



Karen Human Rights Group

Documenting the voices of villagers in rural Burma

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## Definitional ambiguity and UNSCR 1998: Impeding UN-led responses to attacks on health and education in eastern Burma

*This paper highlights impediments to effective international responses to attacks on health and education in eastern Burma presented by lack of clarity regarding the meaning of “attacks” within the monitoring and reporting framework established by UN Security Council resolutions 1612 and 1998. In order to address this definitional ambiguity and enable recent developments in the UN Security Council to potentially provide support to communities facing attacks in eastern Burma, this paper argues for interpreting “attacks” in a fashion that is consistent with applicable international humanitarian law. The analysis below concludes that UN-led monitoring, reporting and response pursuant to UNSCRs 1612 and 1998 should include acts by parties to armed conflict that both: a) violate relevant international law; and b) attack or threaten to attack personnel related to schools or medical facilities and/ or destroy, damage or force the closure of a school or medical facility.*

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On July 24<sup>th</sup> 2010, units from Burma’s state armed forces, the Tatmadaw, destroyed the village of Tha Dah Der, in eastern Burma’s Karen State. Teachers, students and residents of Tha Dah Der and two other villages nearby had begun going into hiding as early as three days prior, expecting an attack after a handful of mortars were fired into the village. But Saw C---, the school principal, wanted to remain behind as long as it was safe. The school was his responsibility, he said, as he described spending the morning of the attack listening to Tatmadaw soldiers over his radio: “*The situation was too hot, so they did not have time to speak in their code.*”

At 12 pm, mortars started landing nearby. Concluding that Tatmadaw soldiers would soon follow on foot, Saw C--- fled, not wanting to be shot. By the next morning, Tatmadaw soldiers had burned nearly all of the houses in the village. They had also tried and failed to burn the school and, after partially damaging the building and school materials, scrawled obscenities on the blackboard and left.<sup>1</sup>

Almost exactly a year after the attack on Tha Dah Der, in July 2011, the UN Security Council adopted Resolution (UNSCR) 1998, urging parties to conflict to refrain from impeding children’s access to education and to health services.<sup>2</sup> The resolution forms an important new component in the Security Council’s Children and Armed Conflict (CAC) agenda. UNSCR 1998 builds on UNSCR 1612, which in 2005 established a UN-led mechanism for monitoring and reporting on six grave violations of children’s rights, known as the “Monitoring and Reporting Mechanism”

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<sup>1</sup> Photographs of Tha Dah Der after the attack in July 2010 are available in *KHRG Photo Gallery 2010-B*, KHRG, February 2011, photos C-11 to C-22. Analysis of the attack in light of relevant international humanitarian law and UNSCR 1998 can be found in: *Attacks on Health and Education: Trends and incidents from eastern Burma, 2010-2011*, KHRG, December 2011.

<sup>2</sup> *Resolution on children and armed conflict*, SC Res 1998, UN SCOR, 66<sup>th</sup> Year, 6581<sup>st</sup> Meeting, UN Doc S/Res/1998 (2011).

(MRM). The 1612 MRM is designed to trigger responses by UN and country actors at a national and international level, including potentially powerful actions by the UN Security Council.<sup>3</sup> At the same time, major global advocacy initiatives have been launched to focus on protecting health and education in conflict settings.<sup>4</sup>

If these developments can encourage the Tatmadaw and non-state armed groups to change practices that violate international norms in eastern Burma – and hold accountable those actors who do not halt unlawful practices – they could create much needed space for communities in eastern Burma that are actively attempting to protect their children’s health and education from attack.<sup>5</sup> For developments in the Security Council to translate into actions that help create this space, however, the 1612 MRM must gather information that is accurate and represents the true scope of grave violations of children’s rights in eastern Burma.

Unfortunately, the 2010 MRM field manual, to which UN staff and its partners refer when determining whether incidents of grave violations of children’s rights should be monitored and reported on, lacks clarity regarding the types of violations that constitute “attacks” falling within the scope of the 1612 MRM, particularly in light of the recent adoption of UNSCR 1998.<sup>6</sup> The section of the manual that UN field staff use to determine whether a given abuse should be included within the MRM defines attacks on medical and educational facilities as follows: “Attacks include the targeting of schools or medical facilities that cause the total or partial destruction of such facilities. Other interferences to the normal operation of the facility may also be reported, such as the occupation, shelling, targeting for propaganda of, or otherwise causing harm to schools or medical facilities or its personnel.”<sup>7</sup>

The phrasing the current manual lacks clarity regarding what constitutes “targeting,” and what acts constitute “other interferences... otherwise causing harm to schools or medical facilities or its personnel.” This risks inconsistent or overly restrictive readings by UN staff attempting to execute it faithfully. KHRG is concerned that this lack of clarity could encourage staff to interpret their mandate as only extending to monitoring ‘targeted attacks’ that can be shown to have intentionally singled out medical or education facilities or staff. Such a narrow interpretation would not be consistent with international humanitarian law, which prohibits knowing and wilful attacks on civilians and civilian objects. It would also risk placing a party to conflict outside the mandate of UNSCR 1998 simply because its intent was unclear, or because it unlawfully attacked a school or clinic *and* other civilian objects.

Limiting the scope of UNSCR 1998 to only those attacks that deliberately single out education and health facilities or personnel would also preclude the resolution from offering any support to communities facing the most common forms of attack in eastern Burma. The Tatmadaw units who attempted to burn the school in Tha Dah Der did, after all, also burn the rest of the village; their intent was not to target the school, but to target the whole community – including the school. The attack on Tha Dah Der was part of an established pattern documented by KHRG over the last two decades. KHRG recently confirmed the continuation of this trend by compiling

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<sup>3</sup> *Resolution on children and armed conflict*, SC Res. 1612, UN SCOR, 60<sup>th</sup> Year, 5235<sup>th</sup> Meeting, UN Doc S/Res/1612 (2005). In 2009, this resolution was augmented by UNSCR 1882; see: *Resolution on children and armed conflict*, SC Res 1882, UN SCOR, 64<sup>th</sup> Year, 6176<sup>th</sup> Meeting, UN Doc S/Res/1882 (2009).

<sup>4</sup> In October 2001, with the release of the report *Health Care in Danger: Making the case*, the International Committee of the Red Cross signalled the launch of a “... major campaign to raise awareness of this pressing issue, and mobilizing a community of concern. This global initiative will last four years and aims at making a crucial difference for people affected on the ground.” In February 2010, meanwhile, the Global Coalition to Protect Education From Attack began organising similar activities to encourage better protection for education in conflict.

<sup>5</sup> For more on these community self-protection strategies, see *Self-Protection Under Strain: Targeting of civilians and local responses in northern Karen State*, KHRG, August 2010.

<sup>6</sup> Note that the MRM field manual has not been updated since the adoption of UNSCR 1998 on July 12<sup>th</sup> 2011.

<sup>7</sup> “Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict,” MRM Field Manual O/SRSG-CAAC-UNICEF-DPKO, April 2010, 1-54, 11.

a database of 59 attacks or threats of attacks on civilians documented between February 2010 and May 2011, and triangulating these reports with health and education organisations active in eastern Burma.<sup>8</sup> While this database is far from comprehensive, it shows that children's health and education is consistently being disrupted by attacks by Tatmadaw forces on civilians in conflict-affected areas of eastern Burma. Schools and clinics are forced to close when residents flee attacks or threats of attack, on the understanding that Tatmadaw soldiers will not accord civilians the basic protection required by IHL; teachers and medics are forced to flee for the same reasons, and on the understanding that Tatmadaw forces will not accord educational or medical personnel any additional protection. In some cases, like the attack on Tha Dah Der, schools, clinics and children's homes are burned, destroyed or otherwise made uninhabitable. In other cases, schools and clinics are permanently or temporarily forced to close, but not physically destroyed. The attacks do not single out teachers or medics, but are clearly unlawful – and unacceptably interfere with children's health and education.

This analysis argues that the decisive factor in whether to monitor and report attacks against health and education should not be whether an attack singled out medics and teachers or hospitals and schools, but whether, in the course of the attack, parties to conflict failed to respect those persons' and objects' protected status. "Attacks" within the meaning of UNSCR 1998 should be defined consistently with relevant provisions of international humanitarian law – not more restrictively – and should reflect the spirit of UNSCR 1998. Monitoring of attacks on health and education pursuant to UNSCRs 1612 and 1998 should thus include acts by parties to armed conflict that both: a) violate relevant international law and; b) attack or threaten to attack personnel related to schools or medical facilities and/ or destroy, damage or force the closure of a school or medical facility.

This interpretation is most consistent with the language of UNSCR 1998. Paragraph 3 of the resolution requests the Secretary General to prepare an annex to his next global CAC report listing parties that, "*in contravention of applicable international law,*" commit "*recurrent attacks on schools and/or hospitals*" or "*recurrent attacks or threats of attacks against protected persons in relation to schools and/or hospitals.*" That this paragraph explicitly requests listing of parties to conflict that attack or threaten to attack personnel offers clear guidance in the context of eastern Burma: attacks and threats of attacks on schools, clinics and related personnel are not separable categories with regard to monitoring and reporting of attacks. Clinics and schools are forced to close when teachers, medics and the surrounding civilian community feel the protected personnel, as well as their students or patients, are under threat of attack. Tatmadaw forces may subsequently damage or destroy clinics and schools, but whether or not a given school or clinic is specifically damaged or destroyed has no bearing on whether protected personnel were threatened with unlawful attacks on their person, and children's access to health and education impeded.

Paragraph 4 of UNSCR 1998, which requests the Secretary General to monitor and report on attacks, provides additional guidance for interpreting what acts should be included within this mandate. It begins by explicitly urging parties to conflict to refrain from "*actions that impede children's access to education and to health services.*"<sup>9</sup> This makes clear that the baseline criteria for judging whether a party to conflict's actions should be monitored is whether or not those actions impede access to education and to health. This in turn indicates that, rather than considering whether or not schools, hospitals or related personnel were singled out for attack, the central question asked when determining if an incident qualifies for monitoring must be whether or not access to health or education for children has been impeded. Indeed, this is the underlying rationale for inclusion of attacks on related personnel within monitoring pursuant to the resolution: personnel related to schools and hospitals are only relevant to the Security Council's CAC agenda insofar as they are necessary for children to be able to access education

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<sup>8</sup> *Attacks on Health and Education: Trends and incidents from eastern Burma, 2010-2011*, KHRG, December 2011.

<sup>9</sup> UNSCR 1998, paragraph 4.

and health. While the remainder of Paragraph 4 identifies two particular issues to be monitored, the use of the phrase “*inter alia*” indicates that a broader range of actions that impede children’s access to education and health are to be monitored under the resolution.<sup>10</sup>

Because the two issues flagged for monitoring in Paragraph 4 are listed “*inter alia*” they, by definition, form part of a non-exhaustive list relating to impediment of access to education and health. It is therefore helpful to consider the spirit and purpose of UNSCR 1998 when determining more broadly what other types of acts should be monitored and reported upon. The text of the resolution makes clear from the outset that both attacks and the threat of attacks on schools and related personnel, and particularly cases which result in the closure of a school or hospital, were priority issues of concern when the Security Council drafted the resolution. The preamble of UNSCR 1998 expressed “*deep concern*” regarding “*attacks as well as threats of attacks in contravention of applicable international law against schools and/ or hospitals, and protected persons in relation to them.*” The same paragraph of the preamble expressed the same concern regarding “*closure of schools and hospitals... as a result of attacks and threats of attacks.*”

The interpretation suggested above would not expand the scope of monitoring under UNSCR 1998 beyond issues relevant to the UNSC CAC agenda. The Security Council’s emphasis on attacks that occur “*in contravention of applicable international law*” would limit out those incidents in which schools or hospitals are destroyed, damaged or forced to close as a result of lawful military practices, such as harm or threat of harm resulting from lawful armed engagements between two parties to conflict. It would also limit out incidents in which schools have to close as a result of some types of ‘forced displacement,’ unless the method by which the community was displaced is also an “*attack*” in violation of “*relevant international law,*” as phrased in Paragraph 3 of UNSCR 1998. Schools or medical facilities that close because a population flees due to generalized threats resulting from lawful combat between two parties to conflict, for example, would not necessarily be monitored in this interpretation; such a context is clearly distinct from incidents in which a single party to a conflict seeks to attack a given civilian population and, as a part of this unlawful attack, fails to accord protection to schools, clinics or related personnel. That some incidents of this latter type could also be described as forced displacement, however, is immaterial to an assessment of whether protected personnel were threatened with attacks on their person or whether education or health services were interrupted, and should not disqualify them from monitoring pursuant to UNSCRs 1612 and 1998. While it is clear that all incidents of forced displacement should not be included in monitoring, all incidents that meet the narrow requirements set forth by the resolutions should be monitored and reported upon.

Monitoring pursuant to UNSCR 1998 should also include attacks which force “*protected persons*” such as teachers or medics to flee to avoid attack or the threat of attack. That such an attack or threat of attack may also place other civilians at similar risks does not negate the risk to protected personnel. The decisive factor in whether to report a given incident should not be whether the attack *singles out* medics and teachers, but whether parties to conflict *fail to respect their status as protected persons*. In the 59 recent attacks identified in KHRG’s recent report, for example, Tatmadaw and NSAG forces clearly failed to meet this responsibility. Ultimately, the question could be posed thus: during attacks on civilian settlements in Karen State, Bago Division and Tenasserim Division, could teachers or medics remain behind in their schools and clinics and expect to remain protected from attack – a protection which all other civilians who

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<sup>10</sup> The guidance provided in the 2010 MRM field manual, drafted prior to the adoption of UNSCR 1998, also explicitly allows for monitoring and reporting on any action that interferes with “*the normal operation of*” an educational or medical facility. The guidance cites three specific activities as examples, but indicates that these are non-exhaustive by including a fourth broad category of activities “*otherwise causing harm to schools or medical facilities or its personnel.*” “Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict,” MRM Field Manual O/SRSG-CAAC-UNICEF-DPKO, April 2010, 1-54, 11

fled the threat of attack could not expect to receive? The principal of the Tha Dah Der school certainly did not; the fact that he and other teachers or medics feel sufficiently threatened to compel flight, along with other civilians, unequivocally indicates that the answer is in the negative.

To exclude from monitoring an attack such as that on Tha Dah Der because the party to conflict did not single out the school for attack is inconsistent with the letter and spirit of UNSCR 1998, and would be tantamount to absolving a party to conflict from responsibility for attacking schools or clinics or threatening to attack related personnel, simply because its forces also attacked other civilians and civilian objects. To make the bright line whether the school or personnel is singled out from other targets, then, raises the bar too high to be useful for child protection purposes. This would require evidence of mental intent to specifically attack a school or personnel in order to include an incident in monitoring, rather than evidence that a school or personnel was unlawfully attacked or threatened with unlawful attack.

Moreover, limiting monitoring and reporting only to incidents in which a party to conflict can be shown clearly to have intended to single out schools, hospitals or related personnel could, perversely, encourage parties to conflict to attack other civilian targets near schools or hospitals as a method for obscuring their intent, by making it difficult to determine whether they intended to attack the school/clinic or whether they intended to attack the entire civilian community. In such a circumstance a party to conflict could violate international humanitarian law by attacking a school and/or clinic, yet nonetheless be shielded from monitoring or listing under UNSCR 1998. This is clearly inconsistent with the spirit of UNSCR 1998 and the entire Security Council CAC agenda.

That an attack or threat of attack on a school, clinic or related personnel also included a similar attack or threat of attack against the broader civilian population or civilian objects in a given location should thus not be interpreted as a reason to exclude the attack from monitoring pursuant to UNSCRs 1612 and 1998. Instead, attacks or threats of attacks on other civilians or civilian objects should confirm the unlawful nature of a given attack. Once an attack has been ascertained to have been unlawful or potentially unlawful, the question should then be whether the attack destroyed, damaged or forced the closure of a school or clinic, or attacked or threatened to attack personnel related to schools or clinics.<sup>11</sup>

Incidents in which an unlawful attack forces schools or clinics to close, but does not damage or destroy the facility, should be monitored and reported upon pursuant to UNSCRs 1612 and 1998, for two reasons. First, such attacks impede children's access to education or health, which is clearly a central issue to UNSCR 1998; children fleeing because their entire village and its inhabitants, including teachers and medics, are under threat of attack can neither attend school nor receive proper medical care. Whether the school or clinic they left behind remains standing provides no material benefit for them, and does not change the fact that their access to education or health was impeded. Second, such attacks also typically entail threat of attack on personnel related to schools and clinics. This is evidenced by the fact that teachers and medics flee from attacks along with other members of the civilian population.

While cases in which schools or clinics are completely destroyed or permanently closed are comparatively more serious than incidents in which schools or clinics are reopened after an attack, the duration of a school or clinic closure should have no bearing on whether an individual incident is monitored and reported upon pursuant to UNSCRs 1612 and 1998, for three main reasons. First, the duration of school closure does not affect assessments of whether or not an attack or threat of attack was unlawful. If parties to conflict violate international humanitarian

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<sup>11</sup> Examples of such analysis, applied to 16 recently-documented attacks in eastern Burma, is undertaken in the recent KHRG report, *Attacks on Health and Education: Trends and incidents from eastern Burma, 2010-2011*, KHRG, December 2011.

law and attack a school, clinic or attack or threaten to attack related personnel, on this basis alone the case should be reported. At minimum, unlawful attacks on civilians that result in the closure of schools and clinics should be taken as additional confirmation of a related threat of attack on teachers and medics.

Second, it is imperative that monitoring pursuant to UNSCR 1998 reports information that enables the Security Council to accurately assess trends. While an individual incident of a short-term threat of attack on protected personnel or short-term closure of schools or clinics may in isolation appear insignificant, effective trends analysis requires clear information that indicates whether such short-term closures occur frequently. This is particularly important given that UNSCR 1998 specifically seeks to establish whether attacks are “*recurrent*.”<sup>12</sup> Existing gaps in information gathered by the 1612 MRM on this issue to date magnify the importance of this last concern.

Lastly, while an individual incident in which a school or clinic is closed for a short period of time may not appear serious when taken in isolation, the cumulative impact of repeated short-term closures has severe consequences for children’s health and education. A KHRG researcher that visited the Kyat Yeh area in Tenasserim Division, for example, where teachers and students fled a threat of attack by Tatmadaw forces in May 2010, noted obstacles to education, including the fact that the number of teachers in the school had halved since 2009, as the result of fears of attacks and repeated short-term closures of the school due to attacks or the threats of attacks.<sup>13</sup>

How many days, in other words, must a school or clinic be forced to close before it should be monitored and reported upon pursuant to UNSCR 1998? The answer is that no school or clinic should ever be forced to close due to fears of unlawful attack. Ultimately, determination of the seriousness of a given incident is inherently subjective and cannot be made effectively in isolation. Such an assessment should only be made after gathering a data set sufficiently large to determine whether a trend exists or does not exist, and whether or not a large number of individually ‘non-serious’ incidents are serious when aggregated. Given that UN staff attempting to monitor and report on grave violations of children’s rights are currently prohibited from accessing conflict areas in eastern Burma, it is clear that such a data set cannot yet have been gathered.<sup>14</sup>

Choosing to ignore individual incidents and exclude them from reporting because of distinctions related to the presumed intent of a given attack, arbitrary criteria such as the duration of a school closure, or subjective criteria such as the seriousness of an attack would at this juncture be particularly damaging to the Security Council’s ability to identify trends. Monitoring and reporting pursuant to UNSCRs 1612 and 1998 needs to be approached from the perspective that as much accurate information as possible should be forwarded to the Secretary General and Security Council so that they have sufficient information to make authoritative evaluations regarding trends and appropriate responses.

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<sup>12</sup> UNSCR 1998, paragraph 4.

<sup>13</sup> Further analysis of this incident can be found in *Attacks on Health and Education: Trends and incidents from eastern Burma, 2010-2011*, KHRG, December 2011.

<sup>14</sup> In her reports to the Security Council, the Secretary General’s Special Representative on Children in Armed Conflict has repeatedly noted that access restrictions have prevented her from effectively monitoring and reporting on grave violations of children’s rights in eastern Burma. *Children and armed conflict: Report of the Secretary-General*, A/65/820-S/2011/250, April 2011. See paragraph 111, noting restrictions on access. See paragraph 112, noting attacks in February 2010 that forced the closure of 13 schools and destroyed a high school, nursery school and a clinic. The SRSR began noting such restrictions in her first report on Burma. See, *Report of the Secretary-General on children and armed conflict in Myanmar*, S/2007/666, November 2007. Paragraph 36 and 37, noting that “Credible reports indicat[e] that during the period 2006-2007 Government armed forces in Kayin state attacked villagers... These reports, however, cannot be confirmed owing to lack of access to conflict-affected areas.”

This analysis opened by highlighting an attack on Tha Dah Der. The school principal who spoke with KHRG was not killed, nor were any of the other teachers who fled along with him. The school was not singled out for destruction; nor was it given any special protection: Tatmadaw soldiers attempted to destroy nearly every major structure in the village. Documentation of the incident indicates that the school was not razed only because soldiers used it as a shelter, and then tried and failed to destroy it before leaving the village. Villagers rebuilt their homes nearby, and a second school building that escaped unscathed because it was built in another location was eventually expanded to accommodate students who had previously studied in the damaged building. The community in Tha Dah Der has been able to rebuild, but it and other communities in eastern Burma should not be left to solitarily make plans for responding to such attacks in the future. If the UN Security Council CAC agenda is to have any relevance for them, no interpretation of UNSCR 1998 should be so restrictive as to exclude the attacks they face from UN-led monitoring, reporting and response.<sup>15</sup>

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<sup>15</sup> Further analysis of this incident can be found in the incident description accompanying explanation of Type 2 attacks in Table 1 of the report: *Attacks on Health and Education: Trends and incidents from eastern Burma, 2010-2011*, KHRG, December 2011.