myanmar Mines Law, 1994 (The SLORC Law No. 8/94) Child and youth The Child Law (The State Law and Order Restoration Council Law No. 9/93). [The revised law is currently being drafted with the technical assistance from UNICEF in collaboration with the ILO]	Industrial relations Labour Organization Law (Pyidaungsu Hluttaw Law No. 7 of 2011). The Settlement of Labour Disputes Law (Pyidaungsu Hluttaw Law No. 5/2012). Law relating to Forming of Organizations (SLORC Law No. 6/88 of Sept. 30, 1988). Wages The Payment of Wages Act, 1936 [To be amended][Currently being drafted with technical assistance from the ILO] The Minimum Wage Law, 2013 (Pyidaungsu Hluttaw Law No. 7/2013) Leave and holidays The Leave and Holidays Act, 2014, amending The Leave and Holidays Act, 1951 (No. 58) and The Law amending the Leave and Holidays Act, 1951 (The State Peace and Development Council Law No. 6/2006 of 30 May 2006). Employment and skill development Employment and Skill Development Law, 2012 (Pyidaungsu Hluttaw Law No. 29/2013). Social security Social Security Law, 2012 (Pyidaungsu Hluttaw Law No. 15 of 2012). Occupational Safety and Health Occupational Safety and Health Bill [Currently being drafted with technical assistance from the ILO] The Workmen Compensation Act, 1923 and the Law Amending the Workmen's Compensation Act, 1923 (The State Peace and Development Council Law No. 4/2005)

National statutes by sector or by category of workers	National statutes by theme
The Children (pledging of labour) Act, 1933 Education National Education Law, 2014 (Pyidaungsu Hluttaw Law No. 41/2014) Basic Education Law of the Republic of the Union of Myanmar, 2nd draft (2014) The Republic of the Union of Myanmar, Technical and Vocational Education Bill Migrant and foreign workers The Burma Immigration (Emergency Provisions) Act, 1947. Registration of Foreigners Act, 1940 (No. 7/40) and Rules 1948. The Law relating to Overseas Employment (The SPDC Law No. 3/99). [The draft amendment is currently being drafted by MOLIP, with ILO assistance] The Anti-Trafficking in Persons Law, 2005 (The SPDC Law No. 5/2005) [Currently being amended] Aliens Workers Bill [A draft Bill has been submitted to Parliament] Farmers Protecting Rights and Enhancing Economic Welfare of Farmers Law (approved by the parliament in October 2013) Foreign investment Foreign Investment Law, 2012 (The Pyidaungsu Hluttaw Law No. 21/2012). To be replaced by the Myanmar Investment Law 2016 Special economic zones Special Economic Zones Law, 2014 (The Pyidaungsu Hluttaw Law No. 1/2014) Small and medium enterprises SME Development Law, 2013	Others Employment Statistics Act, 1948 [To be amended] Employment and Training Act, 1950 [To be repealed very soon] Employment Restriction Act, 1959 [To be newly drafted & repealed]

According to the results of the interviews with the key stakeholders, the stakeholders are divided over the effectiveness of the current national laws and regulations in eliminating child labour. Some were of the view that they are effective enough, while others expressed that they are not. Below is the brief summary of the interview results.

Table 3: Interview results on the stakeholders' perceptions about the effectiveness of the current national laws and regulations in eliminating child labour, in particular WFCL

	Number and composition of respondents	Reasons
Effective	Government: 3	Government: Because the Government take action according to the law if the workers do not receive compensation. The following laws are sufficient to eliminating child labour: i.e. The new Child Law; Burma Immigration Provision Act; Registration of Foreigner Act. Labour lawyers for workers' organizations: In general, many national laws sufficiently address forced labour, but in reality many children are working. The main cause of child labour is the lack of social security. Other causes include the increasing gap between the rich and the poor; and the lack of quality universal education. Laws that meant to protect to children from hazardous labour are ineffective and not implemented correctly.
	Workers' organizations: 0	
NOT effective	Labour lawyers for workers' organizations: 1	Government: no specific reasons. Workers' organizations: Laws need to be implemented at the ground level. Also, simply removing children labourers from the workplaces does not address the root problems; and therefore programmes such as awareness raising, vocational and skills trainings, education, organizing and poverty alleviation are needed. No effective actions are being taken. There is also a lack of awareness. There should be: tripartite dialogue on child labour; networking among ministries; free education up to high school. Law enforcement is weak. Government staff is not fully aware of laws and regulations. People turn blind eyes to the laws. Labour lawyers for workers' organizations: The current laws are very weak and not being applied. UN agencies: Not enough protection is defined in the law. There is no specific protection involved. Lack of participation. No definition of child labour. NGOs: There are no significant national laws in eliminating child labour, in particular in its worst forms. The awareness and understanding of the current laws is low. In the Child Law, there is no room for protection of child labourers, working children or forced labour. The public awareness on the WFCL, minimum age, working hours, prosecution of alleged perpetrator of child labour, protection of victims is not so clear that children are working in hazardous environment or exceeding working hours without any chance or access to education, leisure, health and social protection. There should be provisions on age, working hours, wages, workloads and types of work for children. Law enforcement is weak. There is no focal person such as labour ministry or police identified for the case of child labour and lack of complaint and monitoring mechanisms.
	Government: 1	
	Workers' organizations: 3	
	Labour lawyers for workers' organizations: 1	
	UN agencies: 2*	
	NGOs: 2	
	Government: 1	

*The other UN representative did not specify reasons in the questionnaire but directly provided comments in the validation workshop, including recommendations for improvement.

Note: Total number respondents: 14 (Government 5; Workers' organizations 3; labour lawyers for workers' organizations 2; UN agencies 2; and NGOs 2).

CHAPTER II: REVIEW OF KEY ELEMENTS OF NATIONAL LEGISLATION FOR THE ELIMINATION OF CHILD LABOUR AND PROTECTION OF YOUNG WORKERS IN LIGHT OF INTERNATIONAL LAWS AND STANDARDS

This paper will now closely review the existing national laws and regulations against the key elements of national legislation in eliminating child labour and protecting child workers as provided in the international laws and standards.

2.1 The right to protection from economic exploitation and hazardous work

The CRC requires the ratifying States to take all measures, including legislative, to ensure that the child's right to protection from exploitation, any hazardous work or work that interferes with the child's education is realized (Art. 32 (2)). To this end, and having regard to the relevant provisions of other international instruments, it requires the ratifying States in particular to:

- (a) Provide for a minimum age or minimum age for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article (Art. 32 (2)).

In the ratifying States, this child's right to protection from economic exploitation and hazardous work should best be upheld in the Constitution and effectively implemented through statutes: i.e. the laws of the child as well as the labour laws. The 2008 Constitution of Myanmar does not uphold this principle and therefore it is recommended to do so. The Child Law which was adopted in 1993 with the aims, among others, "to implement the CRC" (Sec. 3(a)), states that:

24. (a) Every child has:

- (i) the right to engage in work in accordance with law and of his own volition; and
- (ii) the right to hours of employment, rest and leisure and other reliefs prescribed by law.

(b) The Ministry of Labour shall protect and safeguard in accordance with law to ensure safety of children employees at the place of work and prevention of infringement and loss of their rights.

Firstly, the Child Law lacks the most important element that is the protection from exploitation, hazardous work and work that interferes with education, and therefore provision must be amended. Secondly, the responsibility to protect children from exploitation should not only rest with the Ministry of Labour, but any other relevant Ministries should involve, in particular the Ministry of Health with respect to ensuring safety and health at work; or the

Ministry of Education to ensure that the work does not interfere with the child's education. Therefore, it is recommended that provisions be amended to ensure inter-ministerial cooperation and coordination among all relevant Ministries.⁴⁷ Finally, as the sub-section (b) provides, the labour law has the crucial role to play in ensuring that the child is protected from exploitation and hazards, by prescribing regulations on the conditions of work and safety and health (see the detailed analysis provided in the corresponding sections below).

2.2 Freedom of association and collective bargaining

Freedom of association is another fundamental principle upheld in the international law, including the CRC. Article 15 (1) of the CRC provides that: "[S]tates Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly." Sec. 15 (c) of the Child Law provides that every child "has the right to participate in organizations relating to the child, social organizations or religious organizations permitted under the law." The Committee on the Rights of the Child expressed its concern that the rights to freedom of expression and association are severely limited in practice and that little space has been created for children to assemble or form associations outside the framework of Government-controlled NGOs.⁴⁸ The Committee therefore urged the Government to "[E]nsure the full implementation of the rights to freedom of expression and freedom of association and peaceful assembly"⁴⁹ and to "[T]ake measures to encourage children to form associations on their own initiatives outside the framework of Government-controlled NGOs".⁵⁰

From the perspectives of the ILO, freedom of association and collective bargaining are among the fundamental rights of workers to defend and promote their rights and interests at work and they are embodied in its two core Conventions: ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948, and ILO Convention No. 98 on Right to Organize and Collective Bargaining, 1949. And these rights should equally be guaranteed to child and young workers. It is recommended that the above-mentioned Section 15(c) of the Child Law be amended to specifically ensure a child's right to "freedom of association" in addition to "participate in organizations". Likewise, the Labour Organization Law currently only accords workers the right to "join as a member in a labour organization" (Article 3(a)) and therefore it is recommended to ensure the right to "freedom of association." With respect to the right to collective bargaining, it must be provided in the labour legislation (which currently does not) and possibly in the Child Law as well.

2.3 Equality and non-discrimination

Equality and non-discrimination is another fundamental principle upheld in the international law, including the CRC. Article 2 of the CRC provides that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination

⁴⁷ If the intention of the drafters was to designate the Ministry of Labour to adopt the necessary law (labour law), then it must be written so accurately.

⁴⁸ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 47.

⁴⁹ *Ibid.*, para. 48(b).

⁵⁰ *Ibid.*, para. 48(c).

of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Committee on the Rights of the Child has expressed its concern over the years about the “multiple forms of discrimination that persist in the State party, particularly those against girls and children in vulnerable and disadvantaged situations, such as children from ethnic and religious minority groups (including Rohingya children), children from remote and border areas, internally displaced children, children in street situations, children affected by HIV/AIDS, children with disabilities, orphans and children in situation of poverty.”⁵¹ The Committee therefore urged Myanmar, among others, to “undertake the necessary legislative changes to ensure non-discrimination on the basis of sex, ethnicity or religion and explicitly incorporate the principle of non-discrimination on any grounds in all newly developed legislation and policies.”⁵² In this respect, the adoption of the principle of non-discrimination in the Child law will reflect better the Government’s intention to move away from the old practice and align itself in its international obligation. Currently, the said Law ensures equality and non-discrimination in a limited manner: section 14 provides that “Every child shall, irrespective of race, religion, status, culture, birth or sex: (a) be equal before the law; (b) be given equal opportunities.” It is recommended that this section be urgently amended in line with Article 2 of the CRC as provided above.

Equality and non-discrimination are also among the fundamental principles upon which the ILO is founded and are embodied in its two core Conventions: ILO Convention No. 100 on Equal Remuneration, 1951, and ILO Convention No. 111 on Discrimination (Employment and Occupation), 1958. In the world of work, discrimination “not only violates a most basic human right, but has wider social and economic consequences. Discrimination stifles opportunities, wasting the human talent needed for economic progress, and accentuates social tensions and inequalities. Combating discrimination is an essential part of promoting decent work, and success on this front is felt well beyond the workplace.”⁵³ From the perspectives of the ILS, in addition to the Child Law, a number of recommendations can be proposed for the amendment of the labour legislation. In particular, the labour legislation must ensure, above all: defining and prohibiting all forms of discrimination, including direct and indirect discrimination; ensuring equal pay for work of equal value (so as to address discriminatory treatment of working children on the basis of age and other grounds. By having this principle in the labour law, those who are paid lower wages can avail themselves of the legal protection and redress); and defining and prohibiting sexual harassment.

⁵¹ United Nations: CRC, Concluding Observations: Myanmar, [CRC/C/15/Add.237], adopted on 4 June 2004 and published on 30 June 2012, para. 27; and CRC Concluding Observations 2012, *supra* note 18 at para. 35.

⁵² United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 36.

⁵³ See ILO’s website section “Equality and Discrimination”, available at: <http://ilo.org/global/topics/equality-and-discrimination/lang--en/index.htm>. Accessed 18 December 2014.

2.4 Scope of application and possible exclusions

ILO Convention No. 182 does not allow any exclusion from the scope of its application. ILO Convention No. 138 (Art. 2(1)) requires that it applies to employment or work in any occupation. Nonetheless, it allows possible exclusions from the application of this Convention “limited categories of employment or work in respect of which special and substantial problems of application arise” (Article 4(1)); or in the case of member States “whose economy and administrative facilities are insufficiently developed”, they may initially limit the scope of application of this Convention (Article 5(1)). In either case, it must be so decided after consultation with the organisations of employers and workers concerned, where such exist, and must specify in its first report to the ILO such exclusions (Article 4(2)). If the scope is to be limited using the option of Article 5, that decision has to be made before ratifying C138, and must be stated at the time of its ratification.

Myanmar’s current labour laws allow various exclusions from the scope of their application: for instance, the draft Shops and Establishments Act exclude certain types of workplaces from the scope of its application, such as “roadside stalls” or “funfairs, refreshment stalls and other shops in shows or entertainments held for a short duration” (Sec. 33). This means that children working in these workplaces do not receive the protection that they are supposed to receive under the draft Shops and Establishments Law. The same problem applies to other labour laws such as the Factories Act. Likewise, child domestic workers are covered only by the Labour Organization Law and not any other labour laws (more details about child domestic workers will be provided in the section on hazardous work).

One solution to this problem could be to provide that provisions of the current labour laws relating to the minimum age for work should cover young persons’ work even when they are outside of workplaces or sectors to which these laws apply; or to adopt separate regulations or other measures that would address the situation of children in other types of work. Another is to prohibit employment or work of children under certain age in a law of general application such as the Child Law.

2.5 Definition of a child and minimum age for admission to work

2.5.1 Definitions of a child

Under international law, a child is defined as a person who is under the age of 18 years old. This means that the measures implementing those international instruments, particularly legislation, should cover all boys and girls under the age of 18 years. It is not important what type of word is used to describe these persons.⁵⁴ Very often, however, national laws do not provide for a uniform definition of a child, leading to insufficient coverage of the protection and creating problems in their implementation. This is the case of Myanmar, where a child is defined differently in different laws as illustrated in the table below. For instance, the Child Law, which is by far the most comprehensive and widely known piece of legislation concerning child’s rights,⁵⁵ defines a child as a person who has not attained the age

⁵⁴ IPEC: *Practical Guide to Child Labour Reporting*, under Article 2 of C182. (Geneva, ILO and Turin, ITC, 2006). Available at: http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_1839/lang--en/index.htm.

⁵⁵ My-PEC Mapping Report, *supra* note 10 at 10.

of **16** years and guarantees protection of children from economic exploitation, hazardous work and work interfering with education (Sec. 24). However, the Factories Act and the Shops and Establishments Act allow employment of children over 14 years old, so unless these laws ensure proper protection of these children, there could potentially be protection gap.

The Committee on the Rights of the Child expressed its concern about the current distinction between a child (up to the age of 16 years) and a youth (between 16 and 18 years); the absence of a minimum age for marriage for boys; and the legality of the marriage of girls as young as 14 years with parental consent.⁵⁶ The Committee therefore recommended that the Government review its legislation to define the child as any person below 18 years of age and establish the minimum legal age for marriage for boys and girls at 18 years.⁵⁷

On the other hand, from the labour law perspectives, defining a child as every person under the age of 18 years “is of limited use when it comes to child labour... and regulating children’s work”,⁵⁸ because virtually all countries have decided to set various limits to work by persons younger than 18 years.⁵⁹ Thus, other age-based cut-off points are needed, and coordination of definitions related to children in all policy areas is necessary to ensure clarity and consistency across the board.⁶⁰

Table 4: Varying definitions of a child and minimum age for admission to work as given in the current national laws (illustrative, not exhaustive)

	Definitions of a child	Minimum age for admission to employment or work
The Children (pledging of labour) Act, 1933	Sec. 2 defines a “child” as a person under the age of 15 years.	An agreement to pledge the labour of a child shall be void (Sec. 3).
The Child Law, 1993	Sec. 2 (a) Child means a person who has not attained the age of 16 years; (b) Youth means a person who has attained the age of 16 years but has not attained the age of 18 years.	None
The Factories Act, 1951, amended in 2016	Sec. 2 (a) “child” means a person who has not completed his fourteenth year, the age permissible to do work [as certified] by a medical practitioner; (b) “adolescent” means a person who has completed his sixteenth year but has not completed his eighteenth year; (c) “young person” means a person who is either a child or an adolescent.	Sec. 76 A child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless -
The Shops and Establishments	No definitions	Sec. 14 (a) No person under the age of 14 shall be required or permitted to be employed in a shop or establishment.

⁵⁶ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 33.

⁵⁷ *Ibid.*, para. 34.

⁵⁸ IPEC: *Modern policy and legislative responses to child labour*, pp. 12. (Geneva, ILO, 2007). Available at: <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=8192>. Accessed on 20 December 2014.[Hereinafter referred to as ILO Modern Policy Response to CL]

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

	Definitions of a child	Minimum age for admission to employment or work
Act, amended in 2016		(b) No person who has not attained the age of 16 shall be required to work overtime exceeding the working hour in any shop or commercial establishment or establishment for public entertainment.
The Anti-Trafficking in Persons Act, 2005	Sec. 3 (j) Child means a person who has not attained the age of 16 years (k) Youth means a person who has not attained the age of 16 years but has not attained the age of 18 years.	None

2.5.2 Minimum age for admission to work

With respect to minimum age for admission to work, ILO Convention No. 138 requires enactment and enforcement of a legal system of minimum age for admission to work. The system must be harmonized with the end of compulsory schooling, and ILO Convention No. 138 establishes 3 benchmark minimum ages: General; Light Work; and Hazardous Work.

Table 5: The legal system of minimum age for admission to work as established under C138

General minimum age (Art. 2)		Light work (Art. 7)	Hazardous work (Art. 3)
Normally	End of compulsory schooling (minimum 15 years)	13 years	18 years (16 years as an exception)
Developing countries	14 years	12 years	18 years (16 years as an exception)

a) General minimum age

General minimum age should be 15 years in general and 14 years for developing countries.⁶¹ In Myanmar, the Factories Act prohibits the employment of children under 13 years old, but allows employment of children from the age of 13 years, with the condition that a certificate of fitness is granted and is kept in the custody of the manager of the factory and that the child carries it while at work (section 76). In theory, the certificate of fitness is meant to provide additional protection to those who have reached the minimum working age but are still below the age of 18 (see for instance, ILO Conventions, NoS. 77, 78 and 124 on Medical Examination of Young Persons). Even though it offers some safeguard against exploitation and abuse,⁶² as a recent report examining child labour in Mon State notes, there is a great discrepancy between what is written in the law and actual practice:

“According to the Factories and Oilfields Acts (in fact, the only two laws that currently limit working hours for children), a “certificate of fitness” provided by a physician authorizes 15 to 17-year-olds to perform adult duties and work adult hours, and permits children between 13 and 15 to work up to four hours a day.

⁶¹ For apprenticeship and vocational training, it can be 14 years upon approval by the competent Authority.

⁶² My-PEC Mapping Report, *supra* note 10 at 10.

Notably, not a single child interviewed for this report had heard of this certificate or encountered an employer who requested it, and many children described being allowed to do the same jobs as adults, although for significantly less pay”.⁶³

Myanmar is requested to amend these existing laws to gradually bring them more in conformity with the ILS. While C138 has not yet been ratified by Myanmar, it is important to envisage the law reform already taking account of the requirements of this fundamental Convention on child labour – especially if Myanmar is to aim at economic development driven by export of its products. Therefore, subject to the consensus of the national tripartite constituents, the ILO recommended 14 years as the general minimum working age, taking advantage of the flexibility of C138. Thus it was recommended to amend any legislative provision – specific to a sector or topic – should follow that line. In this regard, it is welcoming that the 2016 amendments to the Factories Act and the Shops and Establishments Act have raised the legal minimum age for employment from 13 to 14 years.

It is also important for the Government to bear in mind that education is a crucial component of any effective effort to eliminate child labour and that the minimum age for work should be aligned with the age of completion of compulsory schooling (C138, Article 2): in other words, the former should not be less than the latter. Any gap in the other way round (compulsory schooling stops at a lower age than the minimum working age) is not desirable for practical reasons, either.⁶⁴ It has been reported around the world that children who are in the “gap period” – those who have completed the compulsory school education but have not attained the age of admission into employment are particularly at risk of child labour. In this respect, the Committee on the Rights of the Child expressed concern over the limited length of compulsory education, which ends at fifth grade,⁶⁵ and therefore recommended that the Government “[E]xtend compulsory education to 16 years of age and take all the necessary measure to ensure that children enroll in and complete primary and secondary school, including children living in remote and border areas”.⁶⁶

Currently in Myanmar, compulsory education is up to 10 years old. The Government has been undertaking education reform, including the education law reform: i.e. the National Education Law (NEL) was just adopted in 2014;⁶⁷ the Basic Education Law and the Technical and Vocational Education Law are currently being drafted.⁶⁸ It is certainly commendable that the NEL “targets” to extend free and compulsory education to middle school (grade 6 to 9; age 10 to 14 years old) (Chapter 5 of the NEL). The challenge now is how to achieve this target

⁶³ Human Rights Foundation of Monland-Burma (HURFOM): *Children For Hire: A Portrait of Child Labour in Mon areas*. Women and Child Rights Project (WCRP), (Thailand, 2013), as originally cited in My-PEC Mapping Report, *supra* note 10 at 10.

⁶⁴ See CEACR General Survey, 2012 para 367 et seq on minimum age and compulsory education. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf.

⁶⁵ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 75 (c).

⁶⁶ *Ibid.*, para. 76 (c).

⁶⁷ But it is currently being amended.

⁶⁸ At the time of writing this paper, it is not clear whether the TVET Law will remain a sector law or will be part of the rule and regulations of the National Education Law.

in practice, and meanwhile how to prevent children aged between 10 and 14 years to engage in work which should be prohibited for children of these ages.

b) Minimum age for admission to light work

Minimum age for admission to light work should be 13 years in general and possibly 12 years for developing countries according to C138. However, this is not blanket permission for employing 12 year olds in full time jobs; and the light work must be compatible with compulsory schooling, not harmful, and under prescribed hours and conditions in specified types of work only. In the case of Myanmar, as the option of 14-year general minimum age has been taken, the light work may be permitted as from 12 years. The first recommendation is to conduct a situation analysis and tripartite consultation on the matter to assess whether Myanmar can or should permit light work and under what conditions in which specific activities.

c) Minimum age for admission to hazardous work

Minimum age for admission to hazardous work should be 18 years, in all economic sectors, and in any situation of employment or work. It could be exceptionally authorized for 16 years under strict conditions⁶⁹ determined by national laws or regulations or by the competent authority. In the case of Myanmar, the 2016 amendment to the Factories Act prohibits employment of “young persons” (i.e. under 18 years) to the work with dangerous machinery (Sec. 25) or it prohibits employment of “children” (i.e. under 15 years) in any part of a factory in which a cotton opener is at work (Sec. 29) and the work in the “worst form like in a hazardous situation, a situation harmful to his health, a situation deterring his education and in a workplace wherein he would be exploited” (Sec.75(a)). Or, the 2016 amendment to the Shops and Establishments Act prohibits persons under the age of 16years to work overtime in any shop, commercial establishment or establishment for public entertainment (sec.14(b)); prohibits persons under 18 years to perform the prescribed dangerous work or in the dangerous workplace (Sec. 15 (d)); and requires that young persons between 16 and 18 complete the relevant vocational trainings, know and abide by the directives relating to the occupational safety and health and to be certified by the registered medical practitioner to be fit for work, to be allowed to work in the trades which are safe and do not affect their development and morale (section 14e). This means that both laws only prohibit employment of children under 18 years to limited types of hazardous work, and therefore a total prohibition of hazardous work for children under 18 years (or 16 years if necessary and with adequate safeguards) should be introduced. It is important to ensure coherence among different acts sometimes undergoing separate processes of revision to be consistent in providing the same principle. The determination of the list of exact types and conditions of hazardous work to be prohibited is discussed later.

⁶⁹ That the health, safety and morals of the young persons are fully protected and that they receive adequate specific instruction or vocational training (plus consultation with Employers’ and Workers’ organizations) – under Article 3(3) of C138.

d) Minimum age for employment overseas

The Law Relating to the Overseas Employment, 1999 does not specify the ages of the workers who are permitted to seek and obtain employment overseas. In theory, the Supervisory Committee, who is established under this law under Sec. 8 (i) and is assigned the task of “preventing workers who are found unsuitable for overseas employment...from departing to take up such employment” may prohibit the under-age children to work abroad. However, even if this may be the case, the Law still has to clearly prescribe the minimum ages for employment abroad, or at least link the Law with the relevant child and labour laws. Bear in mind, however, that the relevant laws – i.e. the Child Law, the Factories Act, the Shops and Establishments Act, etc - currently provide varying definitions of children.

2.6 Exception for light work

National laws or regulations may permit the employment or work of persons as from 13 or 12 years of age to light work. ILO Convention No. 138 and Recommendation No. 146⁷⁰ require that light work is work which is:

- not likely to be harmful to their health or development;
- not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their a capacity to benefit from the instruction received; and
- the competent authority shall determine the activities in which employment or work may be permitted and shall prescribe the number of hours during which and the conditions in which such employment or work may be undertaken.

From the international standard of practice worldwide the consultation among national tripartite constituents is necessary at the outset. Subsequently, further consideration is usually given on national labour laws, to define light work and the age threshold, and to develop a list of light work in a separate ministerial regulation. The list should be developed and reviewed periodically in consultation with workers’ and employers’ organizations.

⁷⁰ C138 and R146 do not specifically define what light work is. But the Minimum Age (Non-industrial Employment) Recommendation, 1932 (No. 41) give examples of types of work considered to be light: i.e. running errands, distribution of newspapers, odd jobs in connection with the practice of sports or the playing of games, and picking and selling flowers or fruits. The Recommendation requires parental consent, a medical certificate of physical fitness, and “where necessary, previous consultation with the school authorities.” The hours of work should be adapted to the school time-table and the age of the child.

2.7 Exception for apprenticeship and vocational training

Children sometimes engage in apprenticeship and vocational training, which are indeed useful in providing them with skills and experience that could improve their future employment opportunities. ILO Convention No. 138 establishes broadly two types of requirements for the Government in respect of apprenticeship and vocational training for children (Article 6): i.e. to set the minimum age for such apprenticeship in enterprises at 14 years old and to regulate vocational training; and to prescribe conditions and standards for their protection and development, in consultation with the organizations of employers and workers concerned, and to ensure that such work is an integral part of—

- (a) a course of education or training for which a school or training institution is primarily responsible;
- (b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or
- (c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

In Myanmar, the existing laws currently do not provide any provisions for apprenticeship and vocational training for children and young persons, and therefore it is recommended that provisions be made.

The Government is now in the process of drafting the Technical and Vocational Education Law (TVEL). (The exact legal status of this law is unclear – whether it will be a stand-alone legislation or could be part of the rules and regulations of the National Education Law). This is an important part of Government’s efforts to reform the technical and vocational education system which so far has been seen as ineffective: i.e. there are few enrolments into the Technical, Vocational Education and Training (TVET) programmes; mismatch of the skills offered at TVET programmes and the actual skills needed in the labour market, as a result of which no guarantee for the graduates to find decent job opportunities; skills standards offered at TVET programmes are outdated or not abreast with the international standards; the TVET programmes are available only for certain trades, etc.⁷¹ The draft TVEL aims, among others, to “train practical skilled technician workers; to “raise individual’s income and employment of citizens” (Section 3 (a) and (e), respectively). And one of the aims of the draft TVET is to extend vocational trainings to the children who dropped out of basic education. In doing so, it is important to regulate the conditions of vocational training (detail recommendations are provided in Chapter III of this paper).

⁷¹ Comprehensive Education Sector Review (CESR): Technical, Vocational Educational Training, National Education Sector Plan Chapter (Draft), April 2015, p. 12-13.

2.8 Exception for artistic performances

ILO Convention No. 138 allows participation of children under the general minimum age – i.e. 15 years in general or possibly 14 years for some developing countries - in artistic performances⁷² by *permits granted in individual cases* which shall limit the number of hours during which and prescribe the conditions in which employment or work is allowed (Article 8).

In Myanmar, the existing laws currently do not provide any provisions in this regard and therefore it is recommended that provisions be made based on tripartite consideration of such an exception.

2.9 Worst forms of child labour⁷³

Article 3 of ILO Convention No. 182 requires immediate action for the abolition of the worst forms of child labour (WFCL) which is defined as: i.e.

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

In the case of Myanmar, neither the Child Law nor the current labour laws provide for the definition and prohibition of the WFCL and therefore provision must be made, in particular to define forced labour, debt bondage, serfdom, human trafficking and hazardous work as the WFCL and prohibit them. And as required under Article 12 of Recommendation No. 190, the first three forms of WFCL (a-c) should be criminal offences. Engagement of children in hazardous work (d) should also be effectively punished, including criminal penalties, or where appropriate, other sanctions (Article 7(1) of ILO Convention No. 182). Finally, people who commit offences under the laws of their own country involving the worst forms of child labour should be prosecuted in their own country even when the offences are committed in another country (Article 15 (c)).

⁷² For instance, a baby's appearance in a TV commercial. Other artistic performances may include participation in dancing, singing, acting, performance of musical instruments, etc.

⁷³ There are several international instruments which deal with worst forms of child labour. Among others, in this paper, ILO Convention No. 182 is used as the framework guidelines to navigate the analysis. Other relevant international instruments are provided in Box No. 1.

Below are the detailed analyses and recommendations for each form of WFCL.

Box 1: Other UN instruments which deal with some of the worst aspects of child labour in specific ways

- CRC (articles 28, 33-36, 39) and its two Optional Protocols: The Involvement of Children in Armed Conflict; and The Sale of Children, Child Prostitution and Child Pornography
- The International Covenant on Economic, Social and Cultural Rights (CESCR), 1966
- The International Covenant on Civil and Political Rights (CCPR), 1966
- The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery (CAS), 1956
- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (CSTP), 1949

2.9.1 All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict

Slavery is universally condemned⁷⁴ and many countries outlaw the practice. Modern practice prohibits slavery in all its forms, including the sale and trafficking of children, debt bondage and serfdom and forced labour or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.⁷⁵ In terms of legislative action against slavery and similar practices, it is important to put in place the following provisions.

- Outlaw and prohibit slavery and similar practices

It is important to outlaw and prohibit slavery and similar practices with criminal sanctions. In Myanmar, the Constitution prohibits “enslaving and trafficking in persons” (Article 358) and the Penal Code punishes anyone who “imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave...with imprisonment of either description for a term which may extend to seven years, and...fine (Art.370).⁷⁶

Definition and prohibition of forced or compulsory labour

Forced or compulsory labour is one form of slavery, but they are not exactly synonymous: slavery includes the ownership by one person over another, but it is most often not the case in modern forms of forced labour.⁷⁷ It is therefore important that legislation specifically defines and prohibits forced or compulsory labour. The ILO has adopted two core

⁷⁴ It is prohibited in several international instruments, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (CCPR).

⁷⁵ ILO Modern Policy Responses to CL, *supra* note 53 at 51.

⁷⁶ Also see Article 371.

⁷⁷ ILO: *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*, pp. 48. (Geneva, 2005). Available at:

http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_081999/lang--en/index.htm. Accessed on 20 December 2014.

Conventions on forced labour: i.e. ILO Convention No. 29 on Forced Labour, 1930 (C29), and ILO Convention No. 105 on Abolition of Forced Labour, 1957 (C105),⁷⁸ and also a protocol.⁷⁹ ILO Convention No. 29 defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Article 2(1)) and prohibits it in all its forms. It also requires that the illegal extraction of forced or compulsory labour be punishable as a penal offence and that ratifying states ensure that the relevant penalties imposed by law are adequate and strictly enforced.⁸⁰ Myanmar ratified the ILO Convention No. 29 on Forced Labour, 1930, in 1955.

With respect to legislative measures, ideally, prohibition of forced labour is upheld in the Constitution and effectively implemented through statutes. In Myanmar, the 2008 Constitution successfully prohibits forced labour (Article 359).⁸¹ Furthermore, the Ward or Village Tract Administration Law, of 24 February 2012 (as amended on 28 March 2012), which has repealed the Village Act and the Towns Act of 1907 (section 37) and makes the use of forced labour by any person a criminal offence punishable with imprisonment and fines (section 27A).⁸² Additionally, it is recommended that provision be made in the Child Law so as to explicitly prohibit forced labour against children.

Also, it is essential and recommended that definition and prohibition of forced labour be provided in the labour law, so as to explicitly prohibit and prevent the practice conducted by private agents, including those engaged in valuable and legitimate economic activity. The ILO further identifies that one of the most widespread forms of forced labour in the private sectors is the forced labour as an outcome of migration and trafficking of workers across national boundaries. Forced labour is commonly manifested in such coercive and fraudulent practices as confiscation or withholding of workers’ personal identify documents such as passports; threatening the denunciation of irregular migrants to the authorities in the host countries; deceiving a trafficked person about the type of work he or she will eventually undertake, and withholding of wages over prolonged periods. Finally, as provided in Article 12 of Recommendation No. 190, all forms of forced labour should be criminal offences.

Adding the definition of “debt bondage”

Article 3(a) of ILO Convention No. 182, in its enumeration of forms of slavery or practices similar to slavery, specifically identifies debt bondage as a worst form of child

⁷⁸ C105 rather deals with forced labour that takes place outside the realm of labour law, and thus is not dealt with in this paper.

⁷⁹ Protocol of 2014 to the Forced Labour Convention

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174672:NO.

⁸⁰ Exceptions are provided for work required by compulsory military service, normal civic obligations, as a consequence of a conviction in a court of law (provided that the work or service in question is carried out under the supervision and control of a public authority and that the person carrying it out is not hired to or placed at the disposal of private individuals, companies or associations), in cases of emergency, and for minor communal services performed by the members of a community in the direct interest of the community.

⁸¹ “except hard labor as a punishment for crime duly convicted and duties assigned by the Union in accord with the law in the interest of the public.”

⁸² The CEACR noted with *interest* the adoption of this law. CEACR Observation to Myanmar on C29, adopted in 2012 and published in 2013.

labour.⁸³ This consists of several situations, including where children are sold into bondage by their parents, where a parent is subject to debt bondage and children have no alternative but to work with their parents, or where children are used to settle financial disputes and sent by their family to work off a debt.⁸⁴ In addition to forced labour, it is useful for the labour law to specifically prohibit debt bondage: i.e. debt bondage or “bonded labour” is understood as the “taking of a loan or wage advance by a worker from an employer or labour recruiter, in return for which the worker pledges his or her labour and **sometimes that of family members** in order to repay the loan” (emphasis added).⁸⁵ The emphasis is added because the general prohibition of debt bondage which does not specifically refer to or include child debt bondage often fails to deal with the intergenerational aspect of debt bondage – the automatic passing of a debt from parent to child – which effectively holds children in a continuing state of forced labour.⁸⁶

Serfdom

Article 3(a) of ILO Convention No. 182, in its enumeration of forms of slavery or practices similar to slavery, specifically identifies serfdom as a worst form of child labour. While rarely is serfdom specifically defined in modern practice,⁸⁷ an example does exist of an explicit definition given in national law.⁸⁸ In Myanmar, it is reported that land-related/feudalism serfdom is somewhat a practice for long time, although it does not apply directly to children and rather applies to their parents and family units. When family units including children are altogether in land-related forced labour, it is also an issue of a worst form of child labour. It is therefore recommended that serfdom be specifically included in the legislative prohibition in Myanmar.

Outlaw and prohibit the sale and trafficking of children for labour exploitation⁸⁹

The sale of children should be outlawed and prohibited with criminal sanctions. In Myanmar, the Penal Code prohibits the sale of children but it appears to be limited for the purpose of sexual exploitation or for “any unlawful and immoral purpose (Article 372).⁹⁰

⁸³ CEACR General Survey 2012, *supra* note 7 at 201.

⁸⁴ *Ibid.*

⁸⁵ ILO: *A Handbook for Employers & Business*, Special Action Programme to Combat Forced Labour, (Geneva, 2015). Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_099622.pdf. A useful reference can be made to Article 9 of the Chinese Labour Contract Law which stipulates that: “While recruiting an employee, an employer unit is not allowed to withhold the employee’s identity documents nor other certificates, neither to make demands on employees providing guarantees nor to collect any kind of money and assets by any other excuses.”

⁸⁶ ILO Modern Policy Response to CL, *supra* note 53 at 54.

⁸⁷ *Ibid.*, pp. 57.

⁸⁸ *Ibid.*

⁸⁹ Note that the ILO Convention No. 29 primarily deals with trafficking for forced labour purposes. With respect to trafficking for the purpose of sexual exploitation, coercive sexual exploitation and forced prostitution do come within the scope of the definition of forced or compulsory labour in Article 2, paragraph 1, of the Convention. (ILO, “General Survey on Forced Labour”, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part B), 2007, pp. 41).

⁹⁰ It provides as follows: “Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be

Therefore, it is recommended that the sale of children be outlawed and prohibited regardless of the purposes.

With respect to the sale of children aimed at the trafficking (i.e. child trafficking), Myanmar ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), supplementing the UN Convention Against Transnational Organized Crime (The Palermo Protocol) in 2005. In the same year, the Anti-Trafficking in Persons Law was enacted with an aim, among others, to prevent and suppress trafficking in persons paying “particular attention to women, children and youth” (Sec. 4 (c)). Accordingly, the Law provides special protection to the protection of women and children victims of human trafficking (Chapter V) and also imposes heavier sanctions for the offenders of women and child trafficking (Sec. 24) While this is certainly an important piece of legislation, some improvements should be made in order to effectively eliminate child trafficking for labour exploitation.

Box 2: Child trafficking – The ILO response through IPEC

Defining (child) trafficking

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) defines trafficking as “...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” In the case of children (i.e. under 18 years of age) the Protocol further specifies, “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in the definition”.

In addition, ILO emphasises the “labour” exploitation dimension of trafficking. In the context of its Convention No. 182 on Worst Forms of Child Labour, ILO considers child trafficking as one of the worst forms of child labour (WFCL) and understands it as a crime involving the recruitment and movement of children for purposes of labour, sexual and other forms of exploitation.⁹¹

Child trafficking – elements defined for the purpose of IPEC⁹² operations:

A child - a person under the age of 18 years;

“Acts” of recruitment, transportation, transfer, harbouring or receipt, whether by force or not, by a third person or group;

The third person or group organizes the recruitment and/or these other acts for exploitative purposes;

Movement may not be a constituent element for trafficking in so far as law enforcement and prosecution is concerned. However, an element of movement within a country or across borders is needed - even if minimal - in order to distinguish trafficking from other forms of slavery and slave-like practices enumerated in Art 3 (a) of ILO Convention No. 182, and ensure that trafficking victims away from their families do get needed assistance.

Exploitation includes:

- a) all forms of slavery or practices similar to slavery, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict (ILO Convention No. 182, Art. 3(a));
- b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances (C182, Art. 3(b));

likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

⁹¹ Such as children involved in crime or armed conflict.

⁹² IPEC, *supra* note 96 at 4.

- c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties (C182, Art. 3(c));
- d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (C182, Art. 3(d) and C138, Art. 3);
- e) work done by children below the minimum age for admission to employment (C138, Art. 2 & 7).

Threat or use of force or other forms of coercion, abduction, fraud or deception, or the abuse of power or a position of vulnerability at any point of the recruitment and movement do not need to be present in case of children (other than with adults), but are nevertheless strong indications of child trafficking.

The first problem concerns the definitions of trafficking. The definitions provided in the Anti-Trafficking Law (Section 3 (a))⁹³ are fully in conformity with the international law, in particular specifically including forced labour, forced service, slavery, servitude, debt-bondage in the definition of exploitation. It is worth mentioning that it takes a step further to define “debt bondage” as well (Explanation (3)). It is also worth pointing out that the Law protects men as well as women against human trafficking. This cannot necessarily be taken for granted because some countries’ anti-trafficking laws do not cover adult men: for instance, that of China only refers to trafficking in women and children (for the purpose of sexual exploitation). Nonetheless, there are a few shortcomings in successfully preventing and prohibiting child trafficking. First, there is a lack of stipulation that, in the case of children, any means of coercion need not be present in establishing the crime of trafficking. Second, the Anti-Trafficking Law neither refers explicitly to nor defines child labour, particularly in its worst forms as defined in C182. This problem is aggravated by the fact that the labour laws do not do so either. Without the explicit reference to or definition of child labour in either of the laws, the crime of child trafficking cannot be established in full terms of ILO Conventions Nos. 138 and 182. That is, under the current Anti-Trafficking Law and labour laws of Myanmar, the crime of child trafficking may not be established for the “recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons” (Sec. 3(a) of the Anti-Trafficking Law) into: the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties (C182, Art. 3(c)); and d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (C182, Art. 3(d) and C138, Art. 3).

The second problem concerns the protection of trafficked victims. While it is commendable that the Anti-Trafficking Law establishes a special Chapter (Chapter V) to “safeguard the rights of trafficked victims” (Chapter V), these provisions can be further strengthened by not limiting its scope only to safeguarding the dignity and rights of the trafficked victims during the court proceedings as it does now, but also by extending it to all steps and procedures from the identification of the victims to protection, and in the case of cross-border trafficking, to repatriation, reintegration and rehabilitation as well. In the case of women and children, there are useful rights-based guidelines developed by the international organizations such as ILO and UNICEF. It is recommended that consideration be given to

⁹³ “**Trafficking in Persons** means recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons after committing any of the following acts for the purpose of exploitation of a person with or without his or her consent: (1) threat, use of force or other forms of coercion; (2) abduction; (3) fraud; (4) deception; (5) abuse of power or of position taking advantage of the vulnerability of a person; (6) giving or receiving of money or benefit to obtain the consent of the person having control over another person.”

incorporating those well-established standards into the Anti-Trafficking Law and/or its implementing rules.

The third problem concerns the enforcement. Under the Anti-Trafficking Law, the penalties that can be imposed on the offender of trafficking appear sufficiently severe and dissuasive (Chapter IX): i.e. from a minimum of 10 years to a maximum of imprisonment for life if the victims are women and children and youth; otherwise, from a minimum of 5 years of imprisonment to a maximum of 10 years. Other than that, the problem is primarily with respect to the practical enforcement of the penalty provisions. In general, anti-trafficking laws are difficult to enforce because of the complexity involved in the crime of trafficking, in particular its cross-border nature. According to a reliable source, the Myanmar Government's efforts to enforce anti-trafficking law focuses primarily on the recruitment and transport of Burmese women and girls across international borders for forced marriages and sex trafficking, and the Government reported investigating 120 cases of trafficking, and prosecuting 215 offenders in 2012.⁹⁴ With respect to enforcement, the Committee on the Rights of the Child, while acknowledging the Government's significant efforts to combat international sex trafficking of women and girls and to protect repatriated victims of cross-border sex trafficking, it nevertheless urged the Government to "[E]nsure that adequate measures are taken to hold perpetrators of child sale, trafficking and abduction accountable for their offences".⁹⁵ The Committee also expressed concern that the Government's enforcement efforts are limited when it comes to prevention and protection of victims of internal trafficking within Myanmar.⁹⁶

Compulsory recruitment of children for use in armed conflict

The use and involvement of children in armed conflict is condemned in a number of international instruments (Box 4) and many countries outlaw and prohibit the practice.

Box 3: International Laws and Standards related to recruitment or involvement of children for use in armed conflict

- Convention on the Rights of the Child, adopted in 1989 and entered into force in 1990 [Ratified by Myanmar].
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), adopted in 2000 and entered into force in 2002 [NOT ratified by Myanmar].
- ILO Convention No. 29 on Forced Labour, adopted and entered into force in 1930 [ratified by Myanmar].
- ILO Convention No. 182 on Worst Forms of Child Labour, adopted in 1999 and entered into force in 2000 [Ratified by Myanmar].
- Rome Statute of the International Criminal Court, circulated in 1998 and entered into force in 2002 [NOT ratified by Myanmar].

⁹⁴ U.S. Department of Labor: *Trafficking in Persons Report 2013*, "Burma" pp. 111-114, at pp. 112. Myanmar (i.e. Burma in its report) is listed on the Tier-2 Watch List for the second consecutive year. Available at: <http://www.state.gov/documents/organization/210738.pdf>. Accessed on 05 June 2014. The report calls Myanmar as Burma in its report.

⁹⁵ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 92(c).

⁹⁶ *Ibid.*, para. 91(c).

- Additional Protocols (I and II) to the four Geneva Conventions of 1949 (1977) [NOT ratified by Myanmar].⁹⁷
- Customary International Humanitarian Law.⁹⁸

The Committee on the Rights of the Child, while noting the efforts of the Government and the Committee on the Prevention of Military Recruitment of Underage Children to prevent and halt the recruitment and use of child soldiers and also the Government's cooperation with ILO to return underage recruits, expressed its deep concern, among others, over:

- The on-going recruitment of child soldiers, both in the military and by non-State actors, and the estimates of thousands of underage soldiers;
- The use of forced labour of children in support of military garrisons or military operations and of non-State armed groups, in activities such as portering, sentry or guard duty and camp-security-fence construction, in particular in ethnic or religious minority regions.⁹⁹

The Committee therefore urged the Government, among others, to:

- Take the appropriate measures to systematize, institutionalize and strengthen disciplinary processes and/or action against those responsible for aiding and abetting the recruitment of child soldiers, in particular ensure that all persons, including senior officials, who have sponsored, planned, incited, financed or participated in military or paramilitary operations using child soldiers are prosecuted by independent and impartial courts;
- Take immediate and effective measures to eliminate child labour in support of military garrison and operations and of non-State armed groups as mentioned above, and take immediate measures to systematize and institutionalize disciplinary processes and/or action against military officers and civilians responsible for recruiting and using child labour;

⁹⁷ "The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects. They specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. The Conventions and their Protocols call for measures to be taken to prevent or put an end to all breaches. They contain stringent rules to deal with what are known as "[grave breaches](#)". Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold. International Committee on Red Cross (ICRC), "Overview of the Geneva Conventions and their Additional Protocols". Website available at: <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>. Accessed on 26 December 2014.

⁹⁸ "Customary international law consists of rules that come from "a general practice accepted as law" and exist independent of treaty law. Customary IHL is of crucial importance in today's armed conflicts because it fills gaps left by treaty law and so strengthens the protection offered to victims." ICRC, "Customary law". Website available at: <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>. Accessed on 26 December 2014. The website catalogues the 161 rules of customary international humanitarian law, identified by the Study on customary international humanitarian law, conducted by the International Committee of the Red Cross (ICRC) and published by Cambridge University Press in 2005.

⁹⁹ United Nations: CRC Concluding observations 2012, *supra* note 18 at para. 81.

- Ratify the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.¹⁰⁰

The CRC, which Myanmar has ratified, requires States Parties to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities” (Article 38 (2)); and to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest” (Article 38 (3)). The Optional Protocol to the CRC on the involvement of children in armed conflict (OPAC) raised the minimum age for direct participation in hostilities and for compulsory recruitment by both state armed forces and non-state armed groups to 18 years (Articles 1, 2 and 4) and requires States Parties to raise the minimum age for voluntary recruitment of persons into their national armed forces from 15 years as set out in Article 38 (3) of the CRC to 18 years (Article 3(1)). And OPAC requires each State Party to take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of OPAC within its jurisdiction (Article 6(1)).

ILO Convention No. 182, which Myanmar has ratified, defines forced or compulsory recruitment of children under 18 years for use in armed conflict as one of the worst forms of child labour (WFCL) and requires member States to take immediate action to abolish and prohibit it. ILO Convention No. 182 also requires that compulsory recruitment of children for use in armed conflict should be a criminal offence.

The UN Security Council has called for a range of actions against those who forcibly recruit children for use in armed conflict, including exclusion of such persons from amnesty programmes and calling for respect for relevant international humanitarian law and child rights and protection obligations.¹⁰¹

In summary, core legal elements of international laws and standards related to the recruitment or involvement of children for use in armed conflict are: setting of minimum age for forced or compulsory recruitment of children or their direct participation in armed conflict, both by State and non-State actors; provisions to ensure rehabilitation and social reintegration of persons who are victims of these acts; and prosecution of any person who took part in these acts.

The Government of Myanmar continues its efforts to prevent the recruitment and use of children in armed conflict. The UN and the Government of Myanmar signed, on 27 June 2012, an action plan to prevent the recruitment and use of children by Myanmar’s armed forces, known as Tatmadaw, and allow for the release of under-age recruits.¹⁰² With respect to legislative measures, currently, the only applicable law appears to be the Ward or Village

¹⁰⁰ *Ibid.*, para. 82.

¹⁰¹ ILO Modern Policy Response to CL, *supra* note 53 at 59.

¹⁰² “The action plan was negotiated under the mandate of the Security Council resolution 1612, which established the UN-led Monitoring and Reporting Mechanism to report on six grave violations of children’s rights in situations of armed conflict.” United Nations News Centre, “UN and Myanmar sign plan to prevent ...accessed on 9 December 2014.

Tract Administration Law of 24 February 2012 (as amended on 28 March 2012) which makes the use of forced labour by any person a criminal offence punishable with imprisonment and fines (section 27A).¹⁰³ Given the gravity of the problem of child soldiering, it is recommended that specific provisions be made in the Child Law concerning forced or compulsory recruitment of children under the age of 18 years in armed conflict as well as forced or compulsory use of children for any work in the context of armed conflict, including portering, sentry or guard duty and camp-security-fence construction. The Child Law could also establish provisions to ensure rehabilitation and social reintegration of children who are victims of these acts, as required under the international law as mentioned above.¹⁰⁴

2.9.2 The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances

The CRC requires States Parties to protect children from all forms of sexual exploitation and abuse, including the exploitative use of children in prostitution and in pornographic performances and materials (Article 34).¹⁰⁵ The ILO Convention No. 182 requires the States Parties to define the use of children (both boys and girls under 18 years of age) in prostitution, pornography or pornographic performances as a worst form of child labour to be eliminated. Furthermore, ILO Convention No. 182 prohibits not only the use of children but also more broadly their procurement or offering for these acts (Article 3(b)).

In Myanmar, Section 66 of the Child Law punishes whoever commits any of the following acts, with imprisonment OR fine:

- (a) neglecting knowingly that a girl under his guardianship, who has not attained the age of 16 is earning a livelihood by prostitution;
- (b) permitting a child under his guardianship to live together or to consort with a person who earns a livelihood by prostitution;

The Penal Code punishes with imprisonment AND fine whoever “sells, lets to hire, or otherwise disposes” or “buys, hires or otherwise obtain possession” of “any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose” (Sections 372 and 373).

First, as “strongly” recommended by the Committee on the Rights of the Child, the Child Law should be amended “to protect children from commercial and sexual exploitation,”¹⁰⁶ instead of only prohibiting the legal guardians to allow children to earn a livelihood by prostitution. Second, the Child Law should also prohibit the use, procuring or offering of a child for prostitution and for the production of pornography or pornographic

¹⁰³ The CEACR noted with *interest* the adoption of this law. CEACR Observation to Myanmar on C29, adopted in 2012 and published in 2013.

¹⁰⁴ According to UNICEF, the draft Child Law would include provisions at least on: prohibition of recruitment of children; prohibition of prosecution of children; and obligation of governments to release and protect children.

¹⁰⁵ And this provision is further strengthened by the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. Myanmar has not ratified it.

¹⁰⁶ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 90 (a).

performances as required by ILO Convention No. 182. Third, in doing so, the Child Law should raise the minimum age from 16 years to 18 years. Fourth, it should include not only girls but boys in its protection. Fifth, the Penal Code should include not only prostitution but also pornography and pornographic performances in its current prohibitions (the term “unlawful and immoral purpose” as currently provided may not be specific enough to cover pornography or pornographic performances). Finally, with respect to enforcement, the Committee on the Rights of the Child expressed its deep concern over the prosecution of children engaged in prostitution¹⁰⁷ and therefore strongly recommended that the Government “[E]nsure that victims of sexual abuse and exploitation are not criminalized and have access to appropriate recovery and reintegration programmes and services.”¹⁰⁸

2.9.3 The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties

ILO Convention No. 182 prohibits the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs. In Myanmar, the Child Law appears to be the only relevant law at the moment. Section 65 of the Child Law penalizes whoever commits any of the following acts with imprisonment or fine:

- (a) employing or permitting the child to work in the business which trades in alcohol;
- (b) urging, inducing or abetting the child to gamble;

First, it is recommended that the above-mentioned prohibition in the Child Law be expanded to all illicit activities, in particular the production and trafficking of drugs. Second, it is recommended that acts of involving a child in illicit activities be broadly defined as the “use, procuring or offering” as defined in ILO Convention No. 182.

2.9.4 Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children [Hazardous work].

International Labour Standards

ILO Convention No. 138 provides that “admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years” (Article 3(3)). And ILO Convention No. 182 further defines “hazardous work” as one of the worst forms of child labour which should be tackled urgently (Article 3(d)).

In terms of legislative measures, both Conventions leave member States to determine in their national laws or regulations the types of employment or work that should be considered “hazardous”, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards (Article 4(1) of C182). The recommended approach for Myanmar is probably to have the basic provision in

¹⁰⁷ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 89 (d).

¹⁰⁸ *Ibid.*, para.90 (e).

the labour law prohibiting hazardous work for children and mandates the Government to develop a detailed list of hazardous work in administrative regulations, in consultation with social partners. And such a list should be reviewed periodically and revised as necessary, in consultation with the organizations of employers and workers concerned (Article 4(3) of C182). Given the ratification of C182 by Myanmar, it is of crucial importance to take action in line with these requirements and report to the ILO.

Regarding how to determine hazardous types of work for children, Article 3 of Recommendation No. 190 provides useful guidance as follows:

3. In determining the types of work referred to under Article 3(d) of the Convention, and in identifying where they exist, consideration should be given, inter alia, to:

- (a) work which exposes children to physical, psychological or sexual abuse;
- (b) work underground, under water, at dangerous heights or in confined spaces;
- (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
- (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
- (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

Looking at the ILO member States, there are many legislative approaches to defining hazardous work that should be prohibited to children. Some hazardous work can be defined by:¹⁰⁹

- **Category:** e.g. types of work which involve machinery, handling of poisons, handling of explosives, etc;
- **Risk:** e.g. work involving harmful exposure such as to radiation, dust or gas, toxic agents, etc; or work with risk to health such as from extreme heat or cold, noise, or vibration, etc;
- **Sector or its characteristics:** e.g. underground; mines; night work; workplaces that are dangerous or injurious to safety, health, welfare or morals; work involving driving or riding any heavy vehicle; work involving the service of customers in entertainment establishments such as night clubs, dance halls, discotheques and bars; workplaces licensed to sell alcohol or tobacco products.

Additionally, some countries recognize gender-specific hazardous work. For instance, setting lower limits for the weights girls are permitted to handle than those for boys; or allowing girls to work in the theatre only if they have attained the age of 18, while boys can take on such work from 16 years of age, etc.

Regarding the exception to the minimum age (18 years) for admission into hazardous work, ILO Convention No. 138 allows for the limited possibility of young persons being

¹⁰⁹ ILO Modern Policy Response to CL, *supra* note 53 at 41-42, 50.

authorized to do such work from the age of 16 with strictly protective conditions: “that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity” (Article 3(3)).

Finally, whatever legislative approaches should the Government of Myanmar decided to adopt, the Government is requested to be mindful that both ILO Conventions Nos. 138 and 182 require that governments consult employers’ and workers’ representatives in determining the types of hazardous work and fixing the minimum age for such work (i.e. 18 years for the general prohibition, and possibly authorizing exceptions under strict conditions as from 16).

Myanmar

In Myanmar, currently, Section 65 (a) of the Child Law lists certain prohibited acts as follows:

- (a) employing or permitting a child to perform work which is hazardous to the life of the child or which may cause disease to the child or which is harmful to the child's moral character;

And the violation of this provision be punished with imprisonment or fine (Section 65 (a)).

The amended Factories Act 2016 prohibits employment of young persons to work with dangerous machinery (section 25), employment of children in any part of a factory in which a cotton opener is at work (section 29) and the work in the “worst form like in a hazardous situation, a situation harmful to his health, a situation deterring his education and in a workplace wherein he would be exploited” (section 75a). The amended Shops and Establishments Act prohibits persons under 18 years to perform the prescribed dangerous work or work in the dangerous workplace (section 15d) and requires that young persons between 16 and 18 complete the relevant vocational trainings, know and abide by the directives relating to the occupational safety and health and to be certified by the registered medical practitioner to be fit for work, to be allowed to work in the trades which are safe and do not affect their development and morale (section 14e).

From the perspectives of the ILS, there are two issues that require consideration. First, the prohibition of hazardous work should apply to all children under the age of 18 years. It is therefore recommended that provision be amended to include both children (under 16 years) and youths (between 16 and 18 years). Second, the articulation of the work prohibited for children is not broad enough to cover all types of hazardous work which should be prohibited under the CRC, ILO Conventions Nos. 138 and 182 as provided above. Therefore, it is recommended that the text be amended as follows: “...work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

In this respect, a significant development has taken place: a list of hazardous work not to be performed by all children under 18 years was developed and validated through tripartite and wider stakeholder consultations in 2016. The list adopts the definition of

hazardous work in line with the ILO as mentioned above. On the one hand, the list provides some sector-specific hazards, such as in agriculture, construction, fishing, manufacturing, food-processing, petroleum and oil, etc. On the other hand, it also allows identification of hazardous work in any other sectors or occupations where children may be working, by applying the general principles on hazardous work as outlined in the provisions 1 and 2. In order to put this list into effect, the ILO has been advocating with the MOLIP and the Parliament to attach this list to the Occupational Safety and Health Bill and/or the Child Law Bill which are both currently being debated at the Parliament. And the list should be made enforceable in all sectors including factories and shops and establishments.

Table 6: Interview results on the stakeholders’ understanding and recommendations on “hazardous work”

	Questions asked	Responses
Government	What types of work are currently prohibited, and if so, up to what age?	They are defined in the Factories Act.
Employers’ organizations	What kind of hazardous tasks or conditions exist in YOUR sector/area, in which you think children under 18 yrs should not be working?	Interviews not conducted
Workers’ organizations		• Exposure to hazardous materials, working rather than going to school, work that affects them negatively (physical or mental), is something that they should not be doing • Heavy workload (carrying heavy things) • Long hours • Night work • Agriculture using pesticide • Dirty work • Fishery • Using pesticide • Carrying brick and sand
Labour lawyers		• Shattering the rock • Children in debt bondage • Pledging of children is occurring increasingly and usually leads to child trafficking from rural to urban areas for employment. These children are working in small production houses and factories.
UN	What types of work should be defined as hazardous work that should be prohibited for children?	• Rubber farm • Shattering the rock • Child soldiering • Night work • Tea shop • Domestic work • Welding • Fishery • Construction
NGOs		• Working in teashop and restaurant with long working hours without access to health, education, leisure, freedom of expression, etc. • Working at construction sites, carrying heavy things without secured uniforms, sufficient food, safe water, medical support, life insurance, etc. • Working in factories, markets for long working hours without any social protection

	Questions asked	Responses
		• Working on the street, selling betel, cigarette, flowers, water, newspapers/journals; begging with and without parents/adults; collecting recycles near around wastage without any mask or gloves • Working voluntarily or forcibly in armed groups or using in armed conflict situation (just as examples) • Construction / Rubber Plantation • KTV / Massage • Fishing boat • Domestic Work • Street Vendor • Making Charcoal • Prick Wig • Child Soldier • Opium Scratch • Pluck tea plant • Gold mine

Note: Total number respondents: 14 (Government 5; Workers' organizations 3; labour lawyers for workers' organizations 2; UN agencies 2; and NGOs 2).

Child domestic work

In addition to the general overview, this paper specifically addresses child domestic work because of the unique characteristics surrounding child domestic workers: i.e. millions of children are engaged in domestic work around the world and their work often might involve dangers and hazards that are detrimental to their safety, health and morals; however, the hidden and informal nature of domestic work – i.e. as it is undertaken in private households where labour inspectorate most often does not have access to - makes child domestic workers invisible and vulnerable to abuse and exploitation.

Many people, from policymakers to the general public, do not give Child Domestic work the recognition that it warrants given its potential for abuse and violation of children's rights. Domestic work for children is often seen not as a job but as a favour granted by the employer to help poor children and their families. As a result of these prevailing attitudes, laws and policies to protect child domestic workers are usually not created or, if created, are not enforced. National decision makers and local government officials, including labour inspectors, often do not consider child domestic labour as a "labour issue".¹¹⁰

The ILO urges its member States to include child domestic work in national discussions of the scope of the minimum working age and also, as relevant, of hazardous work under ILO Conventions Nos. 138 and 182 and under Recommendation No. 201 §5.1. The ILO Committee of Experts (CEACR) has discussed various manifestations of *child domestic work as forced labour*, and more recently as *a worst form of child labour*.¹¹¹ This includes children who are obliged to work long hours without pay and who experience restricted freedom of movement, children who are sold into domestic work by their parents, those who are

¹¹⁰ *Ibid.*, pp. 10

¹¹¹ ILO: *Ending child labour in domestic work and protecting young workers from abusive working conditions*, at 14. (Geneva, 2013). Available at: http://www.ilo.org/ipec/Informationresources/WCMS_207656/lang--en/index.htm. Accessed on 28 February 2015.

trafficked for the purpose of domestic work, as well as children in various traditional systems of domestic servitude.¹¹² In some countries including in Indonesia, child domestic work is specifically defined as a worst form of child labour and is prohibited for all children under the age of eighteen.

For the purpose of legal analysis, “child labour in domestic work” (CLDW) is defined as domestic work undertaken by: a) children under the legal minimum working age; and b) children above the legal minimum age but under the age of eighteen and subject to slavery-like, hazardous, or other exploitative conditions; a form of “child labour to be eliminated” as defined in international treaties.¹¹³

In the case of Myanmar, the available sources do indicate that children are working as domestic workers¹¹⁴ and that there are risks and incidences of abuse and exploitation.¹¹⁵ However, at the moment, the existing labour laws only partially apply to domestic workers: i.e. they are specifically covered under the Labour Organization Law but not by other labour laws, either explicitly or implicitly, including Payment of Wages Law, Leave and Holidays Act, etc. If the Labour Organization Law and the Child Law are the only laws applicable to child domestic work at the moment, then the current rules and standards applicable to child labour are quite limited as follows:

- A child under the age of 16 years old who is defined as a “child” under the Child Law can engage in domestic work with the “right to hours of employment, rest and leisure and other reliefs prescribed by law.” (Sec. 24 (a)). And the Ministry of Labour is designated to ensure, in accordance with the law, the safety of children employees at the place of work and prevention of infringement and loss of their rights (Sec. 24 (b));
- A child between the ages of 16 and 18 can also engage in domestic work but without the protective regulations as described above.
- Child domestic workers of all ages have the right to organize (but not the right to bargain collectively) and to take strike actions against their employers (Labour Organization Law).

Apparently, there are a number of shortcomings from the perspectives of the ILS. First and foremost, it is a grave situation that under the current national laws, children of all ages can engage in child domestic work, as the Child Law is the only applicable law and the existing labour laws which set the minimum ages for employment of children under certain ages do not apply to domestic work, because they are applicable only to factories or shops and establishments. Therefore, it is recommended that the minimum age for employment of children in domestic work be set urgently. In doing so, the policy and law makers are asked to decide whether to prohibit domestic work to all children under the age of 18 years (as in the case of Indonesia), or to allow it to children above the minimum working ages under specific

¹¹² ILO: *Giving globalization a human face* (2012), paragraph 469, cited in *Ibid*.

¹¹³ See ILO’s International Programme on the Elimination of Child Labour (IPEC) website section “Child labour and domestic work”. Available at: <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm>. Accessed on 20 December 2014.

¹¹⁴ For instance, UNICEF Situation Analysis, *supra* note 17 at 116.

¹¹⁵ Accounts of NGO representatives at the validation workshop, as well as some media reports

conditions and safeguards. In line with ILO Recommendation No. 201 § 5.1 and 5.2 which state:

- (1) Taking into account the provisions of the ILO Convention No. 182 on Worst Forms of Child Labour, 1999, and Recommendation (No. 190), Members should identify types of domestic work that, by their nature or the circumstances in which they are carried out, are likely to harm the health, safety or morals of children, and should also prohibit and eliminate such child labour.
- (2) When regulating the working and living conditions of domestic workers, Members should give special attention to the needs of domestic workers who are under the age of 18 and above the minimum age of employment as defined by national laws and regulations, and take measures to protect them, including by:
 - (a) strictly limiting their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts;
 - (b) prohibiting night work;
 - (c) placing restrictions on work that is excessively demanding, whether physically or psychologically; and
 - (d) establishing or strengthening mechanisms to monitor their working and living conditions.

Secondly, it is recommended to urgently extend the application of, if not done so yet, Section 24(a) of the Child Law, which is the only legal protection available to child domestic workers at the moment, to child domestic workers.

Thirdly, it is recommended to urgently include child domestic work in the national discussions of hazardous work, with the view to identify the way in which domestic work should be contemplated by the hazardous child labour list in Myanmar, and to determine whether domestic work – either as a whole or some specified tasks or conditions – should be prohibited as hazardous work.¹¹⁶

Finally, the enforcement issues also require special attention and measures. In general, it is difficult to enforce labour law provisions to domestic work, as the “workplace” of domestic workers are someone’s private households which labour inspectorate most often has no or limited access to (in many countries, including Myanmar, the Constitution protects the privacy and security of home). In this respect, the ILO has developed useful standards and guidelines (ILO Convention No. 189 on Domestic Workers, 2011, and Recommendation No. 201) and also a rich database of a number of good initiatives taken by its member States in

¹¹⁶ Worldwide, the identified common hazards include: “long working hours, which create fatigue; lack of public scrutiny, which can provide opportunities for sexual exploitation; and isolation, inhibiting normal social and intellectual development. In addition, domestic service often involves carrying heavy loads (laundry, water, children), being exposed to fires and hot stoves, handling household chemicals and using sharp knives, as well as deprivation of education...injuries, accidents and illness....and various types of abuse”. IPEC: *Children in hazardous work: What we know, what we need to do*, pp. 27-30. (Geneva, 2011).

strengthening law enforcement for child domestic work:¹¹⁷ for instance, ensuring the access of domestic workers to courts, tribunals and other dispute settlement mechanisms and complaints mechanisms (ILO Convention No. 189); allowing the labour inspectorate to enter private homes through judicial orders (in South Africa); involving organizations of workers and employers, NGOs and community groups in enforcement, monitoring and implementation of policy and law;¹¹⁸ or using public powers such as the police to enforce and give effect to policy and laws.¹¹⁹

2.10 Working hours and night work

2.10.1 Working hours

National labour laws often restrict working hours for young employees which are less than that for adult workers. While well intended, this may present an obstacle to legitimate and safe employment of young persons (i.e. between 15 and 18 years) in a market economy, particularly shift work, and arguably constitutes age discrimination.¹²⁰ It can be suggested, therefore, that the general daily or weekly working hours apply equally to both adults and young workers,¹²¹ while overtime and night work is strictly prohibited for young workers, so as to allow enough time for rest during the day and for leisure activities. In the case of Myanmar, the Factories Act, amended in 2016, provides as follows:

Sec.79:

- (1) children (between 14 and 16 years) shall not be employed or permitted to work in any factory for more than 4 hours a day and between 6 p.m. and 6 a.m.;
- (2) shift work should be limited to two shifts not overlapping and both of shift not exceeding 5 hours inclusive of intervals;
- (3) no work on a Sunday in principle;
- (4) no child shall be required to work in any factory or any day on which he has already been worked in another factory.

With respect to the working hours for adolescents aged between 16 and 18 years, the adolescents who have been granted a certificate to work as adults can work the same working hours as adults (Sec.78(1)); otherwise, those adolescents who have not been granted a certificate are governed under Section 79 which provides for the working hours for children aged between 14 and 16 years.

With respect to sub-section (4), it might be necessary to establish the ways for the employers and authorities to determine whether or not a child has worked in another factory on the same day. One option is to impose the burden of proof on the employers.

¹¹⁷ See, for instance, ILO Modern Policy Responses to CL, *supra* note 49; ILO, Effective Protection for Domestic Workers: A Guide to Designing Labour Laws, 2012.

¹¹⁸ ILO Modern Policy Responses to CL, *supra* note 53 at 93-97.

¹¹⁹ *Ibid.*, pp. 98

¹²⁰ The ILO's technical advice given to the Government of Vietnam for the revision of its labour code between 2011-2012.

¹²¹ *Ibid.*

With respect to the Shops and Establishments Law, amended in 2016, the same recommendations shall apply to Sec. 13 (b) and Sec. 14 of the Law which regulate overtime and working hours, respectively.

2.10.2 Night work

With respect to night work, under the ILS, it should in principle be prohibited for children under the age of 18 years. Certain exceptions may apply as follows:

- Children over the age of 16 years in a limited number of processes which are required to be carried on continuously day and night (Article 2, Paragraph 2 of the ILO Convention No. 6 on Night Work of Young Persons (Industry), 1919);
- Work which is not deemed to be harmful, prejudicial or dangerous, in family enterprises in which only parents and their children or wards are employed (Article 1, Paragraph 4 (b) of ILO Convention No. 79);
- Young persons between 16 and 18 years for apprenticeship or vocational training in specified industries or occupations which are required to be carried out on continuously (Article 3, Paragraph 2 of the ILO Convention No. 90 on Night Work of Young Persons (Industry) (Revised), 1948).

In the case of Myanmar, CEACR, in its Direct Request adopted in 2012 concerning the application of ILO Convention No. 6, ratified by Myanmar in 1921, expressed concern that the Section 79(1) of the Factories Act, 1951 may prohibit employment of a child at night but under this Act, the term child means persons under the age of 15 years; and that the Government indicated that a young person between 15 and 18 years of age who is certified as being fit for work as an adult in factories may be employed at night. The CEACR therefore “expressed the firm hope” that section 79(1) of the Factories Act will be amended in the near future to be brought into conformity with Article 2(1) of the ILO Convention No. 6, ratified by Myanmar, which prohibits employment of children under the age of 18 years to night work.¹²² The 2016 amendment prohibits night work for children as well as adolescents aged 16 and 18 years who have not been granted a certificate of fitness by a medical practitioner to work as adults (Sec. 78 (3)). It is therefore recommended that night work should be prohibited for all adolescents under 18 years.

The Shops and Establishments Law, amended in 2016, prohibits night work between 6 p.m. and 6 a.m.¹²³ for children under the age of 16 years (Sec. 14 (b)). It is recommended that night work should be prohibited for all children under 18 years.

2.11 Wages

The Committee on the Rights of the Child expressed its concern, in its 2012 Concluding Observations, over the persistence of economic exploitation of children, including

¹²² It should be noted that night work as well as long hours of work can also be considered as hazardous work that must be prohibited for under-18 as part of WFCL according to C182, also ratified by Myanmar.

¹²³ The draft law says “between 6 am and 6 pm” but it seems to be a translation error.

low wages. It is in fact common in many countries that children and young workers are paid lower wages than their adult counterparts, even if they may perform the same or equal work as the adult workers. The ILO urges the member States to apply the principle of *equal pay for work of equal value* for all workers (as stated in the Preamble to its Constitution), which effectively includes children and young workers. Lower level of wages may be applied to young workers in the cases of apprenticeship and vocational training or probation periods (through individual employment contracts, and not enforced by the law). But even in these cases, allowing lower wages for these workers is justified with the element of actual training (on the job) provided during the working hours or lower skills and experience, and not simply with the ages of the workers. However, it should be underlined that the fact of paying wages does not justify employing a child below the legal minimum age.

2.12 Enforcement and sanctions

2.12.1 Enforcement

Enforcement of labour laws to prohibit child labour and to protect young workers from exploitation is a challenge for many countries. This is especially the case where a large proportion of working children are found in informal economy where, in principle, the protective coverage of labour laws does not reach in the first place. Furthermore, in Myanmar, even in the cases where labour laws may apply, the enforcement is reported to be ineffective due to the low awareness of labour laws not only amongst the Government but also police, law officers, township administrations, communities, employers and families; and the prosecution under labour laws, as well as the Child Law, was virtually impossible given the limited knowledge of both employers and employees about what actually constitutes child labour.¹²⁴ The Committee on the Rights of the Child expressed concern over the lack of enforcement of the labour laws¹²⁵ and therefore recommended the Government to strengthen it, in particular to prosecute those who make use of forced labour of children¹²⁶ and to take the appropriate measures to systematize and institutionalize disciplinary processes and/or action against the military officers and civilians responsible for recruiting and using child labour.¹²⁷

¹²⁴ My-PEC Mapping Report, *supra* note 10 at 11.

¹²⁵ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 85(d).

¹²⁶ *Ibid.*, para. 86(d).

¹²⁷ *Ibid.*, para. 86 (e).

Table 7: Interview results on the stakeholders' views about the weak law enforcement

	Reasons for weak law enforcement	Suggestions for improvement
Government	• Lack of awareness of the law among government officials, the public, workers and employers, and lawyers • Laws are not easy to understand (very complicated) • Capacity of labour inspectors needs to be promoted • Weak application of the laws • The public stays away from the law	• Awareness raising is essential • Action needs to be taken • Effective application of the law • Capacity building • Everyone must accept that "no one is above the law" • All government officials must understand the law • Citizens need to be willingly follow the law • Strengthen coordination
Employers' organizations	• Interviews not conducted	
Workers' organizations	• Lack of awareness of the law • Long history and culture of child labour • Lack of skills of staff • No monitoring and complaint mechanism • Lack of knowledge of child labour	• Change political system • Need to establish nation-wide worker's unions • All stakeholders need to actively involve • Increase manpower of the government • Effective structure and system • Awareness campaign • Establish monitoring centers at township level • Set up minimum wage • Establish complaint mechanism • Capacity building • Incentive programmes to help families sending children to work rather than to school • Legal and educational reform • Skills training • Need to include individuals and organizations who are working on the ground
Labour lawyers	• Corruption	• There should be justice first and then improve our community
UN	• Lack of awareness of the law • No data-based management • No free legal services • Corruption	• Awareness raising • Practical application of the law • Establish monitoring mechanisms • Participation of concerned ministries
NGOs	• The main cause is the lack of political commitment. Both in public and private sectors, there should be a common understanding of child labour, working children, minimum age, safe and hazardous working environment, social protection of both children and adults in any settings, etc. • Lack of human resources • Laws are not easy to understand, even for lawyers and solicitors • Laws and regulations are not being applied properly	• Awareness raising • Increase human resources • Strong legal action •

Note: Total number respondents: 14 (Government 5; Workers' organizations 3; labour lawyers for workers' organizations 2; UN agencies 2; and NGOs 2).

There are a number of ways a country can take to strengthen the enforcement of labour laws to prohibit child labour and protect young workers: i.e.

Scope of labour law application

First and foremost, by ensuring that the labour law provides for a broad definition of employment relationship, the informality of employment will be reduced and the coverage of labour law protection will be expanded significantly.¹²⁸ The ILO is currently offering the Government a more detailed advice on this issue in the context of the overall labour law reform.

Keeping of registers

ILO Convention No. 138 requires that national laws or regulations or the competent authority shall prescribe the registers or other documents which shall be kept and made available by the employer containing the names and ages or dates of birth, duly certified, wherever possible, of persons whom he/she employs or who work for him/her and who are less than 18 years of age. While the Factories Act, 1951 does have the relevant provision (Sec. 81), it only applies to a “child” who is defined by this Act as a person between 14 and 16 years (Sec. 2(a)); therefore amendment must be made to include all children under the age of 18 years. Provision must be made for other labour laws as well.

Labour inspection

The labour inspection services in many developing and transition countries are not adequately staffed or equipped to effectively enforce standards, particularly in the informal economy including private households where child domestic workers are found. In Myanmar, the Committee on the Rights of the Child expressed concern over the “absence of systematic labour inspections”¹²⁹ and therefore recommended the Government to “[I]mprove labour inspections to ensure that these comprehensively monitor all aspects of the work environment, including the use of child labour”; and “[C]ontinue to seek technical assistance from the ILO International Programme on the Elimination of Child Labour in this regard”.¹³⁰ A range of recommendations can be made for the improvement of the overall labour inspection system, and the ILO is currently offering them in detail to the Government. Above all, labour inspection can be strengthened in relation to child labour and protection of young workers in a number of initiatives. Below are some examples of good initiatives from other countries, which can be used as inspiration and guidance for Myanmar in developing its own measures which would better fit its needs and reality:

¹²⁸ For example, a common problem found in many countries is that the law requires the existence of an employment contract between an employer and a worker as a condition for recognizing an employment relationship. This results in the exclusion of a vast proportion of workers from the scope of labour law, because in reality many workers work without employment contracts; be it because employers refuse to conclude the contract, or workers do not ask for it because they do not know how important it is for them. The ILO has been strongly urging the member States to address this issue.

¹²⁹ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 85(e).

¹³⁰ *Ibid.*, para. 86(e) and (f), respectively.

- By gradually extending the functions of labour administration to categories of workers who are not, in law, employed persons,¹³¹ such as: agricultural workers; self-employed workers; members of cooperatives and worker-managed enterprises.
- By enhancing and broadening labour inspection authority: the authority and methods used by inspectors to enforce laws under their jurisdiction can be adapted so that they better fit the demands of enforcing laws touching on child labour.¹³² For instance:¹³³
 - To put education policy and legislation under their jurisdictions;
 - To empower labour inspectors, through legislation, to request that a physician in the public service examine children less than 18 years of age in order to establish whether their job is beyond their physical capacities. If this is found to be the case, the labour inspector is empowered to demand that their conditions of employment be changed (Cambodia). In this scenario, labour inspectors are given educational and advisory functions, in addition to their traditional enforcement functions;
 - The labour inspectors may be authorized by legislation to enter any premises or place where have reasonable cause to believe that a child is being employed (Saint Kitts and Nevis);
 - Reference may be made in child labour legislation to the authority of health and safety inspectors to inspect enterprises employing young persons, for the specific purpose of determining whether any toxic substance or machinery or equipment used in any industrial undertaking or any plant engaged in particular types of processes is potentially dangerous to young persons, giving the inspector the authority to prohibit the employment of young persons in that undertaking (Canada).
- *By strengthening human and financial resources for labour inspection:*¹³⁴ the human and financial resources of labour inspection should be enhanced as part of strengthening institutional capacity to implement responses to child labour.

Inter-ministerial cooperation or centralization of authorities

Inter-ministerial cooperation is essential in ensuring that any laws related to child labour are implemented in a comprehensive manner. In particular, cooperation between MOLES and the Ministry of Social Welfare, Relief and Re-settlement in ensuring synergies between the Child Law and labour laws, Ministry of Education in linking compulsory education with minimum age for employment, and Ministry of Health in ensuring safety and health for child workers, etc is essential. Alternatively, centralizing responsibility for the response to child labour in a single agency has been one way of fulfilling the need for building institutional capacity.¹³⁵ In this respect, the establishment of the Technical Working Group on Child Labour is certainly a welcoming development. While the TWG-CL does not exactly have an authority to implement or enforce the laws and regulations, it could make important contributions

¹³¹ ILO Convention No. 150 on Labour Administration, 1978, requires member States to promote extension of labour administration to workers who are not employed persons.

¹³² ILO Modern Policy Responses to CL, *supra* note 53 at 100.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, at 92.

through, for instance, observing how the relevant laws are being implemented and bring up any issues of concern to the relevant authorities for improvement.

Police authority

The authority and law enforcement methods used by the police can be adapted so that they better fit the demands of enforcing laws touching on child labour.¹³⁶ For instance:¹³⁷

- The police can be given the jurisdiction not only to enforce criminal law but also to enforce labour policy and legislation, as well as educational policy and legislation;
- The police can be authorized to investigate alleged violations of the law which is specifically dealing with the employment of young persons and children, and the refusal to admit the police is an offence (Saint Vincent and the Grenadines);
- A special children's unit may be created within the national police force to enforce laws and policies dealing with the protection of minors, including child labour (Panama and Nigeria);

Prosecutorial authority

As provided above, in Myanmar, prosecution of persons who use child labour under labour laws and the Child Law is reported to be almost impossible. As part of addressing this problem, prosecutors' authority can be enhanced, for instance through adapting limits placed on how prosecutors can go about enforcing laws under their jurisdiction or through broadening their jurisdiction.¹³⁸ For instance:¹³⁹

- Prosecutorial services can be established within the Ministry of Labour and be given the powers to act under administrative, civil and criminal procedures specifically in combating child labour. In the same vein, labour inspection reports can be sent directly to the prosecutorial services for consideration of possible administrative or judicial measures (Brazil);
- Citizen's access to judicial system can be strengthened for bringing accusations of abuse and exploitation before the judicial authorities. As part of this process, prosecutorial and judicial authorities are familiarized with the specialized mechanisms needed to investigate, prosecute and sanction abuse and exploitation (Nicaragua. As part of a plan of action against sexual exploitation of children);
- Action on possible violations of child labour regulations may be taken before rights commissioners/committees,¹⁴⁰ who serves as an informal conciliation service to help resolve disputes involving young workers (Ireland);
- Special courts can be established to deal with different types of cases involving children.

¹³⁶ *Ibid.*, at 98.

¹³⁷ *Ibid.*, at 98-99.

¹³⁸ *Ibid.*, at 101.

¹³⁹ *Ibid.*

¹⁴⁰ In the case of Myanmar, the National Committee on Children's Rights could possibly be capacitated to take up this role?

Other partners

Involving other partners outside the Government in law enforcement is part of modern policy and legislative practice against child labour: i.e. employers and workers and their organizations; NOGs; community groups, etc.¹⁴¹

- *Employers and workers and their organizations*: the tripartism is the fundamental principle of the ILO, and consultations with the organizations of employers and workers are required in a variety of areas and actions affecting them: in the case of child labour, ILO Convention No. 138 for instance requires consultation with social partners before the Government develops the list of hazardous work which should be prohibited for children. Likewise, they can also be effectively involved in the enforcement, monitoring and implementation of policy and law. For instance, national law may specifically recognize the authority of individual workers to report violations of labour laws to competent national authorities (Japan).¹⁴² Or, an innovative legal provision can be found in South Africa which makes it is an offence to discriminate against a person who refuses to permit a child to be employed in contravention of the law; such a provision, aimed at protecting “whistleblowers” and “protecting bystanders” of child labour from recrimination by the employer, can be useful tool in efforts to enforce laws against child labour.¹⁴³
- *NGOs and community groups*: the authorities (i.e. the Government, police and judicial authorities) may establish close contacts and cooperation with NGOs/community groups in respect of the enforcement and monitoring of child labour laws, including exchange of information or requiring them to report child labour cases. Such cooperation may be established through legislation, written bilateral agreements between the authorities and the NOGs/community groups or through the establishment of public bodies which are jointly represented by the authorities and the NGOs/community groups.¹⁴⁴ This approach in which the whole community remains vigilant over any cases of child labour would significantly broaden the scope of monitoring and enforcement of child labour laws.

2.12.2 Sanctions

Effective law enforcement should be accompanied by penalties and sanctions that are effective and sufficiently dissuasive. Overall, in an established market economy, there are primarily three forms of sanctions: administrative, civil and criminal. **Administrative sanction**

¹⁴¹ ILO Modern Policy Responses to CL, *supra* note 53 at 93-97.

¹⁴² *Ibid.*, at 94.

¹⁴³ *Ibid.*

¹⁴⁴ For instance, in Zimbabwe, the legislation calls upon a National Child Welfare Council composed of government officials and representatives of voluntary organizations to advise the Minister responsible on any matter relating to the welfare of children, to monitor situations of children in need of care, to promote the coordination of various organizations involved in the protection of children’s rights and to perform any other function assigned to it by the Minister. *Ibid.*, at 96. In Australia, schoolteachers, doctors and the organs of private youth welfare institutions and all corporate bodies whose fields of activities include youth welfare issues are required to report any cases of violation of the regulations on child labour which come to their attention, and this mandated under the Employment of Children and Young Persons Act of Australia. *Ibid.*, at 97. Or in Pakistan, vigilance committees are set up at the local level to advise the district authorities on matters relating to the effective and proper implementation of laws against bonded labour and some of the worst forms of child labour. *Ibid.*, at 97.

will be imposed primarily through labour inspection, and as stated above, effective labour inspection system shall be accompanied by an effective (sufficiently dissuasive) enforcement mechanism enabling those guilty of violations reported by labour inspectors to be prosecuted. In Myanmar, it needs to be pointed out here that the existing laws, including labour laws, are extremely punitive, to the point of punishing almost all violations of all provisions of the laws with imprisonment on conviction. However, in principle, criminal sanctions should be administered carefully and only in most severe cases of violation. Therefore, the first and foremost recommendation is to establish effective administrative sanctions which are appropriate and proportionate to the types of violations of labour laws. The ILO is in the best position to offer comparative perspectives in this regard should Myanmar request such assistance. The second recommendation is to ensure in legislation that labour inspectors have the power to enforce administrative sanctions. In the event that labour inspectors fail to act, and the matter is pursued through the dispute resolution procedures, it is recommended to make it possible for a judge to exercise these powers as in many other jurisdictions. Additionally, as a further compliance mechanism, it may be worth considering enabling labour inspectors and employers to enter into agreements under which part or all of a penalty was suspended provided the employer undertakes to remedy non-compliance (these are sometimes referred to as “enforceable undertakings”).¹⁴⁵ If the employer fails to comply, a heavy penalty is imposed.

Civil sanction is more important than the administrative sanction in an established market economy. It makes parties responsible for their own labour relationships and reduces the burden on administrative authorities in handing down sanctions. In many countries, the common approach to the violations in relation to employment contracts such as failure to conclude written contracts, failure to pay severance or failure to provide advance notice for termination is to give workers opportunities to bring the case before the court. And the enforcement is through court verdicts, not through administrative sanctions. In Myanmar at the moment, however, resorting to court may not be the most popular or accessible means for the general workers to claim their rights. So during the transition period, the role of administrative sanctions will remain great and important. In the mid-term and long-term perspectives, labour legislation can gradually reduce its reliance on administrative sanctions over time as the rule of law begins to settle in the society, the legal system develops and the workers are more empowered and equipped to claim their rights through adjudication.

It should be added that effective administrative and civil sanctions should not only involve penalties but should also be accompanied by remedial measures, which include compensation, correction orders, etc depending on the cases. The ILO is again in the best position to offer comparative perspectives in this regard should Myanmar request such assistance.

Finally, **criminal sanction** is also important and should be applied in certain grave violations. The ILS requires the application of criminal sanctions in certain grave cases which include, among others: forced labour (C29 – ratified by Myanmar, Art.25) and worst forms of child labour other than hazardous work (R.190 para 12). In the case of children, labour law, as

¹⁴⁵ Ibid.

well as criminal law,¹⁴⁶ must ensure that appropriate sanctions apply specifically to the worst forms of child labour, namely: i.e.

- All forms of slavery
- Prostitution or production of pornography or pornographic performances
- Use, procuring or offering of a child for illicit activities
- Violations of the national provisions for the prohibition and elimination of hazardous work (criminal sanctions should be considered but not necessarily mandatory under ILO Conventions).

¹⁴⁶ In Myanmar, if specialized laws or new laws include penalty provisions for the violations of those laws, then the penalties are ensured in principle and there is no need of having the relevant provisions in the Penal Code. This is the case for the Child Law and the Anti-Trafficking Law, for instance.

CHAPTER III: SUMMARY OF ISSUES, GAPS AND RECOMMENDATIONS FOR NATIONAL STATUTES RELATED TO CHILD LABOUR

This chapter will mainly provide the summary of issues and gaps that have been identified and the recommendations for amendment that have been provided in Chapter II by each national statute, so as to facilitate the revision process. As this is the summary version, please go back to the corresponding sections in Chapter II for the detailed analyses.

3.1 The Constitution of the Republic of the Union of Myanmar, 2008

The Constitution of the Republic of the Union of Myanmar was adopted in 2008. From the perspectives of the ILO, the following principles and rights related to labour, at minimum, should be upheld in the Constitution and effectively implemented through national statutes:

- Prohibition of child labour, i.e. the admission of children to employment or work below the minimum ages specified in the law;
- The child's right to protection from economic exploitation and hazardous work;
- Freedom of association (both the freedom to form and join an association) and the right to organize;
- Prohibition of discrimination on the basis of sex, colour, race, national extraction (including ethnic origin), social origin, religion and political opinion;
- Prohibition of forced labour.

Myanmar has ratified the ILO Convention No. 29 on Forced Labour, 1930. The Committee of Experts commented in its 2012 Observation for Myanmar as follows: "...the Committee notes that no action has been taken or contemplated to amend section 359 of the Constitution (Chapter VIII – Citizenship, Fundamental Rights and Duties of Citizens), which exempts from a prohibition of forced labour "duties assigned by the Union in accordance with the law in the interest of the public". In its earlier comments, the Committee observed that the exception encompasses permissible forms of forced labour that exceed the scope of the specifically defined exceptions in *Article 2(2)* of the Convention and could be interpreted in such a way as to allow a generalized exaction of forced labour from the population. The Committee notes the Government's statement in its reports that the 2008 Constitution has been approved by the people of Myanmar and that no request to amend it has yet been received by Parliament. ***However, the Committee expresses the firm hope that, following the legislative amendment referred to above, the necessary measures will at last be taken with a view to amending section 359 of Chapter VIII of the Constitution, in order to bring it into conformity with the Convention.***"

3.2 The Child Law (The State Law and Order Restoration Council Law No. 9/93)

[The revised law is currently being drafted with the technical assistance from UNICEF]

The Child Law was enacted in 1993 to protect the rights of the child. As one of its Aims is "to implement the rights of the child recognized in the United Nations Convention on

the Rights of the Child”¹⁴⁷ (Sec. 3(a)), it can be said that the Law largely incorporates the principles and standards set out in the CRC, including the core principle the “best interests of the child”. Below is the summary of the issues and gaps identified and the specific recommendations for amendment¹⁴⁸.

- State clearly the minimum age and definition of a child, in line with the ILO Conventions No. 138 and No. 182.
- Ensure the child’s right to protection from economic exploitation, hazardous work and work that interferes with education.
- Specify and allocate responsibilities in protecting children from economic exploitation and hazardous work not only with the Ministry of Labour but with all relevant ministries and state agencies (e.g. Ministry of Health in ensuring occupational safety and health of child workers, or the Ministry of Education in ensuring the work does not interfere with the child’s education).
- Ensure that the Law includes specific provisions on what constitutes child labour, including in domestic work settings, and outlines what counts as Worst Forms of Child Labour in line with the ILO Convention No. 182 on the worst forms of child labour. This would ensure the Law is robust enough not only to guide future iterations of labour laws, but to enable prosecution under the law and simple, clear awareness raising activities.¹⁴⁹
- Ensure child’s right to “freedom of association” in addition to “participate in organizations”.
- Ensure, as the Committee on the Rights of the Child urged Myanmar, non-discrimination on the basis of sex, ethnicity or religion and explicitly incorporate the principle of non-discrimination on any grounds in all newly developed legislation and policies.”¹⁵⁰
- Within the Rules and Regulations of the Child Law, to include provisions on delegation of responsibility from the Chairman of the Township Child Rights Committees to the Secretary or other member.¹⁵¹
- Ensure that the Law’s Rules and Regulations have specific reference to child labour including how Governmental child protection structures will address it and, if possible, outlining budget allocations and reporting/co-ordination mechanisms.¹⁵²
- Ensure effective and sufficiently dissuasive penalties and sanctions for the violations of the provisions related to child labour, in line with ILO Conventions Nos. 138 and 182.

¹⁴⁷ Myanmar ratified the CRC in July 1991.

¹⁴⁸ The ILO shared comments and recommendations on relevant sections of the draft law to UNICEF and relevant Government institutions.

¹⁴⁹ My-PEC Mapping Report, *supra* note 10 at 12.

¹⁵⁰ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 36.

¹⁵¹ My-PEC Mapping Report has identified in its key informant interviews that the existing TCRCs are not all functioning adequately. In part, this is due to the fact that the Chairman of the TCRC is nominally the Township Administrator reporting under the General Administration Department of the Ministry of Home Affairs who already has a high workload and cannot dedicate enough time to child protection issues. My-PEC Mapping Report, *supra* note 10 at 12.

¹⁵² *Ibid.*

3.3 The Factories Act, 1951, amended in 2016

The Factories Act was enacted in 1951 (amending its previous 1934 Act) to “consolidate and amend the law regulating labour in factories” (Preamble). The Act provides provisions on labour inspection, health, safety and welfare of workers, working hours of adults, employment of young persons, punishments and procedure. The Factories Act provides some provisions in relation to children and young persons (Chapter VIII). Below are the summary of issues, gaps and recommendations.

- **Scope of application/exemption:** Sections 2(m) and 5 of the Factories Act, amended in 2016, may exempt factories employing less than five workers if a manufacturing process is being carried on with the aid of power, and less than ten workers if there is no aid of power, from the application of the Act. However, explicit mention must be made in the law that the social partners will be consulted on such possible exemptions.
- **Definition of a child:** the Act defines a “child” as a person aged between 14 and 16 years, and an “adolescent” as a person aged between 16 and 18 years. For the purpose of this Act there is no problem but when it is amended again in the future, it must take into consideration other relevant laws, in particular the amended Child Law, to ensure that there will not be protection gap due to different categorization of children.
- **Apprenticeship and vocational training:** the 2016 amendment has raised the minimum age for admission into apprenticeship and vocational training to 14 years. Additionally, provision must be made in relation to the working conditions and standards for their protection.
- **Working hours:** With respect to the working hours for adolescents aged between 16 and 18 years, those who have been granted a certificate to work as adults can work the same working hours as adults (Sec.78(1)); otherwise, those adolescents who have not been granted a certificate are governed under Section 79 which provides for the working hours for children aged between 14 and 16 years. International Labour Standards allows same working hours as adults for young workers beyond 15 years. With respect to sub-section (4), it might be necessary to establish the ways for the employers and authorities to determine whether or not a child has worked in another factory on the same day. One option is to impose the burden of proof on the employers.
- **Night work:** CEACR, in its Direct Request adopted in 2012 concerning the application of the ILO Convention No. 6 on Night Work of Young Persons (Industry), 1919, ratified by Myanmar in 1921, expressed concern that the Section 79(1) of the Factories Act, 1951 may prohibit employment of a child at night but under this Act, the term child means persons under the age of 15 years; and that the Government indicated that a young person between 15 and 18 years of age who is certified as being fit for work as an adult in factories may be employed at night. The CEACR therefore “expressed the firm hope” that section 79(1) of the Factories Act will be amended in the near future to be brought into conformity with Article 2(1) of the ILO Convention No. 6, ratified by Myanmar, which prohibits employment of children under the age of 18 years to night work. The 2016 amendment prohibits night work for children aged between 14 and 16 years as well as adolescents aged between 16 and 18 years who have not been granted a certificate of fitness by a medical practitioner to work as adults (Sec. 78 (3)). It is recommended that night work should be prohibited for all adolescents under 18 years.

- **Determination and prohibition of “hazardous work”:** the 2016 amendment prohibits employment of young persons aged between 14 and 18 years to the work with dangerous machinery (Sec. 25); and it prohibits employment of “children” in any part of a factory in which a cotton opener is at work (Sec. 29) and the work in the “worst form like in a hazardous situation, a situation harmful to his health, a situation deterring his education and in a workplace wherein he would be exploited” (Sec.75(a)). While these types of work should be prohibited as they are, “hazardous work” in which children should be prohibited to engage in are not limited to these above-mentioned types of work as provided in ILO Conventions No. 138 and 182. The new hazardous list which has been developed and validated must be made enforceable in the factories.
- **Keeping of registers:** While the Act does have the relevant provision (Sec. 81), it only applies to a “child” who is defined as a person aged between 14 and 16 years (Sec. 2(a)). The amendment must be made to include all children under the age of 18 years.
- **Sanction:** criminal sanctions are recommended to be applied in the case of the violation of the prohibition of employment of children into hazardous work.

3.4 Shops and Establishments Act, 1951 (No. LIX), amended in 2016

The Shops and Establishments Act 1951, amended in 2016, applies to persons working in “shops and establishments.” The Act provides inadequate regulations in relation to child labour and thus further amendment must be made. Below are the summary of issues, gaps and recommendations for amendment.

- **Scope of application:** The Act excludes certain types of workplaces from the scope of its application, such as “roadside stalls”, “refreshment stalls and other shops in any public exhibition” or “funfairs, refreshment stalls and other shops in shows or entertainments held for a short duration” (Sec. 34). This means that children working in these workplaces do not receive the protection that they are supposed to receive under this Act. One solution to this problem could be to provide that provisions of the current labour laws relating to the minimum ages for work should cover young persons’ work even though they are outside of workplaces or sectors to which these laws apply; or to adopt separate regulations or other measures that would address the situation of children in other types of work.
- **Minimum ages for admission to work:** the Act prohibits children under the age of 14 to be employed in shops and establishments, in line with the International Labour Standards.
- **Apprenticeship and vocational training:** provision must be made to prescribe working conditions and standards for their protection and development, after consultation with organizations of workers and employers;
- **Working hours:** children between 14 and 16 years certified by the registered medical practitioner may be employed to work for not more than 4 hours a day (sec.14(a)). For young workers beyond 16 years, the same working hours for adults apply. International Labour Standards allow same working hours as adults for young workers over 15 years, while strictly prohibiting overtime and night work so as to allow enough time for rest during the day and for leisure activities. But the Act allows overtime and night work for young workers over 16 years, and therefore it must be amended;

- **Determination and prohibition of “hazardous work”:** the Act prohibits young workers under 18 years from performing prescribed dangerous work or work in dangerous workplace (Sec.14(d)). In addition, the list of hazardous work which has been validated recently must be made enforceable in shops and establishments;
- **Keeping of registers:** the Act must be amended to prescribe the registers or other documents which shall be kept and made available by the employer containing the names and ages or dates of birth, duly certified, wherever possible, of persons whom he/she employs or who work for him/her and who are less than 18 years of age;
- **Enforcement:** it is recommended that criminal sanctions apply to the violations of the provisions for the prohibition and elimination of hazardous work.

3.5 National Education Law, 2014 (Pyidaungsu Hluttaw Law No. 41/2014)

[To be amended]

The new National Education Law (NEL) aims, among others, to “be the good citizens who respect the laws and can practice the civics and the good practices of democracy and human right standardizations; “develop the Union spirit and to be the citizens who value, maintain and raise the languages, literatures, cultures, arts and traditional customs of Union races and who can relay them”; “train the required human resources for education based socio-economy development”; and to “increase the qualification of teaching, learning, research and administration by creating the international education environment and applying the ICT effectively” (Section 3 (b) - (e)).

The NEL establishes a target of extending free and compulsory education to children up to 14 years old (Chapter 5). It is then important to align the end of compulsory schooling with the minimum age for admission to work, and therefore urgent revision of the labour laws to raise the minimum age from currently 13 to 14 years.

3.6 Basic Education Law of the Republic of the Union of Myanmar, 2nd draft (2014)

[This law may be incorporated into the NEL as its regulations]

The draft Basic Education Law (BEL) provides that middle school is from 6 to 9th grade (10-14 years), which is in line with the National Education Law which aims to extend free and compulsory education up to middle school (14 years). Therefore the above-mentioned same recommendation to align the compulsory schooling with the minimum age for admission to work applies.

3.7 The Republic of the Union of Myanmar, Technical and Vocational Education Bill

[This could be part of the rules and regulations of the NEL]

The Technical and Vocational Education Law (TVEL), which is currently being drafted, aims, among others, to “train practical skilled technician workers; to “raise individual’s income

and employment of citizens” (Section 3 (a) and (e), respectively). The following provisions at a minimum need to be provided in the TVEL:

- In the case where the students of the training schools can be sent to enterprises for apprenticeship, adopt a specific provision linking the TVEL to the labour law with respect to minimum ages for admission as well as working conditions and treatment of children;
- Adopt a provision in Chapter VII on curriculum to ensure that the curriculum for children under 18 years old is developed in line with the conditions and treatment provided in the labour law;
- The Technical and Vocational Education Council, which is to be established under Chapter IV of the draft TVEL, shall have the duties and powers to monitor the working conditions and treatment of children in accordance with the labour law;
- Adopt provisions which obliges schools to keep registers of children and to make them available for labour inspection;
- Give labour inspectors the power to inspect the schools where children are registered.

3.8 The Dock Labourers Act, 1934 *[To be newly drafted & repealed]* and The Dock Workers (Regulation of Employment) Act, 1948 *[To be amended]*

There are no provisions related to children and young workers. It is therefore recommended that the necessary provisions be established in these Acts.

3.9 Oilfield (Welfare of workers) Act, 1951 *[To be amended]*

The Oilfield Act has some provisions related to children and young workers: i.e. employment of children (minimum age and certificate of fitness); working hours; registration of children and young workers; and labour inspection. Below is the summary of the minimum recommendations for amendment:

- **Minimum age:** the minimum age for admission to work in the oilfields should be raised from 13 years (Section 52) to 14 years;
- **Certificate of fitness, working hours, night work and hazardous work:** the Act requires that the employers shall obtain a certificate issued by a doctor for a child over 13 years and that the child must keep it with him during the period he is working (Sec. 53). In the case of a child over 15 years, a doctor may issue a certificate certifying that the child is fit to work as an adult (Sec. 54 (b)). First of all, children under 14 years should not be admitted to work in the oilfield regardless of a certificate except for light work. Second of all, for children over 15 years, there should be regulations for working hours and types of work which should be permitted or prohibited for children in the oilfield (i.e. “hazardous work”). Please refer to the recommendations made for the Factories Act on “working hours”, “night work” and “hazardous work” as the same would apply here.
- **Sanction:** criminal sanctions are recommended to be applied in the case of the violation of the prohibition of employment of children into hazardous work.

3.10 The Myanmar Merchant Shipping Act, 1954 and the Law Amending the Myanmar Merchant Shipping Act, 1954 (The State Peace and Development Council Law No. 4/99)

At the time of writing this paper, I was only able to access the English copy of the Law Amending the Myanmar Merchant Shipping Act, 1954. As such, the detailed analysis was not possible. One observation that can be made for sure is that seafarers are either directly or indirectly excluded from the existing labour laws; and therefore if this Merchant Shipping Act including its amendment do not provide decent regulations and standards for the employment of seafarers, either this law needs to be amended as a matter of priority or the coverage of the existing labour laws must be extended to cover seafarers.

Note that the ILO Committee of Experts has made some comments in its Direct Request adopted in 2011 in relation to the application of the ILO Convention No. 22 on Seamen's Articles of Agreement, 1926 - Myanmar (Ratification: 1932).

3.11 Myanmar Marine Fisheries Law (The State Law and Order Restoration Council Law No. 9/1990).

The Myanmar Marine Fisheries Law primarily sets out rules and regulations on the operation of fishing business: i.e. inshore or offshore fishery, normal fishery, collection of marine products, sport fishing. It makes very little reference to what can be considered as labour-related matters: Section 31 (e) states that the Master of the Vessel "shall be responsible for the safety of the inspector, researchers, observers and trainees who are on board the vessel". As fishermen are either directly or indirectly excluded from most of the existing labour laws, either this law must be amended as a matter of priority or the coverage of the existing labour laws should be extended to include persons employed in fishery business.

3.12 The Myanmar Mines Law, 1994 (The SLORC Law No. 8/94)

The Mines Act was enacted to implement the State's policy on mineral resources, to meet the domestic and foreign demands or to develop local and foreign investment in mineral resources (Sec. 3 (a)-(c)). It also aims to protect the environment ((f)); however, it does not aim to protect workers in mines. There are a few provisions that have anything to do with labour: i.e. Sec. 26 (b) stipulates that the Chief Inspector has the duties to inspect the health, sanitation, safety, prevention of accident, welfare, disciplinary measures of the personnel and workers in the mine. However, the Act does not provide for any rules or standards on health, sanitation, etc., on the basis of which the Chief Inspector should inspect. In this respect, it can mostly likely be assumed that the Shops and Establishments Act extends to mines by virtue of Sec. 2 (d)¹⁵³ and therefore the rules and standards on health, sanitation, etc. under this Act appear to apply in mines.

With respect to children, Section 3 defines a child as a person who has not attained 15 years and Section 26 (1) prohibits the employment of a child in a mine which is underground. Sec 26 (A) stipulates that a person under the age of 18 years shall not be allowed

¹⁵³ "industrial establishment" means a mine or an oilfield and such other establishment....

in any part of a mine which is underground, unless a certificate of fitness is granted to the child by a qualified medical practitioner and the child carries the certificate during work. However, underground work in mines is usually considered as an obvious case of hazardous work to be prohibited for children under 18 years old, and allowing it exceptionally with just a fitness certificate would be problematic, and therefore provision must be amended to bring it in line with the ILS requirements on hazardous work. Additionally, the same recommendations made for the Factories Act on “working hours”, “night work”, “hazardous work”, “keeping of registers” and “sanction” should apply here.

3.13 The Anti-Trafficking in Persons Law, 2005 (The SPDC Law No. 5/2005)

The Anti-Trafficking in Persons Law, 2005 declares it a “national duty” “to prevent and suppress the trafficking in persons as it damages the pride and pedigree of Myanmar nationality that should be valued and safeguarded by Myanmar race” (Sec. 4 (a)). The Law further declares to “pay particular attention to women, children and youth” (Sec. 4 (b)) and provides special protection to the protection of women and children victims of human trafficking (Chapter V) and also imposes heavier sanctions for the offenders of woman and child trafficking (Sec. 24). The Law is certainly welcoming and commendable, in light of the high incidences of human trafficking of Myanmar people overseas. Nonetheless, some improvements should be made in order to effectively eliminate child trafficking for labour exploitation. Below is the summary of issues, gaps and recommendations for amendment.

- Definitions of trafficking:** The definitions provided in the Anti-Trafficking Law (Section 3) are fully in conformity with the international law, in particular specifically including forced labour, forced service, slavery, servitude, debt-bondage in the definition of exploitation. It is worth mentioning that it takes a step further to define “debt bondage” as well (Explanation (3)). It is also worth pointing out that the Law protects men as well as women against human trafficking. This cannot necessarily be taken for granted because some countries’ anti-trafficking laws do not cover men: for instance, that of China only refers to trafficking in women and children (for the purpose of sexual exploitation). Nonetheless, there are a few shortcomings in successfully preventing and prohibiting child trafficking. First, there is a lack of stipulation that, in the case of children, any means of coercion need not be present in establishing the crime of trafficking. Second, the Anti-Trafficking Law neither refers explicitly to nor defines child labour, particularly in its worst forms as defined in C182. This problem is aggravated by the fact that the labour laws do not do so either. Without the explicit reference to or definition of child labour in either of the laws, the crime of child trafficking cannot be established in full terms of ILO Conventions Nos. 138 and 182. That is, under the current Anti-Trafficking Law and labour laws of Myanmar, the crime of child trafficking may not be established for the “recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons” (Sec. 3(a) of the Anti-Trafficking Law) into: the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties (C182, Art. 3(c)); and d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (C182, Art. 3(d) and C138, Art. 3);

- **Protection of trafficked victims:** While it is commendable that the Anti-Trafficking Law establishes a special Chapter (Chapter V) to “safeguard the rights of trafficked victims” (Chapter V), these provisions can be further strengthened by not limiting its scope only to safeguarding the dignity and rights of the trafficked victims during the court proceedings as it does now, but also by extending it to all steps and procedures from the identification of the victims to protection, and in the case of cross-border trafficking, to repatriation, reintegration and rehabilitation as well. In the case of women and children, there are useful rights-based guidelines developed by the international organizations such as ILO and UNICEF. It is recommended that consideration be given to incorporating those well-established standards into the Anti-Trafficking Law and/or its implementing rules;
- **Enforcement:** Under the Anti-Trafficking Law, the penalties that can be imposed on the offender of trafficking appear sufficiently severe and dissuasive (Chapter IX). Other than that, the problem is primarily with respect to the practical enforcement of the penalty provisions. The Committee on the Rights of the Child, while acknowledging the Government’s significant efforts to combat international sex trafficking of women and girls and to protect repatriated victims of cross-border sex trafficking, it nevertheless urged the Government to “[E]nsure that adequate measures are taken to hold perpetrators of child sale, trafficking and abduction accountable for their offences”.¹⁵⁴ The Committee also expressed concern that the Government’s enforcement efforts are limited when it comes to prevention and protection of victims of internal trafficking within Myanmar.¹⁵⁵

3.14 Labour Organization Law (Pyidaungsu Hluttaw Law No. 7 of 2011)

The Labour Organization Law was enacted “to protect the rights of the workers, to have good relations among the workers or between the employer and the worker, and to enable to form and carry out the labour organizations systematically and independently” (Preamble). The Law currently only accords workers the right to “join as a member in a labour organization” (Article 3(a)) and therefore it is recommended to ensure the “freedom of association” as well for all workers including children and young workers. [Details of other ILO recommendations omitted for the purpose of this paper].

3.15 The Settlement of Labour Disputes Law (Pyidaungsu Hluttaw Law No. 5/2012).

The Settlement of Labour Disputes Law was enacted “for safeguarding the right of workers or having good relationship between employer and workers and making peaceful workplace or obtaining the rights fairly, rightfully and quickly by settling the dispute of employer and worker justly” (Preamble). It is recommended that the Law provides for the right to collective bargaining for all workers including children and young workers. [Details of other ILO recommendations omitted for the purpose of this paper].

¹⁵⁴ United Nations: CRC Concluding Observations 2012, *supra* note 18 at para. 92(c).

¹⁵⁵ *Ibid.*, para. 91(c).

3.16 The Payment of Wages Act, 1936

The Payment of Wages Act (the Act) was enacted to regulate the payment of wages to certain classes of persons employed in industry: i.e. factory, railway administration and (the president may extend to) industrial establishments¹⁵⁶ (Preamble&Art.1(4)(5)). It provides rules and regulations for: i.e. employer's responsibility for wage payment, fixation of wage-periods, time of payment of wages, wages to be paid in legal tender, the wage deductions, and sanctions and penalties. Currently, the Act provides the most elaborated rules and standards on wage protection among other laws which have any provisions on wages.¹⁵⁷ The Government intends to draft a new law on the payment of wages to repeal this Act. While the Act already provides relatively well-established rules and regulations for wage protection, the ILO is providing a range of recommendations primarily on the basis the ILO Convention No. 95 on Protection of Wage, 1949.

The Committee on the Rights of the Child expressed its concern, in its 2012 Concluding Observations, over the persistence of economic exploitation of children, including low wages. The existing national laws do not specifically allow lower wages for children and young workers, so it appears to be the problem of practice. The ILO recommends, among others, that the principle of equal pay for work of equal value for all workers should be introduced in this Act, so that children and young workers who are paid lower wages can avail themselves of the legal protection and redress.

3.17 The Minimum Wage Law, 2013 (Pyidaungsu Hluttaw Law No. 7/2013)

The Minimum Wage Law (the MW Law) was adopted in 2013, repealing the Minimum Wage Law, 1949 and the Minimum Wage for Agricultural Labourers Law, 1948.¹⁵⁸ The implementing rules (the MW Rules) were also adopted by the MOLES in the same year. The MW Law and Rules provide for the legislative framework for the determination of the statutory MW. While the MW Law and Rules are just being implemented, a number of problems and weakness have already been identified. The ILO is providing comments and recommendations primarily on the basis of the ILO Convention No. 131 on Minimum Wage Fixing Convention, 1970. [Details omitted for the purpose of this paper].

With respect to the situation of children and young workers being paid lower wages as pointed out above, one way of preventing it might be to introduce a safeguard provision in

¹⁵⁶ More detailed definitions are provided for under Sec. 2 of the 1951 Act and Sec. 2 of the draft Law.

¹⁵⁷ The Factories Act and the Shops and Establishments Act only provide the definitions of wages and the payment of wages for overtime. The rest of the laws only provide the definitions of wages.

¹⁵⁸ CEACR, Observation on the ILO Convention No. 26 on Minimum Wage-Fixing Machinery, 1928, for Myanmar, 2012: "The Committee accordingly expresses the firm hope that in this climate of transition towards a more open and democratic society, the Government will seize the opportunity to introduce all necessary changes for the modernization of the minimum wage legislation and the establishment of a truly comprehensive system of minimum wages based on workers' needs and periodically reviewed after consultation with employers' and workers' representatives."

the Law which specifically provides that children and young workers should not be paid below minimum wages.

3.18 The Leave and Holidays Act, 1951 (No. 58) and The Law amending the Leave and Holidays Act, 1951 (The State Peace and Development Council Law No. 6/2006 of 30 May 2006)

The Leave and Holidays Act, 1951 was amended by the Law Amending the Leave and Holidays Act, 1951 (The State Peace and Development Council Law No. 6/2006 of 30 May 2006). The Law provides for rules and regulations on leave and holidays. The GORUM has requested the ILO to provide its technical guidance for the revision of certain provisions of, in view of the Observation by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which was adopted in its session of 2013 and published in 2014 concerning the application of the ILO Convention No. 52 on Holidays with Pay, 1936, which was ratified by Myanmar in 1954.¹⁵⁹ [Details omitted for the purpose of this paper].

One overall problem with this Law is its limited scope of application: it applies to an “employee” employed either in or upon “any trade or industry or establishment specified in the Schedule to this Act, and employed either on wages or on basic pay” (Section 2(4) as amended). The ILO recommends, among others, to extend the application of this Law to all employment relationships.

3.19 Employment and Skill Development Law, 2012 (Pyidaungsu Hluttaw Law No. 29/2013)

This law primarily deals with employment placement and skill development, and requires the Government to provide opportunities for job seekers (Art.3), set up labour exchange office (Art.4), develop employment and skill development teams (Chapt.3); while requiring employers to carry out employee skill development programme (Chapt.5) and to contribute to the employee skill development fund (Chapt.8), etc.

It is recommended that the law either sets the minimum age for admission to apprenticeship in enterprises at 14 years, or adopts a provision linking with the minimum age provisions in the labour laws, in accordance with ILO Convention No. 138.

3.20 Social Security Law, 2012 (Pyidaungsu Hluttaw Law No. 15 of 2012)

The Social Security Board has developed over the past three years a new social security law which was enacted in August 2012. This new law covers the nine contingencies established by the ILO Convention No. 102 on Social Security (Minimum Standards), 1952 – i.e. access to medical care, sickness, maternity, employment injury, temporary and permanent invalidity, old age, survivors’ benefits, loss of employment - as well as additional contingencies (paternity, housing) and aims at providing some improvements to the social security

¹⁵⁹ ILO: Steps to reflect the Observation by the Committee of Experts concerning the revision of the Leave and Holidays Act, 1951, 23 April 2014, a technical memo submitted to the Government of Myanmar.

protection of workers in Myanmar. It also aims at covering formal sector workers in smaller business units and opens the door to the protection of workers in smaller enterprises and outside formal employment (agriculture, informal sector, family businesses), through the establishment of a voluntary scheme. The new law was developed based on a careful study of ILO social security up to date conventions and recommendations as well as other countries' legal frameworks. However some of the principles and design options entailed in the new social security law and draft rules differ from the core provisions of the ILO Convention No. 102 on Social Security (Minimum Standards), 1952.

First of all, social security is an important preventative measure against child labour, as “poverty and shocks play a key role in driving children to work”.¹⁶⁰ Under the Social Security Law, in principle all workers employed in covered establishments¹⁶¹ are compulsorily insured irrespective of the type and nature of their employment, of the duration of their contract and of the level or form of their remuneration. Nonetheless, there is also “the foreseen difficulty to expand coverage to some categories of workers who will fall under a voluntary and fully contributory scheme.”¹⁶² As such, it is important to extend the coverage of social security, either compulsory or voluntary, to all workers including those working in uncovered establishments and in informal sector. While the new law created an option for voluntary registration of workers who do not fall under the mandatory registration, the fact that voluntary registration implies that workers pay both their contributions and the employer's contributions may not allow for the rapid coverage of the workers in the informal economy and their families.

Secondly, in extending the social security to all workers, it is important to ensure that young workers are entitled to social security just as equally as adult workers. In doing so, the following features of the law could be revised:

- 1) the medical care scheme could cover the family and not only the worker, as families with children often face an important burden in terms of the cost of care;
- 2) the family benefit level for workers with children in primary school could be increased as 10 per cent of the wage of the worker is unlikely to cover the costs of maintaining children at school, it could also be extended to secondary education;
- 3) the voluntary registration could be modified and subsidized so as to ensure effective access to workers in the informal economy.

¹⁶⁰ See ILO's International Programme on the Elimination of Child Labour (IPEC) website section Child Labour and Social Protection”, available at: http://www.ilo.org/ipec/Campaignandadvocacy/wdacl/2014/WCMS_245210/lang--en/index.htm. Accessed on 28 January 2015.

¹⁶¹ The list of covered establishments:

Industrial establishments in which at least 5 persons are employed;
Establishments covered under the shops and Establishments Act (1951);
Railways under the Myanmar Railways Enterprises;
Public industrial and transport establishments under the Union Government or a local authority;
Ports / Mines / Oilfields/ Docks;
The Ministry of Labour; and
Any other establishments as may be notified by the competent authority from time to time.

¹⁶² *Ibid.*, at 2.

In any instances, it is likely that considering the structure of the labour market in Myanmar, the introduction of some universal social protection schemes (such as universal access to health care or universal cash transfers for families with children) may be necessary in order to effectively ensure that families do not need to resort to child labour as a result of a financial shock or because they live in poverty.” The Government of Myanmar recently formulated a national social protection strategic plan which includes provisions for universal child benefits and benefits for children living with disabilities. However, this policy document is not yet implemented or embedded in the legal framework.

3.21 Occupational Safety and Health Bill (as of 30th April 2014)

The draft Bill on OSH is currently being debated at the Parliament.

3.22 The Workmen Compensation Act, 1923 and the Law Amending the Workmen’s Compensation Act, 1923 (The State Peace and Development Council Law No. 4/2005)

The law does not provide any specifics for young workers. The workmen compensation act puts in place a mechanism by which workers who are victim of a work injury and are not already covered by the social security work injury scheme can claim compensation to their employer via a township workmen compensation committee under the authority of the Department of Labour. However, it is important to note that the compensation level is extremely low (i.e. Maximum 600 USD can be granted in case of death) and puts the injured or dead worker's family at risk to fall into poverty and / or resort to child labour.

The ILO Committee of Experts has issued comments on this Act in its Direct Request adopted in 2011 and published in 2012. However, the comments are of general nature and not specific to child labour and young workers. The Committee has yet to review the amended law.

CONCLUSIONS

The Government of the Republic of the Union of Myanmar (GORUM) has been implementing a number of important national policies and legislative measures for children. With respect to child labour, however, limited data is available and the concentrated national actions have just begun to emerge. It is therefore an important step that the GORUM, with ILO support, has set up a Technical Working Group on Child Labour (TW-CL) with a view to establishing a comprehensive and collaborative response against child labour.

With respect to the legislative measures, important law reforms are underway, in particular of the Child Law and the labour laws. The ILO has been working closely with the GORUM and the social partners (i.e. employers and workers) in this process and providing recommendations for amendment. The existing national labour laws, which are outdated and fragmented, need to be urgently amended in line with the international laws so as to effectively eliminate child labour and protect young workers.

The legal minimum age for admission of children into work, which is currently set at 13 years of age, must be urgently raised to 14 years to be in line with the international laws such as C138.

To implement Myanmar's international obligations under the ILO Convention No. 182 on Worst Forms of Child Labour, the law must clearly define and prohibit – for all girls and boys under-18 – the worst forms of child labour (WFCL), which includes slavery and forced labour, human trafficking, use of children in armed conflicts, sexual exploitation of children, involvement of children in illicit activities and hazardous work. The existing laws provide some relevant rules and regulations, in particular against forced labour and human trafficking. However, there remain a number of crucial gaps in light of ILO Convention No. 182, in particular regarding hazardous work¹⁶³ and involvement of children in armed conflicts.

The labour laws must provide rules and regulations to ensure proper working conditions and treatment for children and young workers of working age, including wages, working hours and occupational safety and health. This is particularly important considering that Myanmar's potential for growth making most of youth employment. As such, it is even more important to ensure proper working conditions and treatment of young workers.

Law enforcement is weak and the violators of the child labour-related provisions are hardly prosecuted. There are a number of ways to improve law enforcement and this paper proposed a number of information and recommendations to realize it.

Finally, as identified by the key stakeholders, awareness of the existing laws related to child labour is reported to be low among the stakeholders, including the government and the law enforcement agencies. Parallel to the on-going law reform, law awareness raising needs to be promoted nationwide so as to make the law powerful tools, as they are supposed to be, in eliminating child labour and protecting young workers in Myanmar.

¹⁶³ The Technical Working Group on Child Labour (TWG-CL) has identified the development of the hazardous work list as a key priority for 2015.

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<http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm>.

International Committee on Red Cross (ICRC) websites:

“Overview of the Geneva Conventions and their Additional Protocols” at:
<https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

“Customary law” at <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

ANNEXES

Annex 1: List of key informants

Stakeholders approached	Data collected
A. State agencies, Judiciary and Legislature	
1. Ministry of Labour, Employment and Social Security (MOLES) - Labour Relations Department (Yes) - General Department of Labour (Yes) - Factories and General Labour Laws Inspection Department (Yes) - Education and Training Department (No)	YES
2. Law drafting Office	NO
3. Attorney General's Office	NO
4. Ministry of Health	YES
5. Ministry of Education	NO
6. Ministry of Social Welfare, Relief and Resettlement	YES
7. Ministry of Rural Development	NO
8. City Development Committee	YES (YCDC & MDCD)
9. Ministry of Home Affairs	YES
10. Ministry of Immigration and Population	YES
11. Ministry of Border Affairs	YES
12. Ministry of Science and Technology (Development of Vocational Training Department)	NO
13. Judiciary	NO
14. Parliamentarians	NO
15. Police	NO
16. National Committee on the Rights of the Child	NO
17. Technical Working Group on Child Labour	YES
18. Ministry of Immigration and Population	YES
19. City Development Committee (Yangon, Nay Pyi Taw and Mandalay)	YES
B. Social Partners	
1. Employers' organizations UMFCCI	NO
2. Workers' organizations - CTUM (Confederation of Trade Unions Myanmar) - AFFM (Agriculture and Farmer Federation of Myanmar) - MTUF (Myanmar Trade Union Federation)	YES

C. Other Stakeholders	
1. School inspectorate	NO
2. Academic scholars and researchers	NO
3. Labour lawyers for employers' organizations	NO
4. Labour lawyers for workers' organizations	YES (CTUM & AFFM)
5. UN Agencies • UNICEF • UNDP • UNACT • UNHCR • UNESCO	YES (UNICEF & UNACT)
6. NGOs • World Vision International, Myanmar (YES) • Save the Children (YES) • National NGOs working on child labour (NO)	YES

Annex 2: Interview Questionnaire

ILO-MyPEC Legal Review of existing National Laws and Regulations related to child labour

INTERVIEW QUESTIONNAIRE FOR KEY STAKEHOLDERS

Government, Legislature and Judiciary

1. What is your individual role or your Agency's/Department's role in regards to child labour? If it involves legislative work, please be as specific as possible (for instance, legal research, legal advisory services, law drafting, etc).
2. Among the laws and regulations that you/your body specifically have the mandate/interest on, or familiar with, what laws and regulations are relevant to child labour issues, in particular the worst forms of child labour (WFCL) as described above?
3. In your view, are the national laws and regulations that you specified in question No.2 sufficient to eliminating child labour, in particular the WFCL? Yes/No
4. If you answered NO to question 3, what are the major shortcomings and how should they be improved? The answers can be general (for instance, lack of provisions, lack of understanding of the law among the stakeholders, difficulty of enforcement, etc) but if possible please try to be as specific as possible, focusing on each type of the WFCL (for instance, "this provision of that law is not sufficient to eliminating trafficking or child soldiering", etc).
5. Please take a look at the list of existing national laws and regulations in the Annex document. Among the laws and regulations that you/your body specifically have the mandate/interest on, or familiar with, can you share with us the latest information on the current status of these laws and regulation (i.e. being drafted, to be repealed, etc)?
6. Regarding the **"hazardous work that is harmful to the safety, health and morals of children"** which is identified as one of the WFCL in the ILO Convention. In Myanmar, what types of work are currently "prohibited", and if so, up to what age?
7. We understand that the enforcement of the law, including prosecution of the violators, is a big challenge in general in Myanmar. In your view, what makes the law enforcement so difficult? Do you have any suggestions to improve it?
8. If you belong to the Judiciary or the Police, and if you have dealt with or are aware of the cases involving child labour, please provide information to the extent you are allowed to.
9. If you are a legal practitioner and have dealt with cases concerning child labour, please share with us the information to the extent possible.
10. Please feel free to provide any additional information you think is useful or important for this law review.

Employers' organizations

1. What is the industry/sector/type of your members' business?
2. Roughly, how many employees do your members have, including regular and non-regular employees?
3. Does any of your member employ children under the age of 18 years? Yes/No

4. If answered YES to question 3, please answer the following additional questions:
 - 4.1. How many children are employed?
 - 4.2. What are the ages of these children?
 - 4.3. What types of work do they perform?
 - 4.4. What are their working conditions (wage, hours of work and rest, occupational safety and health, social insurance, etc.)?
 - 4.5. What types of work are NOT allowed for these children?
 - 4.6. Do your members keep registers of these child workers?
5. Please take a look at the list of existing national laws and regulations in the Annex document. Among the laws and regulations that you are familiar with, do you think that the existing national laws and regulations are sufficient to eliminating child labour, in particular the WFCL? Yes/No
6. If you answered NO to question 5, what are the major shortcomings and how should they be improved? The answers can be general (for instance, lack of provisions, lack of understanding of the law among the stakeholders, not matching with the business needs, difficulty of enforcement, etc.) but if possible please try to be as specific as possible, focusing on each type of the WFCL (for instance, “this provision of that law is not sufficient to eliminating forced labour or hazardous work”, etc.).
7. Regarding the **“hazardous work that is harmful to the safety, health and morals of children”** which is identified as one of the WFCL in the ILO Convention. What kind of hazardous tasks or conditions exist in YOUR sector/area, in which you think children under 18 yrs should not be working?
8. We understand that the enforcement of the law, including prosecution of the violators, is a big challenge in general in Myanmar. In your view, what makes the law enforcement so difficult? Do you have any suggestions to improve it?
9. Please feel free to provide any additional information you think is useful or important for this law review.

Workers’ organizations

1. What industry or sector do you represent?
2. Are children under the age of 18 years among your members?
3. Are you aware of any children under 18 years employed? Yes/No
4. If answered YES to question 3, please answer the following additional questions:
 - 4.1. How many children are employed?
 - 4.2. What are the ages of these children?
 - 4.3. What types of work do they perform?
 - 4.4. What are their working conditions (wage, hours of work and rest, occupational safety and health, social insurance, etc.)?
 - 4.5. Are there any types of work that children are engaged that you think they should not?
 - 4.6. Have you ever had to take any specific actions concerning child workers? For instance, represent them in negotiating with their employers or settling disputes between them, or reporting the violations of child labour regulations to the authorities, etc.
5. Please take a look at the list of existing national laws and regulations in the Annex document. Among the laws and regulations that you are familiar with, do you think

that the existing national laws and regulations are sufficient to eliminating child labour, in particular the WFCL? Yes/No

6. If you answered NO to question 5, what are the major shortcomings and how should they be improved? The answers can be general (for instance, lack of provisions, lack of understanding of the law among the stakeholders, not matching with the reality of working children, difficulty of enforcement, etc) but if possible please try to be as specific as possible, focusing on each type of the WFCL (for instance, “this provision of that law is not sufficient to eliminating forced labour or hazardous work”, etc).
7. Regarding the **“hazardous work that is harmful to the safety, health and morals of children”** which is identified as one of the WFCL in the ILO Convention. What kind of hazardous tasks or conditions exist in YOUR sector/area, in which you think children under 18 yrs should not be working?
8. We understand that the enforcement of the law, including prosecution of the violators, is a big challenge in general in Myanmar. In your view, what makes the law enforcement so difficult? Do you have any suggestions to improve it?
9. Please feel free to provide any additional information you think is useful or important for this law review.

Other non-state actors

1. What is your role in your current position? If it involves any legal work, please be as specific as possible (for instance, legal research, legal advisory services, adjudication, etc).
2. Please take a look at the list of existing national laws and regulations in the Annex document. Among the laws and regulations that you are familiar with, do you think that the existing national laws and regulations are sufficient to eliminating child labour, in particular the WFCL? Yes/No
3. If you answered NO to question 2, what are the major shortcomings and how should they be improved? The answers can be general (for instance, lack of provisions, lack of understanding of the law among the stakeholders, difficulty of enforcement, etc) but if possible please try to be as specific as possible, focusing on each type of the WFCL (for instance, “this provision of that law is not sufficient to eliminating forced labour or trafficking or child soldiering”, etc).
4. Regarding the **“hazardous work that is harmful to the safety, health and morals of children”** which is identified as one of the WFCL in the ILO Convention. In your view, what types of work should be defined as hazardous work that should be prohibited for children? You may give examples by specific types of work, sector, or characteristics of work.
5. We understand that the enforcement of the law, including prosecution of the violators, is a big challenge in general in Myanmar. In your view, what makes the law enforcement so difficult? Do you have any suggestions to improve it?
6. Please feel free to provide any additional information you think is useful or important for this law review.