

Legal Opinion¹

United Nations Credentials Committee: Representation of the State of Myanmar to the United Nations

This document has been prepared to inform the deliberations of the UN Credentials Committee when it convenes in the context of the 76th session of the UN General Assembly (UNGA 76) which starts on 14 September 2021.

A. Introduction

1. The international community avoids, where possible, judgments regarding the legitimacy of individual Member State governments. As a general matter the legal capacity of a regime to assert rights, incur obligations or authorise acts on behalf of a State is not subject to any systematic process of assessment by the international community on democratic grounds. For this and other reasons most governments have a policy of not formally recognizing new governments.² International organizations, however, cannot avoid determining who they will accept as entitled to act on behalf of a Member State, and in certain cases they have taken positions on the legitimacy of governments, especially where they have come to power by non-democratic means.
2. There are two dimensions to State participation in the UN General Assembly: membership and representation. Membership of the UN is governed by Articles 4 to 6 of the UN Charter. Representation refers to the presence in the General Assembly of the representative of the Member State and is dealt with in Rules 27-29 of the General Assembly's Rules of Procedure.³ It is the latter with which we are concerned in this legal opinion.
3. Rule 27 of the General Assembly's Rules of Procedure states that the credentials of representatives shall be submitted to the Secretary General at least a week ahead of the opening of the session, and "shall be issued either by the Head of State or Government or by the Minister of Foreign Affairs".⁴ In a 1970 memorandum to the General Assembly, the UN Legal Counsel advised that the credentials process was a "procedural matter limited to ascertaining that the requirements of Rule 27 have been satisfied".⁵
4. Other than the Rules of Procedure and the 1970 memorandum, the only authoritative guidance to assist the Assembly in its credentials decisions is provided in General Assembly Resolution 396(V), 14 December 1950, entitled "Recognition by the United

¹ This legal opinion has been prepared by the Myanmar Accountability Project, MAP, (the-world-is-watching.org), including its Director, Chris Gunness and Director of Protection, Damian Lilly, along with the legal scholars that have signed it. It takes as its starting point a legal opinion from 2008 by Christine Chinkin et al, 'Opinion: In re: United Nations Credentials Committee, Challenge to the Credentials of the Delegation of the State Peace and Development Council to Represent Myanmar/Burma' (2008), available at: <http://www.birmaniademocratica.org/GetMedia.aspx?id=cda0962d94b244a18dcf8a6124e68608&s=0&at=1>.

² See, eg: Brad Roth, *Sovereign Equality and Moral Disagreement* (2011) 200; Hilary Charlesworth, 'The New Australian Recognition Policy in Comparative Perspective' (1991) 18(1) *Melbourne University Law Review* 1; Colin Warbrick, 'New British Policy on Recognition of Governments' (1981) 30(3) *International and Comparative Law Quarterly* 568.

³ UNGA, Rules of Procedure of the General Assembly (1985) UN Doc A/520/Rev.15.

⁴ Ibid.

⁵ UNGA, Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request, 11 November 1970, UN Doc A/8160.

Nations of the Representation of a Member State”. That Resolution provides in paragraph 1 that:

whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.

B. Practice of the UN Credentials Committee

5. In most cases, accreditation at the UN is a formality whereby the General Assembly approves specific individuals to represent a Member State. According to this procedure, the Head of State or Government or Minister for Foreign Affairs of a Member State submits documentation to the UN Secretary-General stating that the named individuals are entitled to represent that Member State. The documentation is referred to a Credentials Committee appointed by the General Assembly at the beginning of each regular session. Thus, the review of the credentials of UN Member States is an annual process. The Credentials Committee examines the credentials and determines whether they are complete and have been issued by the proper authority, but it does not generally inquire into the legitimacy of the issuing authority. The Committee then submits a report to the General Assembly recommending either rejection or approval of the credentials of the representatives of all Member States.⁶ Typically, the General Assembly adopts the Committee’s recommendations without discussion.
6. In making its recommendation to the General Assembly, the Credentials Committee will generally not look beyond the credentials of the nominated representative of a Member State to consider the legitimacy of the issuing entity. However, in the event that two rival delegations submit competing credentials to the Secretary General, each claiming to represent the same State, the Credentials Committee is in practice required to make such an inquiry. Moreover, regardless of whether competing credentials have been submitted, any Member State may challenge the credentials of a representative of another Member State, and implicitly of the government that issued them, under a specific agenda item of the General Assembly, for example on the basis that the submitting government does not legitimately represent the State. If such a challenge is made, the representative in relation to whom the objection has been made is seated provisionally, until the Credentials Committee has reported and the General Assembly has made its decision.⁷

(a) Credentials practice 1945-1990

7. In its first 45 years, the General Assembly was faced with seven major credentials contests. These should be briefly reviewed.
8. South Africa (1970-1994): The General Assembly took up the question of racial discrimination in South Africa at its first session in 1946.⁸ Over the next quarter-century, both the General Assembly and the Security Council repeatedly urged the South African Government to abandon the “inhuman and aggressive” racist policies of apartheid and conform to the human rights provisions of the Charter and the Universal Declaration of

⁶ UNGA, Rules of Procedure of the General Assembly (1985) UN Doc A/520/Rev.15, Rule 28.

⁷ Ibid, Rule 29.

⁸ See GA Res 44 (I) (8 December 1946), regarding the treatment of Indians.

Human Rights.⁹ In 1970 the General Assembly accepted the recommendation of the Credentials Committee not to accept the credentials of the South African delegation.¹⁰ However the President of the General Assembly ruled that this did not preclude South Africa from participating in the work of the Assembly.¹¹ From 1970 until 1972 the General Assembly neither accepted nor rejected South Africa's credentials, but it did not interfere with South Africa's participation. Then in 1973 the General Assembly voted to reject the credentials of the representatives of South Africa;¹² and similarly in 1974, the Assembly accepted the recommendation of the Credentials Committee to accept all credentials submitted with the exception of South Africa.¹³ The President of the 1974 session ruled that the rejection of the credentials of the South African delegation barred South Africa from participating in the work of the Assembly.¹⁴ South Africa was thus precluded from participating in the General Assembly until 1994, when it was officially welcomed back to the Assembly following democratic elections in South Africa.¹⁵

9. Hungary (1956-63): In November 1956, Warsaw Pact forces intervened in Hungary to remove the established government and to install the rival Kadar government. In 1956, the Credentials Committee adopted a proposal of the representative of the US that it should "take no decision regarding the credentials submitted" by Hungary's representatives, on the basis that the credentials had been "issued by authorities established as a result of military intervention by a foreign power whose forces remained in Hungary despite requests by the General Assembly for their removal".¹⁶ The General Assembly approved the Committee's report.¹⁷ The effect of the Assembly's decision to "take no decision" regarding credentials in this case was that Hungary's delegation was permitted to provisionally participate in General Assembly sessions, until a decision was made. Opposition to the credentials was finally dropped in 1963 as the regime had by then demonstrated its ability to maintain effective control without assistance from foreign forces.¹⁸
10. Congo-Leopoldville (1960): Congolese President Kasavubu dismissed Prime Minister Lumumba on 5 September 1960. The Parliament convened to vote full powers to the Prime Minister and to declare illegal any competing government. President Kasavubu responded by authorizing the Army Chief of Staff to disperse the Parliament "temporarily". Upon submitting delegation credentials to the General Assembly, Kasavubu had neither full de facto control nor a constitutionally ordered government. The Credentials Committee recommended that Kasavubu's delegation be accepted, ruling that to entertain Lumumba's constitutional objection would constitute "an intervention in the domestic affairs of the

⁹ See, eg: GA Res 616 (VII) A-B, 17 December 1952; SC Res 181, 9 August 1963; SC Res 182, 4 December 1963; SC Res 191, 18 June 1964; GA Res 2506 (XXIV), 21 November 1969; GA Res 31/6I, 6 November 1976; GA Res 41/35B, 10 November 1986.

¹⁰ GA Res 2636 (XXV), 13 November 1970.

¹¹ UN GAOR (25th sess, 1901st plen mtg), 11 November 1970, UN Doc A/PV.1901, 24-25.

¹² UN GAOR (28th sess, 2141st plen mtg), 5 October 1973, UN Doc A/PV.2141, 7.

¹³ GA Res 3206 (XXIX), 30 September 1974, adopting the First Report of the Credentials Committee, 28 September 1974, UN Doc A/9779.

¹⁴ UN GAOR (29th sess, 2281st plen mtg), 12 November 1974, UN Doc A/PV.2281, 854-56.

¹⁵ GA Res 48/258, 6 July 1994.

¹⁶ UNGA, Report of the Credentials Committee, 13 February 1957, UN Doc A/3536, 1.

¹⁷ GA Res 1009 (XI), 21 February 1957.

¹⁸ UNGA, Report of the Credentials Committee, 14 December 1963, UN Doc A/5676; and UNGA, Report of the Credentials Committee, 14 December 1963, UN Doc A/5676/Rev.1.

Republic of the Congo”.¹⁹ The General Assembly approved the report of the Credentials Committee.²⁰

11. Yemen (1962): On 26 September 1962, revolutionary republican forces carried out a coup d'état against the monarchy. When the two contestants submitted competing credentials, the Credentials Committee recommended that the credentials submitted by the republican delegation be accepted. The recommendation was approved by the General Assembly.²¹
12. China (1949-71): In 1949, communist forces were in control of the mainland and nationalist forces controlled the island of Taiwan and certain other islands. The General Assembly was presented with a choice between two governments, each in control of a portion (far from equal) of territory and population, each claiming to represent the State of China.²² In 1950 the Assembly established a Special Committee to consider the question of Chinese representation, and resolved that pending any further decision by that Committee, the representatives of the National Government of China would be seated in the General Assembly.²³ Over the next two decades, the issue of China's representation was raised repeatedly both in the Credentials Committee and in the plenary, but attempts to change China's representation were consistently defeated.²⁴ Finally in 1971, the Assembly passed a resolution recognising the representatives of the People's Republic of China as the “only lawful representatives of China”, and deciding to “expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations”.²⁵
13. Cambodia (1973-74): In March 1970 the Cambodian Head of State was ousted by the Prime Minister, General Lon Nol, who established the “Khmer Republic”. In May 1970, Prince Sihanouk announced in Beijing the formation of a government in exile, the Royal Government of National Union of Cambodia. In 1973 and again in 1974, some States objected to the credentials submitted by the Khmer Republic, however, these credentials were ultimately accepted by the General Assembly.²⁶ The Assembly recognised that “while the Royal Government of National Union of Cambodia, ... exercises authority over a segment of Cambodia, the Government of the Khmer Republic still has control over a predominant number of the Cambodian people”.²⁷
14. Cambodia (1979-90): In December 1978, the Vietnamese army captured Phnom Penh and installed a new government of Kampuchean Communists (the People's Republic of Kampuchea). However, the Khmer Rouge maintained a foothold within the national territory along the Thai border and presented themselves as the government of Democratic

¹⁹ UNGA, First Report of the Credentials Committee, 17 November 1960, UN Doc A/4578, 4-5.

²⁰ GA Res 1498 (XV), 22 November 1960. See B Roth, *Government Illegitimacy in International Law* (2000) 268-274.

²¹ UNGA, Report of the Credentials Committee, 20 December 1962, UN Doc A/5395; GA Res 1871 (XVII) 20 December 1962.

²² See Crawford, *The Creation of States in International Law* (2006) 198-221.

²³ GA Res XXX, 19 September 1950.

²⁴ See, eg, UNGA, Report of the Credentials Committee, 21 September 1950, UN Doc A/1383; GA Res 1135 (XII) 24 September 1957; GA Res 1668 (XVI) 15 December 1961 (determining that any proposal to change China's representation was an ‘important question’, thus requiring a two thirds majority); GA Res 2025 (XX), 17 November 1965.

²⁵ See GA Res 2758 (XXVI), 25 October 1971; Roth, *Government Illegitimacy*, above n 20, 261-263.

²⁶ UNGA, Second Report of the Credentials Committee, 12 December 1973, UN Doc A/9179/Add.1, 12, approved by GA Res 3181 (XXVII), 17 December 1973; UNGA, Second Report of the Credentials Committee, 13 December 1974, UN Doc A/9779/Add.1, approved by GA Res 3323 (XXIV), 16 December 1974.

²⁷ GA Res 3238 (XXIX), 29 November 1974.

Kampuchea, in resistance to foreign occupation. International opposition to the Vietnamese invasion was overwhelming. Security Council condemnation was blocked only by the veto.²⁸ The General Assembly demanded an “immediate withdrawal” of Vietnamese forces.²⁹ In 1979, delegates from both the People’s Republic of Kampuchea and Democratic Kampuchea submitted credentials to the Secretary General. The Credentials Committee voted to accept the credentials of the delegation of Democratic Kampuchea, a decision confirmed by the General Assembly.³⁰ The credentials contest was repeated from 1979 until 1991, when the parties reached an accord.³¹

15. No clear answers emerge from practice during the period 1945-90 as to the principles to be adopted in evaluating a challenge to the credentials of the nominated representative of a Member State. The case of China ultimately supported effective control as the primary determinant of representation. In the cases where effective control was closely contested – Congo-Leopoldville, Yemen and Cambodia/Khmer Republic – the most significant common factor appears to have been control of the capital and the State apparatus. The presumption in favour of the prior established government was indeterminate in the Congo case, was disregarded by half the membership in the first Cambodian case and did not attract significant support in the Yemen case. On the whole, these earlier credentials controversies appear to have been dominated by the traditional criterion of recognition of effective control. But the practice showed that the Credentials Committee retained a discretion to decline to recognise the credentials of a government imposed by force, external or internal, or otherwise demonstrably unrepresentative. It did so whether or not there was a rival government whose credentials could be recognised. Evidently these decisions did not themselves operate to change the internal political situation, but they had significance in marking the international illegitimacy of the questioned regime, and they added to the pressure to remedy the situation, whether by democratic elections or some form of national reconciliation agreement.

(b) Credentials practice since 1990

16. Liberia (1990 – 1997): In December 1989, rebel forces launched an insurrection against President Samuel Doe’s government. By September 1990, with Doe’s forces in control of just a small area outside the capital, Doe was captured and executed. However, Doe’s ousted government continued to submit credentials to the UN, which the Credentials Committee chose to accept, as the situation on the ground in Liberia was fluid and no competing credentials claims were made by any other Liberian party.³²

²⁸ UN Doc S/13027, 15 January 1979.

²⁹ GA Res 34/22, 14 November 1979.

³⁰ UNGA, First Report of the Credentials Committee, 20 September 1979, UN Doc A/34/500; GA Res 34/22, 14 November 1979.

³¹ See UNGA, Letter from the Permanent Representatives of France and Indonesia to the United Nations addressed to the Secretary General, 17 September 1990, UN Doc S/21732 & A/45/490; see also Roth, *Government Illegitimacy*, above n 20, 280-283.

³² UNGA, First Report of the Credentials Committee, 11 October 1991, UN Doc A/46/563; UNGA, First Report of the Credentials Committee, 9 October 1992, UN Doc A/47/517; UNGA, Second Report of the Credentials Committee, 17 December 1993, UN Doc A/48/512/Add.1; UNGA, First Report of the Credentials Committee, 14 October 1994, UN Doc A/49/517; UNGA, First Report of the Credentials Committee, 13 October 1995, UN Doc A/50/559; UNGA, Second Report of the Credentials Committee, 13 December 1996, UN Doc A/51/548, Add.1; UNGA, Report of the Credentials Committee, 11 December 1997, UN Doc A/52/719.

17. Haiti (1991-94): In September 1991 the Haitian military, in a coup led by General Raoul Cedras, took over the democratically elected government of President Jean Bertrand Aristide.³³ In October 1991 the General Assembly passed a resolution “affirm[ing] as unacceptable any entity resulting from [the] illegal situation and demand[ing] the immediate restoration of the legitimate Government of President Jean-Bertrand Aristide”.³⁴ Despite the military junta wielding effective control, in 1991, 1992 and 1993 the General Assembly accepted without objection the credentials submitted by the representative of the ousted Aristide Government.³⁵ In July 1994, expressing concern at the deterioration of the humanitarian situation in Haiti and condemning the military regime’s refusal to cooperate with the United Nations, the Security Council acted under Chapter VII of the UN Charter to adopt Resolution 940. The resolution authorised:

Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, ... the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti...³⁶

Following the deployment of this force, Aristide was returned to office in October 1994.

18. Afghanistan (1996-2000): Following the assumption of power by the Taliban in Afghanistan in 1996, the ousted democratically elected government led by President Rabbani submitted the credentials of its representatives to the 51st session of the General Assembly. The Taliban disputed those credentials in a communication to the UN Secretariat, but did not submit its own credentials. The Credentials Committee recommended that the General Assembly decide to “defer any decision on the credentials of the representatives of Afghanistan until a later meeting”, a recommendation approved by the General Assembly.³⁷ In 1997 and the years following, the Rabbani government continued to submit its credentials, as did the Taliban. The Assembly repeatedly deferred its decision, allowing the representatives of ousted President Rabbani to “continue to participate in the work of the General Assembly”, pursuant to the Assembly’s rules of procedure.³⁸ Such practice continued until 2001, when the Interim Authority was appointed for Afghanistan in the aftermath of the US-led intervention, and the Afghan relationship with the UN began to normalise. In its 2001 report, the Committee noted that the Interim Authority was due to take office on 22 December 2001, in accordance with the Agreement on provisional arrangements on Afghanistan endorsed by the Security Council in resolution 1383 (2001). Formal credentials would be submitted on or after that date.³⁹

19. Sierra Leone (1996): President Ahmed Tejan Kabbah was popularly elected to power in 1996. He was removed in May 1997 in a military coup led by Major Koroma, who declared

³³ UNGA, Letter dated 20 November 1991 from the Permanent Representative of Haiti to the United Nations addressed to the Secretary General, 20 November 1991, UN Doc A/46/695.

³⁴ GA Res 46/7, 11 October 1991.

³⁵ See UNGA, Second Report of the Credentials Committee, 16 December 1991, UN Doc A/46/563/Add.1; UNGA, First Report of the Credentials Committee, 9 October 1992, UN Doc A/47/517; UNGA, First Report of the Credentials Committee, 20 October 1993, UN Doc A/48/512.

³⁶ SC Res 940, 31 July 1994, 2.

³⁷ UNGA, First Report of the Credentials Committee, 23 October 1996, UN Doc A/51/548.

³⁸ See: UNGA, Report of the Credentials Committee, 11 December 1997, UN Doc A/52/719, para 10; UNGA, First Report of the Credentials Committee, 18 October 1999, UN Doc A/54/475, para 9; UNGA, First Report of the Credentials Committee, 1 November 2000, UN Doc A/55/537, para 9.

³⁹ UNGA, Report of the Credentials Committee, 20 December 2001, UN Doc A/56/724, para 4.

the Armed Forces Revolutionary Council to be the new government. The people of Sierra Leone rejected the coup, responding with civil disobedience and demanding the restoration of the democratically elected government. The military junta never submitted credentials, and in 1997 the Credentials Committee recognized, without any objections, the credentials submitted by the deposed Kabbah government.⁴⁰

20. Cambodia (1997-8): In 1997, credentials were submitted by both Prince Ranariddh's Royalist Party and Hun Sen's Cambodian People's Party to represent Cambodia. Ranariddh, supported by the US, opposed Hun Sen's government on the basis of his violent usurpation of power. The Credentials Committee, "having considered the question of the credentials of Cambodia, decided to defer a decision on the credentials of Cambodia on the understanding that, pursuant to the applicable procedures of the Assembly, no one would occupy the seat of that country at the fifty-second session".⁴¹ The Credentials Committee, and the General Assembly plenary, were reluctant to take any action that might influence the process of national reconciliation. The two parties eventually agreed to form a coalition and, in December 1998, the General Assembly accepted the Committee's recommendation to seat Cambodia's new coalition government.⁴²
21. Guinea (2009-10): In December 2008, Moussa Dadis Camara seized power in a coup, declaring himself head of a military junta. Violent protests followed and in September 2009, when the junta ordered its soldiers to attack protesters, dozens of people were killed. That same month, the junta's representatives submitted their credentials to the UN Secretariat. No competing credentials were submitted for Guinea. In December 2009, a UN Commission of Inquiry recommended that senior figures in the junta be referred to the International Criminal Court for crimes against humanity.⁴³ When the Credentials Committee met to consider credentials for the Assembly's 64th session in 2009, representatives of Zambia and Tanzania expressed "serious concerns" about Guinea's credentials.⁴⁴ The General Assembly decided to defer its decision, on the understanding that Guinea's previously-credentialled representatives "will continue to have the right to participate provisionally in the activities of the sixty-fourth session with all the rights and privileges enjoyed by other Member States whose credentials have been accepted until such a time that the Credentials Committee reviews the matter and makes a final recommendation to the General Assembly."⁴⁵ Presidential elections were conducted in Guinea in 2010, bringing the opposition candidate Alpha Conde to power, and later that year the General Assembly voted to accept Guinea's credentials.⁴⁶
22. Madagascar (2009): In 2009 the opposition leader, Andry Rajoelina, led a movement against President Ravalomanana, who was forced from power in a process widely held to be unconstitutional. In March 2009 Madagascar's Supreme Court declared Rajoelina to be "President of the High Transitional Authority", an interim body charged with moving the country to presidential elections. In September 2009, Rajoelina's representatives submitted

⁴⁰ UNGA, Report of the Credentials Committee, 11 December 1997, UN Doc A/52/719, para 7.

⁴¹ Ibid, para 5.

⁴² UNGA, Special Report of the Credentials Committee, 4 December 1998, UN Doc A/53/726; and see UN GAOR (53rd sess, 80th plen mtg), 7 December 1998, UN Doc. A/53/PV.80, 7 December 1998.

⁴³ N MacFarquhar, "UN Panel Calls for Court in Guinea Massacre", *New York Times*, 22 December 2009, available at: <https://archive.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/48633-un-panel-calls-for-court-in-guinea-massacre.html>.

⁴⁴ UNGA, Report of the Credentials Committee, 17 December 2009, UN Doc A/64/571.

⁴⁵ Ibid.

⁴⁶ UNGA, Report of the Credentials Committee, 22 December 2010, UN Doc A/65/583/Rev.1.

their credentials to the General Assembly. As with Guinea, no competing credentials were submitted. In the Credentials Committee, representatives of Zambia and Tanzania raised concerns about Madagascar's credentials, as they had for Guinea, and, as with Guinea, the Assembly decided to defer its decision on the understanding that Madagascar's representatives "will continue to have the right to participate provisionally in the activities of the sixty-fourth session with all the rights and privileges enjoyed by other Member States whose credentials have been accepted until such a time that the Credentials Committee reviews the matter and makes a final recommendation to the General Assembly".⁴⁷

23. Honduras (2009): In June 2009, the Honduran army staged a coup against President Manel Zelaya. The Organisation of American States (OAS) and the European Union condemned the move and, on 5 July 2009, all members of the OAS voted by acclamation to suspend Honduras from the organisation. The UN General Assembly adopted a resolution condemning the coup and demanding "the immediate and unconditional restoration of the legitimate and constitutional government",⁴⁸ and called "firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President, Mr. José Manuel Zelaya Rosales". In December 2009, the General Assembly voted to accept the credentials of the constitutional government of Honduras and leave the incumbent ambassador in the seat.⁴⁹
24. Libya (2011): In Libya, the dispute involved competing credentials from the government of Muammar al Gaddafi, who had been in power for over four decades, and the National Transitional Council (NTC), an opposition group formed in February 2011. In 2011 the Security Council adopted Resolution 1970, which imposed an arms embargo on the Libyan government, applied targeted sanctions against Gaddafi and other senior officials, and referred the situation in Libya to the International Criminal Court.⁵⁰ A few weeks later, Security Council Resolution 1973 established a no-fly zone over Libya and authorised an international military intervention to protect civilians.⁵¹ Over the next several months there was a stalemate, but by August 2011 the NTC's rebels had gained the upper hand and taken control of the capital Tripoli, forcing Gaddafi into hiding. In September 2011, although the NTC had not yet established effective control over the entire country, the UN Credentials Committee unanimously recommended to the General Assembly that the credentials submitted by the NTC be accepted.⁵² Countries that supported the NTC's credentials highlighted the suffering of the Libyan people at the hands of Gaddafi and the NTC's focus on supporting Libya's people and its commitments to international bodies.⁵³ A short time later, the General Assembly accepted the Credentials Committee's recommendation.⁵⁴
25. Guinea-Bissau (2012): In April 2012, elements of the armed forces in Guinea-Bissau staged a coup d'état, shortly ahead of the second round of a presidential election. The coup leaders arrested both second-round presidential candidates as well as the incumbent interim president, Raimundo Pereira, and established a National Transitional Council. In September 2012, representatives of Raimundo Pereira and representatives of the

⁴⁷ UNGA, Report of the Credentials Committee, 17 December 2009, UN Doc A/64/571.

⁴⁸ UN Doc. A/RES/63/301, 30 June 2009.

⁴⁹ UN Doc. A/64/571, 17 December 2009.

⁵⁰ SC Res 1970, 26 February 2011.

⁵¹ SC Res 1973, 17 March 2011.

⁵² UNGA, Report of the Credentials Committee, 14 September 2011, UN Doc A/66/360.

⁵³ UN GAOR (66th sess, 2nd plen mtg), 16 September 2011, UN Doc A/66/PV.2, at 11-12.

⁵⁴ GA Res 66/1, 18 October 2011.

Transitional Government both submitted credentials to the UN Secretariat. The Credentials Committee decided to “defer its consideration of the credentials submitted by Guinea-Bissau ... on the understanding that the representatives of Guinea-Bissau, who currently participate provisionally, will continue to have the right to participate provisionally in the activities of the sixty-seventh session with all the rights and privileges enjoyed by other Member States”.⁵⁵ In 2013, the credentials of Guinea-Bissau’s Transitional Government – which had by that time committed to holding elections, among other things – were accepted without objection.⁵⁶

26. **Venezuela (2019-20)**: After banning the opposition from standing, President Nicolas Maduro won the elections in 2018 with nearly 70 per cent of the vote. The result was challenged both inside Venezuela and by the US, France and Germany. However, a number of States including Cuba, China, Russia, Turkey and Iran continued to recognise Maduro as President. In January 2019, the OAS adopted a resolution “to not recognize the legitimacy of Nicolas Maduro’s new term”. In August 2019 President Trump signed an executive order imposing an economic blockade on Venezuela, and in March 2020 the Trump administration indicted Maduro on charges of drug trafficking. In 2019 and 2020, the Credentials Committee recommended that the General Assembly accept the credentials of the Maduro Government. In both years, the US “dissociated itself” from the Committee’s recommendation.⁵⁷ Notwithstanding the objection of the US, in both years the General Assembly approved the Committee’s recommendations.⁵⁸
27. To summarise, since the 1990s, the Credentials Committee has been willing on occasions to approve the credentials of democratically elected governments and groups in restored democracies even in circumstances where they had been deposed from power or lacked effective control of the country concerned. In situations where there has been a refusal to accept the outcome of a free and fair election or where power has been illegally seized through a coup, the Credentials Committee has on occasions considered other factors, such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record.

C. The Case of Myanmar

(a) From political reforms to military coup (2008-21)

28. Since the last time Myanmar’s credentials were raised at the UN in 2008,⁵⁹ the country has moved from military dictatorship to a political transitional stage and then back to a military coup in 2021. In May 2008 following a referendum, the military regime claimed approval of a new constitution. Nationally, media reports stated that the constitution was approved by 92.48 percent, with a 98 percent turnout, though this was disputed.⁶⁰ Under the new

⁵⁵ UNGA, Report of the Credentials Committee, 4 December 2012, UN Doc A/67/611.

⁵⁶ UNGA, Report of the Credentials Committee, 2 December 2013, UN Doc A/68/680; GA Res 68/22, 5 December 2013.

⁵⁷ UNGA, Report of the Credentials Committee, 4 December 2019, UN Doc A/74/572; UNGA, Report of the Credentials Committee, 23 November 2020, UN Doc A/75/606.

⁵⁸ GA Res 74/179, 18 December 2019; GA Res 75/19, 1 December 2020.

⁵⁹ The issue was not raised at the Credentials Committee, but in a letter to the UN Secretary General, who did not act on it. See UN Daily Press Briefing, 26 September 2008, available at: <http://www.hri.org/news/world/undh/2008/08-09-26.undh.html>.

⁶⁰ Human Rights Watch, “Burma: Reject Constitutional Referendum”, 17 May 2008, available at: <https://www.hrw.org/news/2008/05/17/burma-reject-constitutional-referendum>.

constitution, one quarter of the seats in parliament were reserved for soldiers appointed by the Commander-in-Chief. Three security ministries – defence, home affairs and border affairs – were reserved for the military, with the Commander-in-Chief alone making the appointments. In essence, the Constitution imposed a power sharing arrangement in a military-civilian coalition.

29. National elections were held in 2010 which were the first since 1990 and also the first under the new 2008 constitution. The military had previously formed the Union Solidarity and Development Party (USDP) as a military-sponsored civilian vehicle to contest the vote. Several dozen parties registered, representing a variety of ethnic groups and interests. The National League for Democracy (NLD) – with Aung San Suu Kyi still under house arrest and numerous leaders in jail or in exile – and many other political parties boycotted the polls. As in previous elections, political space was highly restricted and the military junta did not allow international observers to monitor the vote. The USDP won nearly 80 percent of elected seats in the national Parliament.
30. The new government initiated economic and political reforms and released Aung San Suu Kyi from house arrest and other political prisoners from prison. It also permitted the growth of independent media with significant free expression. These were among a series of measures that led to the easing of Western sanctions on Myanmar.⁶¹ In this context, the NLD decided to participate in by-elections in 2012 to fill 45 parliamentary seats vacated as parliamentarians took up positions in the executive administration. The NLD won 43 of the 44 seats it contested and began a campaign for reform of the 2008 constitution.
31. In 2015 the NLD participated in national elections held under the 2008 constitution and won 80 per cent of the seats. Aung San Suu Kyi was constitutionally barred from the presidency, and so assumed a new role of State Counsellor, created for her by the NLD. Her long-time ally, Htin Kyaw, became president.
32. In August 2017, following attacks on a military base and police posts organised by the Arakan Rohingya Salvation Army (ARSA), the Myanmar army, the Tatmadaw, began “clearance operations” against the country’s Rohingya minority, which drove about 700,000 people into Bangladesh. The UN Fact-Finding Mission report of 2018 described it as “a human rights catastrophe the effects of which will span generations”.⁶² In its 2019 report, it said “there is serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide, and to enact effective legislation criminalizing and punishing genocide”.⁶³ In January 2020, the International Court of Justice found that the Rohingya people remaining in Myanmar faced a ‘real and imminent risk’ of genocide, and it ordered the Government of Myanmar to take provisional measures to prevent it.⁶⁴

⁶¹ US Government (The White House), “Statement by the President on the Easing of Sanctions on Burma”, 11 July 2012, available at: <https://obamawhitehouse.archives.gov/the-press-office/2012/07/11/statement-president-easing-sanctions-burma>.

⁶² Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, UN Doc A/HRC/39/CRP.2, para 749.

⁶³ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, 16 September 2019, Para 9.

⁶⁴ *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)*, Provisional Measures Order [2020] ICJ Rep 3.

33. In November 2020, Myanmar held national elections in which the NLD increased its share of the vote, winning 396 out of 476 contested seats in parliament.⁶⁵ The military-backed USDP won just 33 seats. The military called on the Union Election Commission to investigate the vote, claiming irregularities on the voter lists, but the Commission rejected the request. On 1 February 2021, shortly before the new government was due to take office and convene parliament, the military declared a state of emergency and launched a coup.⁶⁶ Dozens of opposition politicians were detained, including Aung San Suu Kyi and the NLD's senior leadership,⁶⁷ a move condemned by the UN Secretary-General.⁶⁸ The coup was illegal as it was a violation of article 417 of the 2008 constitution which states that it is only the President that is empowered to declare a state of emergency, but the President had been arrested.⁶⁹
34. Many UN Member States, including members of the Association of South-East Asian Nations (ASEAN), expressed concern about the coup while the G7 and others condemned it. Protesters took to the streets across the country and the junta launched what the UN Special Rapporteur on the Human Rights Situation in Myanmar called a “brute force reign of terror”.⁷⁰ The US, European Union, UK, New Zealand, Japan and Canada imposed sanctions and other punitive measures.⁷¹ According to the Assistance Association for Political Prisoners, over 1000 people have been killed since the coup and over 6000 have been arrested, charged or sentenced.⁷² In August 2021, Commander-in-Chief Senior General Min Aung Hlaing announced that he had been appointed head of an interim government, that the state of emergency had been extended for two years, that the 2020 election results had been annulled and that fresh elections would be held in 2023.⁷³

(b) The National Unity Government and the State Administrative Council

35. **The National Unity Government (NUG)** was formed on 16 April 2021 by the Committee Representing the Pyidaungsu Hluttaw (CRPH) – the Lower House of the Myanmar Parliament – whose members had won parliamentary seats in the November 2020 election.⁷⁴ Its objectives, work programme and principles are laid out in a Federal

⁶⁵ BBC News, “Myanmar: Aung San Suu Kyi’s party wins majority in election”, 13 November 2020, available at <https://www.bbc.com/news/world-asia-54899170>.

⁶⁶ UK Government, “Myanmar military coup: Minister Adams statement”, 2 February 2021 available at <https://www.gov.uk/government/speeches/myanmar-military-coup-minister-adams-statement-2-february-2021>.

⁶⁷ Human Rights Watch, “Myanmar Military Coup Kills Fragile Democracy”, 1 February 2021, available at <https://www.hrw.org/news/2021/02/01/myanmar-military-coup-kills-fragile-democracy>.

⁶⁸ UN Secretary General, “Arrests, military control ‘a serious blow’ to democratic reforms in Myanmar: UN chief”, 1 February 2021, available at <https://news.un.org/en/story/2021/02/1083442>.

⁶⁹ Andrew Harding, “Constitutional implications of Myanmar’s Coup”, *ConstitutionNet*, 11 February 2021, available at <https://constitutionnet.org/news/constitutional-implications-myanmars-coup-1-february-2021>.

⁷⁰ Special Rapporteur on the situation of human rights in Myanmar, “Myanmar: Human rights defenders under siege, say UN experts”, 19 July 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27323&LangID=E>.

⁷¹ Special Advisory Council for Myanmar, “Cut the Cash”, 26 May 2021, available at <https://specialadvisorycouncil.org/cut-the-cash/>.

⁷² See the website of the Assistance Association for Political Prisoners, available at: <https://aappb.org>.

⁷³ BBC News, “Myanmar: State of emergency extended with coup leader as PM”, 1 August 2021, available at <https://www.bbc.co.uk/news/world-asia-58045792>.

⁷⁴ National Unity Government of the Republic of the Union of Myanmar website, available at <https://www.nugmyanmar.org/en/>.

Democracy Charter.⁷⁵ The NUG includes a president, state counsellor, vice president, prime minister and eleven ministers for twelve ministries. There are also twelve deputy ministers appointed by the CRPH. Of the twenty-six cabinet members, thirteen belong to ethnic nationalities, and eight are women. In the new government, President U Win Myint and State Counsellor Aung San Suu Kyi retain their positions. The vice president is Duwa Lashi La, the president of the Kachin National Consultative Assembly.⁷⁶ Mahn Win Khaing Than, an ethnic Karen and former House Speaker under the NLD government, is the country's prime minister.

36. **The State Administration Council (SAC)** under Senior General Min Aung Hlaing was formed by the military following the 1 February 2021 coup. Eight of the original 11 members of the junta were military officers and three were civilians. Six of the eight military SAC members were in top posts in the Myanmar Armed Forces at the time of the coup, while the remaining two were appointed secretaries to the junta.⁷⁷

(c) The response of the international community and condemnation of the coup

37. The military junta, like previous military regimes in Myanmar, has largely ignored the growing condemnation from the UN and other international bodies. It has also rejected attempts by the UN and ASEAN to encourage dialogue, stating that it will engage with ASEAN's five-point plan adopted in April only after stability is restored.⁷⁸ That plan calls for an immediate end to violence, dialogue with all parties, mediation through the ASEAN envoy, humanitarian assistance and a visit to Myanmar by an ASEAN delegation.
38. Myanmar has for a long time been an issue of concern to the **UN General Assembly** which has adopted 11 resolutions related to the country since 2011.⁷⁹ At a meeting of the General Assembly on 26 February 2021, the Ambassador of the Republic of the Union of Myanmar, Kyaw Moe Tun, urged the international community to use "any means necessary to take action against the military" to help "restore the democracy".⁸⁰ The military subsequently wrote to the UN Secretary-General on 12 May 2021 informing him that Kyaw Moe Tun had been "terminated", "due to abuses of his assigned duties and mandate".⁸¹ However, the Ambassador continues to be accepted by the General Assembly, attending meetings and sending letters to the Secretary-General about the continuing human rights abuses taking

⁷⁵ CRPH, "Federal Democracy Charter", 27 March 2021, available at <https://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf>.

⁷⁶ See National Unity Government of the Republic of the Union of Myanmar website, available at <https://www.nugmyanmar.org/en/>.

⁷⁷ Yusof Ishak Institute, "Min Aung Hlaing and His Generals: Data on the Military Members of Myanmar's State Administration Council Junta", 23 July 2021, available at <https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2021-97-min-aung-hlaing-and-his-generals-data-on-the-military-members-of-myanmars-state-administration-council-junta-by-htet-myet-min-tun-moe-thuzar-and-michael-montesano>.

⁷⁸ Kayla Wong, Myanmar coup leader says military will consider Asean's proposal after 'stability' returns to country, *Mothership*, 27 April 2021, available at <https://mothership.sg/2021/04/myanmar-min-aung-hlaing-stability-asean>.

⁷⁹ GA Res 65/241, 24 December 2021; GA Res 66/230, 24 December 2011; GA Res 67/233, 24 December 2012; GA Res 68/242, 27 December 2013; GA Res 69/248, 29 December 2014; GA Res 70/233, 23 December 2015; GA Res 72/248, 24 December 2017; GA Res 73/264, 22 December 2018; GA Res 74/246, 27 December 2019; GA Res 75/238, 31 December 2020; GA Res 75/287, 18 June 2021.

⁸⁰ BBC, "Myanmar Coup: UN Ambassador fired after anti-army speech", 28 February 2021, available at <https://www.bbc.co.uk/news/world-asia-56222987>.

⁸¹ Letter of the military junta to the UN Secretary-General, 12 May 2021, on file by author.

place in Myanmar.⁸² On 18 June 2021, the General Assembly adopted a resolution strongly condemning the violence in Myanmar and expressing concern about the coup.⁸³ The resolution expressed grave concern about the declaration of the state of emergency by the Myanmar armed forces and called on it:

to respect the will of the people as freely expressed by the results of the general election of 8 November 2020, to end the state of emergency, to respect all human rights of all the people of Myanmar and to allow the sustained democratic transition of Myanmar, including the opening of the democratically elected parliament and by working towards bringing all national institutions, including the armed forces, under a fully inclusive civilian Government that is representative of the will of the people.⁸⁴

39. The **UN Security Council** has issued a series of statements expressing concern regarding the situation in Myanmar. On 4 February 2021 the Council issued a press statement expressing “deep concern at the declaration of the state of emergency ... and the arbitrary detention of members of the Government”, calling for the immediate release of those detained, and expressing support for Myanmar’s democratic transition.⁸⁵ On 10 March, the Council issued a presidential statement reiterating its previously-expressed concerns, and also “strongly condemn[ing] the violence against peaceful protesters”, expressing “deep concern at restrictions on medical personnel, civil society, labour union members, journalists and media workers”, and calling for the military to “exercise utmost restraint”.⁸⁶ On 1 April, the Council issued press elements again expressing “deep concern at the rapidly deteriorating situation”, condemning “the use of violence against peaceful protesters”, and calling on the military to exercise “utmost restraint” and to “fully respect human rights”.⁸⁷
40. The **United Nations Human Rights Council** has held several discussions on the situation in Myanmar since the coup. On 21 February 2021 it held a special session on Myanmar, and in that session adopted a resolution deploring “the removal of the Government elected by the people of Myanmar in the general election held on 8 November 2020, and the suspension of mandates of members of all parliaments”, and calling “for the restoration of the elected Government.”⁸⁸ **The UN Special Rapporteur on the situation of human rights in Myanmar** said in a statement at that special session that: “this coup is truly illegal in every sense of the word. The international community must refuse to recognize this illegal regime.”⁸⁹
41. As well as numerous international bodies, senior UN officials and experts have condemned the military coup. The **UN Secretary-General** has issued repeated statements calling for

⁸² UNGA, Letter dated 15 May 2021 from the Permanent Representative of Myanmar to the United Nations addressed to the Secretary-General, 19 May 2021, A/75/883; UNGA, Letter dated 29 March 2021 from the Permanent Representative of Myanmar to the United Nations addressed to the Secretary-General, 16 April 2021, A/75/834-S/2021/362.

⁸³ GA Res, 75/287, 25 June 2021.

⁸⁴ Ibid.

⁸⁵ UNSC Press Statement, 4 February 2021, UN Doc SC/14430.

⁸⁶ UNSC Presidential Statement, 10 March 2021, UN Doc S/PRST/2021.

⁸⁷ UNSC Press Elements, 1 April 2021, available at: <https://www.youtube.com/watch?v=VfVcrsHiWSQ>.

⁸⁸ HRC Res, 21 February 2021, A/HRC/RES/S-29/1.

⁸⁹ OHCHR, ‘29th Special Session of the Human Rights Council on the human rights implications of the crisis in Myanmar, Joint Statement by Tom Andrews, Special Rapporteur on the situation of human rights in Myanmar and the Coordination Committee’, 12 February 2021, available at <https://bangkok.ohchr.org/myanmar-statement-by-tom-andrews-special-rapporteur-on-the-situation-of-human-rights-in-myanmar/>.

the coup to be reversed and civilian rule to be restored,⁹⁰ as has his Special Envoy on Myanmar who has been openly critical of the military junta.⁹¹ The **UN High Commissioner for Human Rights** has also been a vocal critic of the military junta.⁹² In a statement on 13 April 2021⁹³ she said there were “credible reports indicating that Tatmadaw forces opened fire with rocket-propelled grenades, fragmentation grenades and mortar fire in Bago in the south of the country”, and in a statement on 11 June 2021, she demanded accountability.⁹⁴ The **UN Special Representative for the Secretary-General for Children and Armed Conflict** and the **UN Special Representative of the Secretary-General on Violence Against Children** have both condemned the violence against children in the “strongest possible terms”.⁹⁵

(d) Representation of Myanmar in UN bodies

42. The credentials of Myanmar’s Permanent Representative at the UN in New York, Kyaw Moe Tun, as well as those of other representatives of Myanmar to the 75th session of the General Assembly, were accepted by the Credentials Committee in November 2020⁹⁶ and approved by the General Assembly in December 2020.⁹⁷ In March and April 2021, Myanmar was represented at two sessions of the Human Rights Council and at the 77th session of the UN Economic and Social Commission for Asia and the Pacific by a representative of the SAC.⁹⁸ In May and June 2021, Myanmar’s NUG and the SAC both sought to represent Myanmar at annual meetings of the World Health Assembly and the International Labour Conference, and in June-July 2021, both the NUG and the SAC sought to represent Myanmar at the 47th ordinary session of the Human Rights Council. All three bodies decided to “defer a decision on the question of the representation of Myanmar, pending guidance from the UN General Assembly”, with the result that Myanmar was precluded from participation in all of these meetings.⁹⁹

⁹⁰ UN Secretary-General Statement, ‘Statement attributable to the Spokesman for the Secretary-General on Myanmar, 1 February 2021, available at <https://myanmar.un.org/en/109983-statement-attributable-spokesperson-secretary-general-myanmar>.

⁹¹ UN News Centre, “‘Stability of the region’ hangs on Myanmar, declares UN Special Envoy”, 3 March 2021, available at <https://news.un.org/en/story/2021/03/1086332>.

⁹² OHCHR, ‘Comment by UN High Commissioner for Human Rights Michelle Bachelet on Myanmar’ 1 February 2021, available at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26705&LangID=E>.

⁹³ OHCHR, “Intensifying widespread, systematic slaughter by Myanmar military must be halted – Bachelet”, 13 April 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26989&LangID=E>.

⁹⁴ OHCHR, “UN rights chief urges accountability for escalating ‘catastrophe’ in Myanmar”, 11 June 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27160&LangID=E>.

⁹⁵ Joint Statement by UN Special Representative of the Secretary-General for Children and Armed Conflict & the UN Special Representative of the Secretary-General on Violence against Children, 1 April 2021, available at <https://violenceagainstchildren.un.org/news/myanmar-joint-statement-un-special-representative-secretary-general-children-and-armed-conflict>.

⁹⁶ UNGA, Report of the Credentials Committee, 23 November 2020, A/75/606.

⁹⁷ GA Res, A/75/606, 23 November 2020.

⁹⁸ Rebecca Barber, “The General Assembly should provide guidance to the UN system on the question of who gets to represent Myanmar”, *EJIL:Talk!*, 7 June 2021, available at <https://www.ejiltalk.org/the-general-assembly-should-provide-guidance-to-the-un-system-on-the-question-of-who-gets-to-represent-myanmar/>.

⁹⁹ World Health Organisation, Report of the Credentials Committee, 74th session of the World Health Assembly, 26 May 2021, A74/56, available at: https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_56-en.pdf; International Labour Organisation, Report on Credentials, 109th session of the International Labour Conference, 7 June 2021, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_799699.pdf.

D. The Competing Credentials to Represent Myanmar at the UN

(a) National Unity Government

43. The National Unity Government has submitted credentials documents to the UN Secretary General in compliance with Rule 27 of the General Assembly's Rules of Procedures.¹⁰⁰
44. As indicated earlier, the NUG was appointed by members of the parliament elected in the national elections in November 2020. The elections were generally considered free and fair where they were conducted but they were incomplete because elections were not conducted in many electorates in ethnic minority areas. The NUG is made up of members of the NLD that won the overwhelming majority of seats in those elections, and of other political parties representative of ethnic nationalities. It has strong support from the broad democratic movement in Myanmar. Furthermore, the NUG's founding document, the Federal Democracy Charter, lays out a roadmap for democratic government, effectively abolishing the 2008 constitution, while including plans to establish a national convention tasked with drafting a new constitution. It commits the NUG to diversity, inclusion of all ethnic nationality groups and consensus based on the multi-ethnic and multi-national nature of the State of Myanmar. The NUG is also working closely with civil society groups inside Myanmar, the Civil Disobedience Movement, the General Strike Committees, representatives of groups in the ethnic nationality areas and Myanmar communities worldwide.
45. On 5 May 2021, the NUG announced the formation of the People's Defence Force (PDF), to defend the population against military violence.¹⁰¹ The NUG said this was a "prelude to establishing a Federal Union Army".¹⁰² According to a statement made by the NUG, the PDF is divided into five divisions (Northern, Southern, Middle, Eastern and Western divisions), each having at least three brigades. On 13 July 2021, the NUG's Minister of Defence, Yee Mon, stated that the strength of the newly formed military was expected to reach 8,000 by the end of the month.¹⁰³

(b) The Military Junta

46. As outlined above, the Myanmar Armed Forces seized power in violation of the 2008 constitution. Specifically, on 1 February 2021, the military announced that it had removed President Win Myint from office along with 24 other ministers and deputies. The military then appointed Vice President Myint Swe as Acting President, and Myint Swe then declared a state of emergency, handing power to the military. These actions were contrary to Myanmar's 2008 Constitution, which was drafted by the military. Under Article 71(a) of the Constitution:

¹⁰⁰ UNGA, Rules of Procedure of the General Assembly, 1985, UN Doc A/520/Rev.15.

¹⁰¹ Reuters, "Myanmar's anti-junta unity government says forming defence force", 5 May 2021, available at <https://www.reuters.com/world/asia-pacific/myanmar-state-media-says-five-killed-blast-were-building-bomb-2021-05-05/>.

¹⁰² Sebastian Strangio, "Can Myanmar's New 'People's Defense Force' Succeed?", *The Diplomat*, 6 May 2021, available at <https://thediplomat.com/2021/05/can-myanmars-new-peoples-defense-force-succeed/>.

¹⁰³ Radio Free Asia (Burmese), "'By the end of July, more than 8,000 PDF members will have completed their military training,' said the NUG Defence Minister", 13 July 2021, available at <https://www.rfa.org/burmese/interview/pdf-nug-coup-military-07132021165750.html>.

The President . . . may be impeached for one of the following reasons: i. high treason; ii. Breach of the provisions of this Constitution; iii. Misconduct; . . . v. inefficient discharge of duties assigned by law.

The Constitution further explains the process of impeachment and removal of the President, which requires a 2/3 vote convicting the President of impeachable offenses in the parliamentary chamber in which the charges were brought. Yet in this case, President Win Myint was summarily removed by the military in an unconstitutional manner. As a result, Vice President Myint Swe's elevation to become Acting President to replace him was also unconstitutional. Acting President Myint Swe's declaration of a state of emergency was purportedly based on Article 417 of the Constitution, which authorizes the President to declare a state of emergency for one year when reasons arise:

[t]hat may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to the acts or attempts to take over the sovereignty of the Union by insurgency, violence, and wrongful forcible means . . .

By invoking this provision, Acting President Myint Swe was purportedly authorizing the transfer of legislative, executive and judicial powers to the Commander-in-Chief of the Defence Forces. However, because the appointment of Myint Swe to the position of Acting President was unconstitutional, Myint Swe had no power to declare a state of emergency and the transfer of power to General Min Aung Hlaing was unconstitutional.¹⁰⁴

47. The junta is also responsible for the deaths of over one thousand people since the coup. The extent to which the military junta exercises effective territorial control is unclear. Fighting has intensified in traditional areas of conflict in border states and has spread into the Myanmar heartland since the coup.¹⁰⁵ The front lines of Myanmar's conflicts have begun to shift since the formation of the PDF, with many ethnic armed organisations increasing the areas under their control, especially in Chin, Kachin, Karen, Kayah, Rakhine and Shan States. The military junta struggles even to control the largest cities of Yangon and Mandalay and other towns. Over half the territory of Myanmar and a majority of its 54 million population are affected by the political breakdown, armed conflict and the contested claims of the different sides.¹⁰⁶ The situation on Myanmar's borders remains fluid. The numbers of Myanmar refugees (principally in Bangladesh, India and Thailand) and internally-displaced persons (principally in Chin, Kachin, Karen, Kayah, Rakhine and Shan States) have increased significantly since 1 February 2021. The UN estimates that over 220,000 people have fled violence since the coup and are in urgent need of humanitarian assistance.¹⁰⁷

¹⁰⁴ The junta has not purported to extend the state of emergency until August 2023 even though the constitution permits only a one-year period followed by two extensions each of six months. The constitution also requires that the President must submit to an emergency session of the parliament (the Pyidaungsu Hluttaw) the declaration of a state of emergency, the periods of the emergency and the transfer of powers to the Commander in Chief. This constitutional requirement has not been met.

¹⁰⁵ Martin Smith, "Memo on Effective Control", August 2021, available at <https://the-world-is-watching.org/wp-content/uploads/2021/08/Memo-on-Effective-Control-MAP-10-August-2021.pdf>.

¹⁰⁶ Ibid.

¹⁰⁷ WFP Press Release, 'Funding gap hampers WFP's lifesaving operations as hunger deepens in Myanmar', 6 August 2021, available at <https://www.wfp.org/news/funding-gaps-hampers-wfps-lifesaving-operations-hunger-deepens-myanmar>.

48. In addition to its lack of effective territorial control, as noted earlier, the military junta has been responsible for a campaign of terror against its own people that many experts believe may amount to crimes against humanity.¹⁰⁸ The manner in which it seized power, ousting a popularly elected government, and its subsequent refusal to engage with ASEAN's roadmap to democratic rule, must be considered by the UN Credentials Committee, as has been the case in previous examples of disputed credentials. The coup and subsequent repression have also badly impacted the economy, that has been depressed for over half a century by military mismanagement. According to the World Bank, the Myanmar economy is expected to contract around 18 per cent in 2021, with damaging implications for lives, livelihoods, extreme poverty and future growth.¹⁰⁹

E. Conclusion

49. In situations in which competing authorities present credentials, both claiming the right to represent the same State in the General Assembly, the criteria to be used by the Assembly in its deliberations to make a decision amongst the different claims are ill-defined. Nevertheless, the different cases presented in this legal opinion illustrate the criteria that the General Assembly has taken into consideration, including effective territorial control, democratic legitimacy and respect for international human rights standards. Effective control of territory has not been the determinative factor in the more recent cases. Rather, the Committee has given weight to other factors, such as the willingness of the relevant entity to meet its international obligations, particularly in the area of human rights, and the extent to which it represents the will of the people of the Member State concerned, especially in the wake of free and open elections.

50. There are broadly four options that the UN Credentials Committee must decide upon.

51. First, the Credentials Committee could recommend acceptance of the credentials of the military junta. Even by its own standards the coup was illegal as a violation of the 2008 Constitution and was a direct result of the military's refusal to accept the result of the November 2020 election. Subsequently, the military junta has failed to provide security and law and order to large areas of the country and, in the ethnic nationality areas, armed conflict has intensified and spread. The junta's human rights record has been deplorable and rather than protecting its own people, the state security forces have been the primary source of threats to them, with the violations committed amounting to crimes against humanity. Its refusal to heed UN and regional calls for political dialogue, reform and a return to democracy are consistent with the military repression that the people of Myanmar have had to endure for decades. Since 1 February 2021, the military junta has consistently violated the fundamental principles and peremptory norms of international human rights law and has shown blatant disregard for the Purposes and Principles of the UN Charter. **Based on these considerations the Credentials Committee should not recommend to the UN General Assembly that the credentials issued by the Myanmar military junta be accepted.**

¹⁰⁸ See, for example: Thomas Andrews, "Statement on the Situation of Human Rights in Myanmar," UN Human Rights Council, March 11, 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26884&LangID=E>.

¹⁰⁹ World Bank Myanmar Economic Monitor, "Progress Threatened; Resilience Tested", 23 July 2021, available at <https://www.worldbank.org/en/country/myanmar/publication/myanmar-economic-monitor-july-2021-progress-threatened-resilience-tested>.

52. Second, the Credentials Committee could recommend acceptance of the credentials of the NUG. The NUG was established by elected members of parliament following the November 2020 election which was won overwhelmingly by the NLD and associated parties,¹¹⁰ and the elected members of the parliament subsequently established and appointed the NUG. The NUG is the best representation of the will of the Myanmar people. While the NUG does not have effective territorial control over the entire territory of Myanmar, neither does the junta. The NUG does possess security forces and has links with ethnic armed groups that have territorial control in many parts of the country. Moreover, total effective territorial control should not be a determining criterion for deciding credentials. Furthermore, the NUG's founding charter commits it to upholding international standards of human rights and democratic practice, including the rights of minorities. **Based on these considerations the Credentials Committee should recommend to the UN General Assembly that the credentials of the representatives of the NUG be accepted.** The Credentials Committee has made similar decisions in relation to Liberia (1990-97), Sierra Leone (1996), Haiti (1991-94), and Honduras (2009).
53. Third, the Credentials Committee could defer a decision on the credentials. If the Credentials Committee is unable to decide on competing credentials submitted by the military junta and the NUG, then it could recommend to the General Assembly that it defer its decision on credentials, on the understanding that Myanmar's current Permanent Representative to the UN in New York, Kyaw Moe Tun, continue to represent Myanmar provisionally at the General Assembly. While this outcome would ensure that the military junta does not represent Myanmar at the UN, the issue of the country's accreditation to the General Assembly would remain open, which is not desirable as it would have implications for how it is able to represent itself internationally. **The Credentials Committee should only defer the decision if it can provide well founded reasons why it has not been able to accept the credentials of the NUG.** The Credentials Committee has made similar decisions in relation to Afghanistan (1997-2001), Guinea (2009-10) and Madagascar (2009) and Guinea-Bissau (2012).
54. Fourth, the Credentials Committee could decide to leave the seat of Myanmar vacant at the UN General Assembly. It could do this either by deferring its decision on credentials, explicitly on the understanding that no one will represent Myanmar at the Assembly's 76th session (as in the case of Cambodia in 1997), or by deciding not to accept any credentials submitted for Myanmar (as in the case of South Africa during the apartheid regime, albeit in that case without any competing credentials). In the case of Cambodia, talks were underway to resolve the country's political crisis which led to the formation of a national government. In Myanmar, as stated above, there are no prospects of dialogue and therefore no real justification for leaving the seat vacant. Moreover, there are serious consequences to such a decision as it would effectively mean that Myanmar is unable to be represented in the UN General Assembly. That would be a de facto suspension of Myanmar's membership not effected in accordance with the UN Charter's provisions for the suspension of the membership of Member States. It would also seriously undermine the chances of reaching a political solution to the crisis. **The Credentials Committee should not recommend that the seat of Myanmar be left vacant at the UN General Assembly.**

¹¹⁰ Carter Center, 'Carter Center Preliminary Statement on the 2020 Myanmar General Elections', 10 November 2020, available at <https://www.cartercenter.org/news/pr/2020/myanmar-111020.html>.

55. The recommendations of the Credentials Committee are almost always adopted by the General Assembly without debate or amendment. However, the General Assembly is not bound to accept the recommendations of the Credentials Committee. In the very rare event that a state or group of states disagree with the draft resolution proposed by the Credentials Committee, whichever of the four options is recommended, that state or group of states may propose amending that resolution – as some states have done on previous occasions, for example, in relation to Israel’s credentials.¹¹¹ Further, according to a 1970 Opinion of UN Legal Counsel, a state or group of states can also propose a new set of representatives for a state directly in a General Assembly resolution independently of the Credentials Committee.¹¹²

SIGNED:

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¹¹¹ See UNGA, Credentials of Representatives to the Forty-Fourth Session of the General Assembly, 16 October 1989, UN Doc A/44/L.9.

¹¹² UNGA, ‘Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request’, 11 November 1970, UN Doc A/8160. In relation to China in 1971, for example, the UNGA passed a resolution ‘decid[ing] to restore all its rights to the People’s Republic of China and to recognise the representatives of its government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-Shek from the place which they unlawfully occupy at the United Nations and in all the organisations related to it’: GA Res 2758 (XXVI) 25 October 1971.

Sriprapha Petcharamesree

Former Thai Representative to the ASEAN Intergovernmental Commission on Human Rights

Chris Sidoti

International Human Rights Lawyer; Member of the Special Advisory Council for Myanmar; Former Member of the UN Independent International Fact-Finding Mission on Myanmar

Nelum Deepika Udagama

Professor of Law, University of Peradeniya, Sri Lanka and Former Chairperson, Human Rights Commission of Sri Lanka (2015-20)

Yuyun Wahyuningrum, Representative of Indonesia to the ASEAN Intergovernmental Commission on Human Rights (AICHR)