

**IN THE MATTER OF THE STATUTE OF THE
INTERNATIONAL CRIMINAL COURT**

**AND IN THE MATTER OF THE DECLARATION MADE BY THE NATIONAL
UNITY GOVERNMENT AS THE REPUBLIC OF THE UNION OF MYANMAR
ACCEPTING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL
COURT UNDER ARTICLE 12(3) OF THE STATUTE**

OPINION

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1. Executive Summaries

1.1 Short

The International Criminal Court (ICC) is **legally entitled and, indeed, legally required, to accept the Declaration made public on 20 August 2021 issued by the National Unity Government (NUG) under Article 12(3) of the ICC Statute as valid under that Article as an acceptance of the Court's jurisdiction by the State of Myanmar.** This conclusion is based on applying the five relevant areas of applicable international law. In the first place, applying the **general rules of international law relating to the recognition practice of states,** the ICC is entitled to recognize the NUG as a valid authority to issue the Declaration on behalf of Myanmar. In the second place, applying the **standards adopted by the UN General Assembly when accrediting State representatives at the UN,** a decision to accept the NUG as being a valid authority to issue the Declaration on behalf of Myanmar would be consistent with, and follow from, a diverse set of precedents drawn from similar situations. In the third place, applying these **UN standards on accreditation as they have been applied to Myanmar since the coup,** accepting the Declaration as valid would follow from the decision made by the UN General Assembly in December 2021 to permit the NUG representative to continue acting as the Permanent Representative of Myanmar to the UN. In the fourth place, for ICC to accept the NUG as capable of engaging the State of Myanmar so as to render the Declaration legally effective would be to follow from, be consistent with, and in one respect potentially required by, **two related international legal positions on Myanmar adopted by States and the UN.** There has been a consistent and widespread determination by both States and all the main relevant UN bodies and officials that the junta is illegitimate. Moreover, there has been an act of collective recognition of the NUG as the government of that State by almost all the world's states when they voted unanimously in the General Assembly on accreditation before that body. A case can be made that this collective recognition was intended to have legal standing, in rendering obligatory the recognition of the NUG as the government of Myanmar. In consequence, the ICC would be required to accept the Declaration as valid as far as the question of the NUG's capacity to act on behalf of Myanmar to issue it is concerned. In the fifth and final place, as a matter of the **internal law of the ICC Statute,** the object and purpose of the Statute, to end impunity, requires the ICC to accept the Declaration as valid for the purposes of Article 12(3).

1.2 Long

[The following is taken from the **bolded** summaries of certain sections below.]

The International Criminal Court (ICC) is legally entitled and, indeed, legally required, to accept the Declaration made public on 20 August 2021 issued by the National Unity Government (NUG) under Article 12(3) of the ICC Statute as valid under that Article as an acceptance of the Court's jurisdiction by the State of Myanmar.

The NUG is the legitimate government of Myanmar as a matter of domestic law, since it is formed of members who were elected under the Constitution, is committed to democratic, pluralistic and Constitutional rule, the rule of law and promotion of human rights and is the only alternative to the military junta/SAC, which is manifestly and

inherently illegitimate, un-Constitutional and undemocratic, and engaged in widespread, systematic and grave human rights violations. It is also notable that the question of de facto control exercised within the country is in flux, with significant areas and population groupings not under the control of the junta while the NUG is also aligned with armed actors that control significant parts of the country.

The analysis in this Opinion leading to the foregoing conclusion about legal status of the Declaration cascades through the different applicable legal regimes, from the general to the specific. It begins with the recognition of governments as a general matter, not specific to Myanmar, as a matter of the rules of customary international law based on the practice of States on the subject, and the implications of this for the ICC's position on the Declaration. It then turns to the accreditation of representatives of member States before the UN General Assembly, again as a general matter, again explaining the implications for the Declaration. The focus then moves to these same two legal regimes as they have been applied to the situation of Myanmar, with further, more specific, implications for the Declaration. Finally, the sui generis legal position of the ICC is addressed, revealing further, distinctive norms applicable to the question of the legal status of the Declaration as far as the Court is concerned.

As far as the ICC acting in a manner that is consistent with the general position in international law applicable to States when they recognize governments of other States, the ICC is free to decide whether or not to recognize the NUG as being a valid authority to issue the Declaration on behalf of Myanmar, and, if it decides in the affirmative, it can do this on any basis. In particular, there is no legal requirement to adopt a consideration based on the level of control exercised over Myanmar by the NUG.

When it comes to the significance of the practice of the UN General Assembly on the accreditation of representatives of Member States, 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. Bearing in mind the manifest similarities between this practice and the situation in Myanmar at the time the Declaration was issued, it follows that a decision by the ICC to accept the NUG as being a valid authority to issue the Declaration on behalf of Myanmar would be consistent with, and would follow from, a diverse set of precedents set by this UNGA practice as a simple matter of fact. Moreover, more specifically, if such a decision were to manifest not only factual coincidence with these precedents, but also to be partly made *on the basis of similar normative considerations*, it would also be consistent with, and, indeed, follow from, a diverse set of precedents to do this set by the UNGA.

The significance for the ICC of the practice of the General Assembly on the representation of Myanmar in particular, and the situation at one stage of proceedings before the International Court of Justice is as follows. A decision by the ICC to accept the Declaration as valid would follow from the equivalent decision made by the United Nations General Assembly in December 2021 to recognize an official acting on behalf of the NUG to represent Myanmar as the Permanent Representative of Myanmar to the

United Nations. This is not contradicted by the presence of two SAC ministers as Agents for Myanmar in oral proceedings at the International Court of Justice in 2022, since that presence cannot be understood to have necessarily operated on the basis of a more general acceptance by the Court on the merit of the SAC's claim to be the government of the State.

For the ICC to accept the NUG as capable of engaging the State of Myanmar so as to render the Declaration legally effective would be to follow from, be consistent with, and in one respect potentially *required by*, two related positions adopted by States and the United Nations that have direct legal significance to the entitlement of the NUG to represent the State in international law as a general matter (i.e. not just before the United Nations General Assembly). In the first place, there has been a consistent and widespread determination by both States and all the main relevant United Nations bodies and officials that the junta is illegitimate both as a general matter—based on how it was constituted—and in terms of the abuses it has perpetrated against the people of Myanmar. In the second place, there has been an act of collective recognition of the NUG as the government of that State by almost all the world's states when they voted unanimously in the General Assembly on accreditation before that body. Moreover, a case can be made that this collective recognition was intended to have legal standing, in rendering obligatory the recognition of the NUG as the government of Myanmar. Since this was made unanimously, it has had the intended legal effect in terms of creating a rule of customary international law requiring the NUG to be accorded this status. In consequence, the ICC would be required to accept the Declaration as valid as far as the question of the NUG's capacity to act on behalf of Myanmar to issue it is concerned.

Finally, as a matter of the internal law of the ICC Statute which the ICC must comply with, given that, for the reasons set out above, treating the NUG as the government of the State of Myanmar is consistent with all the different relevant areas of international law and, indeed, a *sui generis* rule of international law adopting such treatment as a legal norm that may well have been established, the object and purpose of the Statute, to end impunity, requires the ICC to accept the Declaration as valid for the purposes of Article 12(3).

2. Introduction

1. I am asked by the Myanmar Accountability Project (MAP) to advise on the compatibility with Article 12(3) of the Statute of the International Criminal Court (ICC Statute)¹ of the Declaration made public on 20 August 2021 made by the National Unity Government (NUG) as the Republic of the Union of Myanmar (Myanmar) accepting the jurisdiction of the International Criminal Court (ICC) (Declaration).² Specifically, I am asked whether or not the Declaration constitutes “acceptance by a State which is not a Party to this Statute” for the purposes of one of the preconditions for the exercise jurisdiction in Article 12(3). The issue turns on whether, as a matter of the ICC Statute, the NUG engaged the legal personality of the State of Myanmar so as to effect such acceptance under Article 12(3).
2. Certain parts of this Opinion are based, with permission on reproductions, with some modifications and/or updates, of an earlier Opinion also prepared for the MAP, dated 8 September 2021 on the specific issue, addressed herein, of representation at the United Nations.³ These modified reproductions chiefly concern certain relevant facts (covering parts of Section 4) and the general practice of UN accreditation (covering parts of section 8).⁴

3. Preliminary matters

3. The potential legal significance of the Declaration under the ICC Statute is as meeting one of the preconditions to the exercise of jurisdiction by the ICC over a situation taking place in, and/or involving accused persons who are nationals of, Myanmar, in the absence of other alternative preconditions being met.
4. In any given situation that might potentially come before the ICC, aside from when the situation is referred to the ICC Prosecutor by the United Nations Security Council, the ICC may exercise jurisdiction only if either it is referred to the Prosecutor by a State

¹ Rome Statute of the International Criminal Court, 1 July 2002, 2187 U.N.T.S. 3, as amended (through resolution RC/Res.6 of 11 June 2010), <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

² <https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/2021-08-20-The-NUG-of-the-Republic-of-the-Union-of-Myanmar-accepts-the-jurisdiction-of-the-ICC-top-en.pdf>.

³ Legal Opinion: United Nations Credentials Committee: Representation of the State of Myanmar to the United Nations, 8 September 2021, obtainable from <https://the-world-is-watching.org/wp-content/uploads/2021/09/Myanmar-Legal-Opinion-Final-2.pdf>, prepared by Chris Gunness and Damian Lilly, and signed by Yuyun Wahyuningrum, William Bourdon, Baltasar Garzon, Chris Sidoti, Rebeca Barber, Nelum Deepika Udagama, John Dugard, Richard J. Goldstone, Jared Genser, Aryeh Neier, Sriprapha Petchamesree. That Opinion reproduced parts of a 2008 Opinion by Christine Chinkin, Luigi Condorelli, James Crawford, John Dugard, Florentino Feliciano, Rein Müllerson, Alain Pellet, Nigel Rodley and Sompong Sucharitkul: ‘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>

⁴ More specifically, the (sometimes quite significantly) modified/updated reproductions are contained in the following paragraphs: 12-28; 52-78; 81-83;102-5. The author notes with great appreciation the assistance of a colleague in Myanmar, who will be referred to as Hein to protect their identity, as well as Christopher Gunness, Director of the Myanmar Accountability Project, Damian Lilly, Protection Director, Myanmar Accountability Project, several anonymous librarians at the United Nations Dag Hammarskjöld Library Department, with various fact-checking and document-obtaining requests, and Tatyana Eatwell of Doughty Street Chambers, Hein, Chris Gunness and Damian Lilly, for comments and suggestions.

Party to the ICC Statute, or the Prosecutor initiates an investigation *proprio motu* over it (ICC Statute Art. 13).

5. In either of these two cases, before jurisdiction may be exercised, the ‘preconditions to the exercise of jurisdiction’ must be met (ICC Statute Art. 12). Here, one or more of the State(s) in whose territory the conduct in question occurred, or the State(s) of which the person accused is a national, are either a party to the ICC Statute, or, as a non-party, gave their acceptance to the exercise of jurisdiction by the Court over the crime in question (*id.*).
6. Myanmar is not a party to the ICC Statute. In the absence of a Security Council referral, the effect of the foregoing is that for ICC jurisdiction to be exercised over a situation taking place in Myanmar, involving an accused who is a national of Myanmar and not also a national of another State that is a party to the ICC Statute, Myanmar needs to have given its acceptance, as a non-party, to the Court’s exercise of jurisdiction, before that jurisdiction may be exercised over that situation.
7. The potential significance of the Declaration, then, is as serving as such acceptance, thereby meeting the preconditions for the exercise of jurisdiction over such cases. This does not mean that jurisdiction will necessarily be exercised. That will depend on further steps being taken, determined by further legal tests, beyond the scope of the present Opinion.
8. The legal issue to be determined is whether the Declaration falls under the scope of what is envisaged as non-ICC-Statute-State-party-acceptance of jurisdiction under the ICC Statute. Within this, the present Opinion is limited to the question of whether or not the NUG acted as the State for the purposes of the acceptance as a matter of the Statute.
9. The relevant provision of the ICC Statute, Art. 12(3), states that:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2 [i.e. the situation has not been referred by the Security Council, and the territorial State, or the State of the nationality of the suspect, are not parties to the ICC Statute], that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.
10. Myanmar is a State as a matter of international law, notably having been a member State of the United Nations (originally as Burma) since 1948.⁵ There is no question, then, that Myanmar constitutes a State for the purposes of this provision, and can therefore accept the exercise of jurisdiction by the Court through a declaration to this effect.
11. For many important purposes, including, particularly, often as a matter of national law and politics, a ‘State’ and a ‘government’ are treated as synonymous. At the same time, there are sometimes important distinctions made between the two. This is the case in international law, where the ‘State’ is the legal person, and the ‘government’ is the

⁵ <https://www.un.org/en/about-us/member-states#gotoM>

merely the agent for this legal person, not a legal person in its own right. It is the State only that has rights and obligations, and, as in the case here, is the entity whose permission is needed in order for a certain precondition to ICC jurisdiction to be met. The role of the government in international law is to act as/on behalf of that legal person, in this case, potentially, manifesting that permission through issuing the necessary declaration. If and when a government acts as the State in international law, this act is treated, legally, as that of the State. Its status as the act of a government has no international legal significance in and of itself, even if it may be separately significant for other purposes, for example as a matter of national law and politics. If the government changes, those acts of the previous government constituting acts of the State retain that status, and the State continues to operate as a matter of international law on the basis of those prior acts, regardless of the position of the new government. Governments change, but in international law this does not somehow bring about a ‘new’ State operating on a blank slate as far as its pre-existing legal position is concerned.

4. Selected relevant facts on the situation in Myanmar

4.1 Before the election in 2020

12. In May 2008 following a referendum, the military regime claimed approval of a new national Constitution.⁶ Nationally, media reports stated that the Constitution was approved by 92.48 percent, with a 98 percent turnout, though this was disputed.⁷ Under the new 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.
13. National elections were held in 2010, the first since 1990, and the first under the new 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 did not allow international observers to monitor the vote. The USDP won nearly 80 percent of elected seats in the national Parliament.
14. 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 becoming possible. These were among a series of measures that led to the easing of Western sanctions on Myanmar.⁸ In this context, the NLD decided to participate in by-elections in 2012 to

⁶ See [Myanmar formally announces ratification of new constitution draft - People's Daily Online](#), 30 May 2008.

⁷ See Human Rights Watch, “Burma: Reject Constitutional Referendum”, 17 May 2008, available at: <https://www.hrw.org/news/2008/05/17/burma-reject-constitutional-referendum>.

⁸ 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>.

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.

15. In 2015 the NLD participated in national elections held under the 2008 Constitution and won 80 per cent of the seats.⁹ 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. In March 2018, Htin Kyaw resigned for health reasons.¹⁰ U Win Myint of the NLD, member of Parliament (elected in by-elections in 2012) and speaker of the Pyithu Hlutaw (House of Representatives), then resigned from his Parliamentary post and was nominated as Vice President. He then stood for the Presidency and defeated the USDP candidate Thaug Aye with 273 votes to 27, becoming President,

4.2 Election 2020

16. In November 2020, a national election was held in which the NLD increased its share of the vote, winning 396 out of 476 contested seats in parliament.¹¹ 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.

4.3 Coup February 2021—a violation of the Constitution

17. On 1 February 2021, before a new government was due to take office and convene parliament, the military announced that it had removed President U Win Myint from office along with 24 other ministers and deputies and appointed Vice President Myint Swe, who was Vice President (having been appointed by the military to this post (one of two) in March 2016) as Acting President. Myint Swe then declared a state of emergency and handed power over to the military.¹² Dozens of politicians who had been elected in the 2020 election were detained, including Aung San Suu Kyi and the NLD's senior leadership.¹³
18. This process was contrary to Myanmar's 2008 Constitution, which the military had itself drawn up.¹⁴ Under Article 71(a) of the Constitution:

⁹ The source for the information in this paragraph is Hein (see above note 4).

¹⁰ <https://www.bbc.co.uk/news/world-asia-43482191>

¹¹ 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>.

¹² 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>.

¹³ 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>.

¹⁴ 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>.

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.

19. 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. In this case, President U Win Myint was summarily removed by the military. Given that this had no basis in the Constitution, Vice President Myint Swe's elevation to become Acting President to replace him was also unconstitutional. 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
¹⁵ . . .

20. By invoking this provision, Myint Swe was purportedly authorizing the transfer of legislative, executive and judicial powers to the Commander-in-Chief of the Defence Forces. However, because his appointment to the position of Acting President was unconstitutional, it was void *ab initio*—he was not, as a matter of the Constitution, the officeholder. Not occupying the post of President in law, he had no constitutional authority to declare a state of emergency. Moreover, the substantive test for a state of emergency to be justified—the reasons set out above under Article 417—was not met, as no evidence of voter fraud, which was the ostensible reason invoked by the military, was furnished by the junta.¹⁶
21. The consequence of the foregoing is that the purported transfer of power by Myint Swe to General Min Aung Hlaing was unconstitutional.¹⁷ Although the transfer happened, and power (to a certain extent—addressed further below) was and is exercised, *de facto*, *de jure* no power had and has been lawfully conferred. Thus, the military operate on an entirely unconstitutional, illegitimate basis. Since this has been brought about through a coup, the military regime had, and has, the status of a junta when it comes to the Myanmar Constitution.

4.4 Military administration

22. **The State Administration Council (SAC)** under a Chairman, now entitled Senior General (he occupied the post of Commander in Chief of the military) Min Aung Hlaing was formed by the military following the coup. Eight of the original 11 members of the SAC 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

¹⁵ See <https://thediplomat.com/2021/02/was-myanmars-cop-legal-and-does-it-matter/>

¹⁶ Source: Hein (see above n. 4).

¹⁷ 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.

the remaining two were appointed secretaries.¹⁸ In April 2021 AESAN adopted a five-point plan calling 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.¹⁹ The SAC stated that it would engage with the plan only when stability has been restored.²⁰ In the meantime, ASEAN has excluded the SAC from representing Myanmar at its regional meetings of heads of states and foreign ministers.²¹

23. 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 2023.²²
24. The military junta has been responsible for a campaign of terror against its own people that many experts, including, most recently, United Nations High Commissioner for Human Rights Michele Bachelet, believe may amount to war crimes and crimes against humanity.²³ According to the Assistance Association for Political Prisoners, since the coup over 1700 people have been killed and over 9000 have been arrested, charged or sentenced.²⁴ The coup and subsequent repression badly impacted an economy that was already in a parlous state due to over half a century of mismanagement by military rulers, with damaging implications for lives, livelihoods, extreme poverty and future growth.²⁵

4.5 National Unity Government

25. 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

¹⁸ 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>.

¹⁹ 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>.

²⁰ Id.

²¹ See <https://www.voanews.com/a/asean-envoy-s-peace-attempts-in-myanmar-fall-flat/6499419.html> and <https://en.tempo.co/read/1553014/indonesia-pushes-asean-consensus-on-myanmar>

²² 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>.

²³ See, for example: <https://www.ohchr.org/en/press-releases/2022/03/myanmar-un-report-urges-immediate-concerted-effort-international-community?LangID=E&NewsID=28283>; <https://www.fortifyrights.org/mya-inv-rep-2022-03-24/>; 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>.

²⁴ See the website of the Assistance Association for Political Prisoners, available at: <https://aappb.org>.

²⁵ See e.g. <https://www.worldbank.org/en/country/myanmar/publication/myanmar-economic-monitor-january-2022-economic-activity-in-myanmar-to-remain-at-low-levels-with-the-overall-outlook-blea> and <https://www.worldbank.org/en/country/myanmar/publication/myanmar-economic-monitor-july-2021-progress-threatened-resilience-tested>.

2020 election.²⁶ Its objectives, work programme and principles are laid out in a Federal Democracy Charter.²⁷ 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.²⁸ Mahn Win Khaing Than, an ethnic Karen and former House Speaker under the NLD government, is the country's Prime Minister.

26. The NUG was appointed by members of the parliament elected in the national elections in November 2020.²⁹ The elections were generally considered credible where they were conducted. They were incomplete, because elections were not conducted in many ethnic minority areas in particular. 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. 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. In addition to its Declaration to the ICC the NUG has also taken several other steps to demonstrate its commitment to international justice and human rights. It has expressed its willingness to represent Myanmar at the ICJ (see below) and also appointed a Human Rights Minister who has engaged with the mechanisms of the Human Rights Council while the NUG has been monitoring human rights violations in the country and submitting these regularly to the United Nations in New York.³⁰
27. On 5 May 2021, the NUG announced the formation of the People's Defence Force (PDF), to defend the population against military violence.³¹ The NUG said this was a "prelude to establishing a Federal Union Army".³² 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. It has been reported that

²⁶ National Unity Government of the Republic of the Union of Myanmar website, available at <https://www.nugmyanmar.org/en/>.

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

²⁸ See National Unity Government of the Republic of the Union of Myanmar website, available at <https://www.nugmyanmar.org/en/>.

²⁹ Source for the information in this paragraph: Hain (see above note 4).

³⁰ Source: Damian Lilly (see above note 4).

³¹ 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/>.

³² 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/>.

significant numbers of police and soldiers have defected from the junta to join the anti-junta Civil Disobedience Movement (CDM).³³

4.6 Control of the country

28. The extent to which the military junta exercises effective territorial control is in flux. After the coup, fighting intensified in traditional areas of conflict in border states and spread into the Myanmar heartland.³⁴ The front lines of Myanmar's conflicts started to shift after 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. Many of these armed groups are now aligned with the NUG³⁵ Meanwhile 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.³⁶ 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 the coup. As of 31 January 2022, UNHCR stated that there was an estimated figure of 440,00 newly-internally-displaced people since January 2021 (i.e., since the coup).³⁷
29. To summarize the foregoing: **the NUG is the legitimate government of Myanmar as a matter of domestic law, since it is formed of members who were elected under the Constitution, is committed to democratic, pluralistic and Constitutional rule, the rule of law and promotion of human rights and is the only alternative to the military junta/SAC, which is manifestly and inherently illegitimate, un-Constitutional and undemocratic, and engaged in widespread, systematic and grave human rights violations. It is also notable that the question of de facto control exercised within the country is in flux, with significant areas and population groupings not under the control of the junta while the NUG is also aligned with armed actors that control significant parts of the country.**

5. Applicable international law

30. The ICC Statute is a treaty in international law – a binding international legal agreement. All parties to the treaty, States, have obligations under it, and other states can become part of the legal regime on an *ad hoc* basis, as is the case with the Declaration that is the subject of the present Opinion. At the same time, it is the constitution for an international organization, the International Criminal Court, of which the Prosecutor forms part. The ICC only has the competence to do what it has been authorized to do in the ICC Statute. It must stay within the boundaries of what

³³ See e.g. <https://www.myanmar-now.org/en/news/over-8000-soldiers-and-police-officers-have-joined-the-civil-disobedience-movement-says>

³⁴ 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>.

³⁵ <https://www.frontiermyanmar.net/en/unity-govt-allies-with-chin-national-front-to-demolish-junta/>; https://www.voanews.com/a/east-asia-pacific_ethnic-armed-organizations-building-unity-myanmar-anti-coup-activists/6204952.html

³⁶ Ibid.

³⁷ <https://reporting.unhcr.org/document/1785>

are referred to legally as its ‘powers’ – express, implied, and inherent – set out there. Equally, this internal legal regime also determines the obligations the ICC is subject to. Clarifying such rights and obligations therefore becomes a matter of applying the international law rules on treaty interpretation. Moreover, the ICC is an international legal person in its own right, being part of the international law system as a potential bearer of rights and obligations within it. In consequence, there is a general presumption that the powers of the ICC under the Statute—in terms of both rights and obligations—should be interpreted where possible to be consistent with general international law—the customary international law rules applicable to States, *mutatis mutandis*. That said, States can and do often create international organizations to perform tasks that supplement, usually in a more specific manner, what they might be required to do on an individual level. Thus the ICC may be required to do certain things in performing its functions which on an individual level States are not required to do, but may do as a matter of discretion.

31. Given the foregoing, in determining who can represent Myanmar for the purposes of making a Declaration that is effective under the ICC Statute, it is necessary to apply the general rules of international law concerning the meaning, definition, and recognition of governments. It is also necessary to consider the question of how accreditation of governments at the United Nations has been determined. Legally, such accreditation is a matter of the internal law of the United Nations under the UN Charter. The ICC is a separate international organization, with an important relationship to (e.g. when it comes to referrals by the UN Security Council), but not legally part of, the UN. The ICC is not therefore directly part of the UN Charter legal regime in a way that, for example, the UN-Security-Council-created *ad hoc* international criminal tribunals (for Rwanda and the former Yugoslavia) were. However, the norms of the UN accreditation process are highly relevant. In the first place, a similar matter is being determined, and approaches taken can therefore be potentially transferrable simply as a matter of useful good practice. In the second place, the link between the ICC and the United Nations, reflected in the ICC Statute Preambular reference to the parties intending the Court to be ‘in relationship with the United Nations system’, suggests that the Court should as a general matter of policy strive to make consistent decisions with the plenary body of the United Nations when possible. In the third place, when the ‘good practice’ under evaluation is of the General Assembly, the body made up of all UN member States who each have a vote on an equal basis, and bearing in mind the near-universal nature of UN membership, this practice can be understood as indicative of the view taken by these States as to the equivalent position in general international law—the law that, as indicated, the ICC must act, where possible, consistently with.
32. As indicated in the executive summary, the conclusion drawn when the foregoing enquiries are pursued is that **the ICC is legally entitled and, indeed, legally required, to accept the Declaration issued by the NUG under Article 12(3) of the ICC Statute as valid under that Article as an acceptance of the Court’s jurisdiction by the State of Myanmar.**
33. **The following analysis in this Opinion leading to the foregoing conclusion about legal status of the Declaration cascades through the different applicable legal regimes, from the general to the specific. It begins with the recognition of governments as a general matter, not specific to Myanmar, as a matter of the rules of customary international law based on the practice of States on the subject, and**

the implications of this for the ICC's position on the Declaration. It then turns to the accreditation of representatives of member States before the UN General Assembly, again as a general matter, again explaining the implications for the Declaration. The focus then moves to these same two legal regimes as they have been applied to the situation of Myanmar, with further, more specific, implications for the Declaration. Finally, the *sui generis* legal position of the ICC is addressed, revealing further, distinctive norms applicable to the question of the legal status of the Declaration as far as the Court is concerned.

34. Before commencing with the aforementioned analysis, it is necessary to clarify what, legally, 'recognition'—the term implicated in whether or not the NUG can act as Myanmar for the purposes of making a legally-effective Declaration—means in international law.

6. Meaning and significance of 'recognition'

6.1 Different meanings of recognition

35. It might be said that states and international organizations usually don't 'recognize', or refuse to recognize, governments in other states, as distinct from recognition of States (e.g. covering the issue of whether a secessionist entity is being treated as an independent State). Let alone do they often make such express 'recognition' and link it to some idea that the entity in question is being recognized because they are somehow legitimate. Thus there is, actually, no 'recognition' of governments to speak of in international diplomacy, and thus no international legal standards that have to be accounted for.
36. However, this is assuming a narrow definition of 'recognition', involving some sort of express, specific declaration to this effect (e.g. 'We, State (or International Organization) X, recognize government Y as the government of State Z'). States and International Organizations do not routinely make such express statements of recognition in relation to the governments of other States every time there is a change (on whatever basis – election, civil war, military coup etc.). Nor in the unusual instances where they do make such statements, do they necessarily provide a rationale for this, for example invoking some sort of test concerning 'legitimacy'.
37. States and International Organizations nonetheless usually do have a position on whether or not they will have dealings with any given governmental entity as the representatives of the State it claims to represent, bearing in mind what has been said about the legal consequences of being such a representative—that the actor engages the international legal person of the State (so, for example, can act on behalf of that State to indicate consent to a binding international treaty with another State, or can represent the State in its capacity as a member of an International Organization). It is rare for States not to make decisions one way or another because they usually want and need to have dealings with the State and to do this they have to decide who to engage with on a practical level. Similarly, International Organizations, including international courts and tribunals, who have States as members or appearing before them, sometimes have no option but to make a decision about which actor is going to be allowed to speak for the State in question. This is 'recognition', then, even if it is often not expressly stated and/or the rationale for it is left unexplained.

38. Given this, in what follows, the term ‘recognition’ will be used in a broad sense, denoting the quotidian behaviour of dealing with governments in a manner that implies/presupposes recognition, whether or not this is accompanied, as is unusual, with express, specific declarations to this effect (either positive or negative).
39. When governmental authority in a particular State is in flux, the response to this by another State, or an international organization, can sometimes imply recognition of a particular actor as the government. This can occur when the actor is the government in place, and the State or international organization continue to have government/State or IO-to-government/State relations with that actor. Or it can occur when they engage with a different actor on a government/State or IO-to-government/State basis. In either case, this can be done while at the same time refraining from expressly acknowledging it as ‘recognition’ of the right of the actor concerned to act in this capacity (and, relatedly, refraining from explaining the rationale for this decision). Nonetheless, it is ‘recognition’ in the more general sense that will be used herein: ultimately, the actor is being treated as the representative of the State for agency purposes.

6.2 ‘Provisional’ recognition—always the case

40. In such circumstances where the situation of governmental authority in a State is in flux, a decision to recognize—in this general sense—a particular actor as the representative of that State may be sometimes expressly characterized, or at least somehow implicitly understood, to be ‘provisional’. For example, as will be explained further below, when a representative is already in place at the United Nations, but the continuance of this is being questioned, the relevant UN body can sometimes decide to ‘defer’ responding to the question to some time in the future. This can be combined with a position that the *status quo* will be maintained in the interim, thus allowing the existing post-holder to continue representing the State.
41. It might be suggested from this that the position in relation to the maintenance of the *status quo* is somehow provisional, and that, in consequence, it somehow doesn’t amount to a clear and unequivocal acceptance of the claim to represent the State at that moment. That the possibility that things might change is somehow hanging over things means this amounts to somehow a degraded, ‘limited’ recognition, because it is ‘provisional’.
42. This has no significance in legal terms. All forms of recognition, and representational accreditation at the United Nations, are provisional, in the sense that circumstances may change, and that change might bring about a dispute about representation that could lead to a change of position. Every decision to recognize or to accredit for representational purposes made without any express indication of the prospect of future review is nonetheless subject to such review. No State or international organization recognizes/accredits a particular government of a State on a permanent basis. Something put as indefinite/open-ended is, bearing in mind the nature of the subject-matter, always effectively provisional. The historically-repeated nature of disputes about the legitimacy of national governments, and repeated consequences this has had for representation at the UN (as explained further below), suggests that, actually, the question of recognition and representation has been and is likely to continue to be in a

state of flux, and that all States and international organizations are and have to be on a watching brief when it comes to whether they continue with the particular positions they have taken when it comes to the representation of a significant number of States.

7. Legal standards—General—Customary international law based on general recognition practice (not specific to Myanmar) by States

7.1 Must a State recognize governments?

43. Do States have a free hand to decide whether or not to recognize (in the aforementioned general sense) governments at all—i.e., in any given situation, might they be able to decide not to have any dealings with a State?
44. As general matter, a State is not under an international law obligation to recognize any government as the representative of that State. This is the default position, which can be departed from if special obligations exist in relation to a particular situation or in particular settings like meetings of international organizations. This will be returned to in due course. It is usually irrelevant in the sense that States will usually recognize one government or another (at least in the aforementioned sense of having government-to-government dealings), rather than choosing non-recognition at all.

7.2 Do standards apply to the recognition decision?

45. When a decision to recognize occurs, or a decision is made not to recognize, are there any international law standards States must follow – a test that must be met in order for recognition to be lawful and, conversely, if not met, should lead to non-recognition?
46. Like any international practice of States, the following of certain standards in the practice of recognizing/not-recognizing governments can have significance in the formation of customary international law if it is consistent and uniform over time, and accompanied by *opinio juris*, evidence that the following of standards in the consistent/uniform practice has been done out of a sense of obligation.
47. There is significant practice amongst States in recognizing as governments entities that exercise effective governmental control over the territory of State in question. However, when this happens, it is not necessarily accompanied by evidence that effective control was necessarily a determining factor in the recognition—indeed most of the time recognition occurs automatically. Even less evidenced is the proposition that insofar as States are actually taking effective control into account, they are doing this on the basis that they necessarily regard it to be something they are legally required to do. Moreover, the practice of recognizing governments that exercise effective control over territory has to be taken together with further practice of recognizing certain governments who did not exercise effective control, either at all, or in circumstances where matters are in flux, and/or where control is divided between more than one regime. The legal significance of the foregoing is that there is, therefore, no general norm of international law based on the recognition practice of States requiring effective control to be present as a lawful pre-requisite to recognition. As far there being a recognition-practice-based norm concerning effective control, then, States are free to

decide to base their individual recognition decisions on the control factor in any way they wish – disregarding it, or recognizing only an actor that has effective overall control, or recognizing an actor that controls only part of the State’s territory.

48. There is also significant practice of States sometimes invoking certain normative standards when they recognize, or refuse to recognize, governments. This includes compliance with certain human rights standards in general and treatment of national, ethnic and religious minorities in particular; whether or not the government is validly constituted as a matter of the State’s own legal and political system; and even, more broadly, whether or not the government is understood to be ‘democratic’. However, as a general matter, practice here is highly varied in terms of which particular normative standards are invoked. It is uncertain in legal terms, in terms of whether or not the invocation of the standards is understood to reflect an obligation to apply them. Moreover, it is accompanied by other recognition practice that fails to invoke any such standards and, indeed, often involves recognition of governments that would manifestly fail to meet the standards were they to be applied. Consequently, it is not possible to conclude from the foregoing that a general customary international law rule exists requiring states and international organizations to apply certain normative standards to governments when deciding whether to recognize them or not.
49. States are certainly free to adopt such standards when making decisions concerning the recognition of governments. When this is taken together with the aforementioned absence of a general obligation, based on recognition practice, to take into account whether or not a particular regime exercises effective control over territory, as a matter of these recognition-practice-based considerations, States are left in a general position where they are free to factor in effective control and normative considerations to varying degrees as they see fit.

7.3 Significance for the ICC

50. It follows from the foregoing that **as far as the ICC acting in a manner that is consistent with the general position in international law applicable to States when they recognize—in the general sense defined herein—governments of other States, the ICC is free to decide whether or not to recognize the NUG as being a valid authority to issue the Declaration on behalf of Myanmar, and, if it decides in the affirmative, it can do this on any basis. In particular, there is no legal requirement to adopt a consideration based on the level of control exercised over Myanmar by the NUG.**
51. This is, however, only part of the relevant applicable rules. The next set of such rules are drawn from practice concerning representation at the United Nations.

8. Legal standards—General—United Nations Representation (not specific to Myanmar)

8.1 Significance, procedure and practice generally

52. The question of who represents a State at the United Nations General Assembly is determined by the General Assembly, on the basis of Rules 27-29 of the General Assembly's Rules of Procedure.³⁸
53. Rule 27 of the 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".³⁹ 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".⁴⁰ Other than the Rules of Procedure and the 1970 memorandum, the only authoritative guidance is provided in General Assembly Resolution 396(V), 14 December 1950, entitled "Recognition by the United Nations of the Representation of a Member State".⁴¹ 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.
54. The procedure usually adopted for accreditation decisions is as follows. 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 9-member 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 usually an annual process. The Credentials Committee deliberates, and submits a report to the General Assembly recommending either rejection or approval of the credentials of the representatives of all Member States.⁴² Typically, the Assembly adopts the Committee's recommendations without discussion.
55. In making its decision on what to recommend to the General Assembly, the Credentials Committee will typically consider whether the documentation is complete and issued by the named authority, but does not generally look beyond this to consider the legitimacy of that issuing authority. 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's practice has been 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

³⁸ UNGA, Rules of Procedure of the General Assembly (1985) UN Doc A/520/Rev.15.

³⁹ *Ibid.*

⁴⁰ UNGA, Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request, 11 November 1970, UN Doc A/8160.

⁴¹ UN Doc. A/RES/396(V).

⁴² UNGA, Rules of Procedure (above n 2), Rule 28.

relation to whom the objection has been made is seated provisionally, until the Credentials Committee has decided what recommendation to make and the General Assembly has made its decision.⁴³

8.2 1945-1990

56. In its first 45 years, the General Assembly was faced with seven major credentials contests.
57. South Africa (1970-1994): The General Assembly took up the question of racial discrimination in South Africa at its first session in 1946.⁴⁴ Over the next quarter-century, both the General Assembly and the Security Council repeatedly urged the South African Government to abandon what they determined to be the “inhuman and aggressive” racist policies of apartheid and conform to the human rights provisions of the Charter and the Universal Declaration of Human Rights.⁴⁵ In 1970 the General Assembly accepted the recommendation of the Credentials Committee not to accept the credentials of the South African delegation.⁴⁶ However the President of the General Assembly ruled that this did not preclude South Africa from participating in the work of the Assembly.⁴⁷ From 1970 until 1972 the General Assembly neither accepted nor rejected the delegation’s credentials, but it did not interfere with South African participation. Then in 1973 the General Assembly voted to reject the credentials of the delegation;⁴⁸ and similarly in 1974, the Assembly accepted the recommendation of the Credentials Committee to accept all credentials submitted with the exception of the South African delegation.⁴⁹ 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.⁵⁰ 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 the State.⁵¹
58. 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 United States 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.”⁵²

⁴³ Ibid, Rule 29.

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

⁴⁵ 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.

⁴⁶ GA Res 2636 (XXV), 13 November 1970.

⁴⁷ UN GAOR (25th sess, 1901st plen mtg), 11 November 1970, UN Doc A/PV.1901, 24-25.

⁴⁸ UN GAOR (28th sess, 2141st plen mtg), 5 October 1973, UN Doc A/PV.2141, 7.

⁴⁹ GA Res 3206 (XXIX), 30 September 1974, adopting the First Report of the Credentials Committee, 28 September 1974, UN Doc A/9779.

⁵⁰ UN GAOR (29th sess, 2281st plen mtg), 12 November 1974, UN Doc A/PV.2281, 854-56.

⁵¹ GA Res 48/258, 6 July 1994.

⁵² UNGA, Report of the Credentials Committee, 13 February 1957, UN Doc A/3536, 1.

The General Assembly approved the Committee's report.⁵³ The effect of the Assembly's decision was that the delegation participated in General Assembly sessions. 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.⁵⁴

59. 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 Republic of the Congo".⁵⁵ The General Assembly approved the report of the Credentials Committee.⁵⁶
60. 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.⁵⁷
61. 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.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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

⁵³ GA Res 1009 (XI), 21 February 1957.

⁵⁴ 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.

⁵⁵ UNGA, First Report of the Credentials Committee, 17 November 1960, UN Doc A/4578, 4-5.

⁵⁶ GA Res 1498 (XV), 22 November 1960. See B Roth, *Government Legitimacy in International Law* (1999) 268-274.

⁵⁷ UNGA, Report of the Credentials Committee, 20 December 1962, UN Doc A/5395; GA Res 1871 (XVII) 20 December 1962.

⁵⁸ See Crawford, *The Creation of States in International Law* (2006) 198-221.

⁵⁹ GA Res XXX, 19 September 1950.

⁶⁰ 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.

deciding to “expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations”.⁶¹

62. 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.⁶² 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”.⁶³
63. 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 Kampuchea, in resistance to foreign occupation. International opposition to the Vietnamese invasion was overwhelming. Security Council condemnation was blocked only by the veto.⁶⁴ The General Assembly demanded an “immediate withdrawal” of Vietnamese forces.⁶⁵ 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.⁶⁶ The credentials contest was repeated from 1979 until 1991, when the parties reached an accord.⁶⁷
64. 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

⁶¹ See GA Res 2758 (XXVI), 25 October 1971; Roth, above n 20, 261-263.

⁶² 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.

⁶³ GA Res 3238 (XXIX), 29 November 1974.

⁶⁴ UN Doc S/13027, 15 January 1979.

⁶⁵ GA Res 34/22, 14 November 1979.

⁶⁶ UNGA, First Report of the Credentials Committee, 20 September 1979, UN Doc A/34/500; GA Res 34/22, 14 November 1979.

⁶⁷ 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, above n 20, 280-283.

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.

8.3 Since 1990

65. 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.⁶⁸
66. 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.⁶⁹ 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”.⁷⁰ 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.⁷¹ 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....⁷²

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ GA Res 46/7, 11 October 1991.

⁷¹ 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.

⁷² SC Res 940, 31 July 1994, 2.

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

67. 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.⁷³ 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.⁷⁴ 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.⁷⁵
68. 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 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.⁷⁶
69. 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.”⁷⁷ 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

⁷³ UNGA, First Report of the Credentials Committee, 23 October 1996, UN Doc A/51/548.

⁷⁴ 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.

⁷⁵ UNGA, Report of the Credentials Committee, 20 December 2001, UN Doc A/56/724, para 4.

⁷⁶ UNGA, Report of the Credentials Committee, 11 December 1997, UN Doc A/52/719, para 7.

⁷⁷ *Ibid*, para 5.

accepted the Committee's recommendation to seat Cambodia's new coalition government.⁷⁸

70. 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.⁷⁹ 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.⁸⁰ 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."⁸¹ 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.⁸²
71. 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 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".⁸³
72. 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

⁷⁸ 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.

⁷⁹ 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>.

⁸⁰ UNGA, Report of the Credentials Committee, 17 December 2009, UN Doc A/64/571.

⁸¹ *Ibid.*

⁸² UNGA, Report of the Credentials Committee, 22 December 2010, UN Doc A/65/583/Rev.1.

⁸³ UNGA, Report of the Credentials Committee, 17 December 2009, UN Doc A/64/571.

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”,⁸⁴ 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.⁸⁵

73. 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.⁸⁶ A few weeks later, Security Council Resolution 1973 established a no-fly zone over Libya and authorized an international military intervention to protect civilians.⁸⁷ 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.⁸⁸ 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.⁸⁹ A short time later, the General Assembly accepted the Credentials Committee’s recommendation.⁹⁰
74. 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 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”.⁹¹ In 2013, the credentials of Guinea-

⁸⁴ UN Doc. A/RES/63/301, 30 June 2009.

⁸⁵ UN Doc. A/64/571, 17 December 2009.

⁸⁶ SC Res 1970, 26 February 2011.

⁸⁷ SC Res 1973, 17 March 2011.

⁸⁸ UNGA, Report of the Credentials Committee, 14 September 2011, UN Doc A/66/360.

⁸⁹ UN GAOR (66th sess, 2nd plen mtg), 16 September 2011, UN Doc A/66/PV.2, at 11-12.

⁹⁰ GA Res 66/1, 18 October 2011.

⁹¹ UNGA, Report of the Credentials Committee, 4 December 2012, UN Doc A/67/611.

Bissau's Transitional Government – which had by that time committed to holding elections, among other things – were accepted without objection.⁹²

75. 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 United States, 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.⁹³ Notwithstanding the objection of the US, in both years the General Assembly approved the Committee’s recommendations.⁹⁴

8.4 Conclusion and relevance to the ICC

76. **When it comes to the significance of the practice of the UN General Assembly on the accreditation of representatives of Member States, the foregoing indicates that the Credentials Committee has been willing on several 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.**
77. **Bearing in mind the manifest similarities between this practice and the situation in Myanmar at the time the Declaration was issued, it follows that a decision by the ICC to accept the NUG as being a valid authority to issue the Declaration on behalf of Myanmar would be consistent with, and would follow from, a diverse set of precedents set by this UNGA practice as a simple matter of fact. Moreover, more specifically, if such a decision were to manifest not only factual coincidence with these precedents, but also to be partly made *on the basis of similar normative considerations*, it would also be consistent with, and, indeed, follow from, a diverse set of precedents to do this set by the UNGA.**
78. The next step of the applicable international legal framework moves from the question of generally-applicable standards, to *sui generis* standards specific to Myanmar.

⁹² UNGA, Report of the Credentials Committee, 2 December 2013, UN Doc A/68/680; GA Res 68/22, 5 December 2013.

⁹³ 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.

⁹⁴ GA Res 74/179, 18 December 2019; GA Res 75/19, 1 December 2020.

9. Legal Standards—specific to Myanmar—United Nations Representation before the General Assembly (and the significance of ICJ proceedings)

9.1 General Assembly

79. The issue of representation of the State of Myanmar at the UN was raised in 2008, but with no consequence.⁹⁵
80. 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
81. As indicated above, the coup happened on 1 February 2021. At a meeting of the General Assembly on 26 February 2021, the aforementioned Permanent Representative of Myanmar urged the international community to use “any means necessary to take action against the military” to help “restore the democracy” clearly aligning himself with the anti-coup movement which subsequently became the NUG.⁹⁸ A member of the military junta purporting to be the Minister for Foreign Affairs wrote to the UN Secretary-General on 12 May 2021 informing him that on 27 February 2021 Kyaw Moe Tun was “terminated...due to abuses of his assigned duties and mandate”.⁹⁹
82. However, Kyaw Moe Tun continued, and continues to this date, to be permitted to represent Myanmar at the United Nations Headquarters in New York, including before the UN General Assembly, in this capacity attending meetings and sending letters to the Secretary-General about the continuing human rights abuses taking place in Myanmar.¹⁰⁰ The foregoing makes it clear that Kyaw Moe Tun acted as an official of the NUG as Permanent Representative of Myanmar at the United Nations and that, therefore, it was his role *in this capacity* that continued, and continued, therefore covering the date when the Declaration was made public, 20 August 2021, and, as will be explained, the December 2021 General Assembly decision to allow him to continue to act in this capacity before that body and therefore at the UN in general. This assumption of his position at the UN is mirrored by how he is described by the NUG, for example the NUG Foreign Minister referring to him as ‘our Ambassador to the United Nations.’¹⁰¹

⁹⁵ 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>.

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

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

⁹⁸ BBC, “Myanmar Coup: UN Ambassador fired after anti-army speech”, 28 February 2021, available at <https://www.bbc.co.uk/news/world-asia-56222987>.

⁹⁹ Letter from U Wunna Maung Lwin, purporting to be the Minister of for Foreign Affairs, to the UN Secretary-General, 12 May 2021, on file with the author.

¹⁰⁰ 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.

¹⁰¹ <https://gov.nugmyanmar.org/2022/02/21/union-minister-for-foreign-affairs-zin-mar-aung-press-statement-on-icj/>

83. The December 2021 General Assembly decision followed a challenge to his position by the SAC, which went before the General Assembly Credentials Committee. That body met on 1 December 2021.¹⁰² It comprised the following states: Bahamas, Bhutan, Chile, China, Namibia, Russian Federation, Sierra Leone, Sweden and United States of America.¹⁰³ According to their Report:

The Committee had before it two communications concerning the representation of Myanmar at the seventy-sixth session of the General Assembly, indicating different individuals as representatives to the seventy-sixth session of the Assembly. The first was dated 18 August 2021 from the Ministry of Foreign Affairs of Myanmar. The second was dated 21 August 2021 from the Permanent Representative of Myanmar to the United Nations in New York (para 7).¹⁰⁴

84. The Credentials Committee adopted, without a vote—so on the basis of unanimity — “to defer its decision on the credentials pertaining to the representatives of Myanmar”.¹⁰⁵ The General Assembly decided, without the need for a vote—so, again, on the basis of unanimity—to approve the report of the Credentials Committee, thereby endorsing the position on deferring the Credentials decision.¹⁰⁶
85. Bearing in mind what was covered above about the nature of recognition, it is important to clarify that the choice to defer the decision is itself a decision of a different but related kind. On the one hand, making a decision that would enable a response to the two letters, articulating competing claims, and potentially stating in positive terms who could represent Myanmar at the General Assembly, was deferred. On the other hand, failing to do this meant, in effect, a decision to maintain the *status quo*. Thus the UN website described this decision, together with a separate, identical decision regarding Afghanistan made at the same time, in the following terms:

The Assembly agreed to defer action, which means the current ambassadors (sic) for the two countries will remain in place for the time being.¹⁰⁷

86. The Committee could have recommended, and the Assembly decided, that not only would they defer things, but also that, pending this, no-one could represent Myanmar at the Assembly as it has done historically in other cases, with the effect that the seat of a Member State was left empty. The fact that they chose not to do this, meaning that the current Permanent Representative continued to represent the State at the UN, was, therefore, a ‘decision’ to recognize that individual as the legitimate representative of the State of Myanmar. The fact that it is not stated expressly in these terms does not change the nature of what had been decided, bearing in mind the alternative option of suspending any representation that could have been, but was not, chosen.

¹⁰² Report of the Credentials Committee, 1 Dec 2021, UN Doc A/76/550.

¹⁰³ *Id.*, para 1.

¹⁰⁴ *Id.*

¹⁰⁵ <https://news.un.org/en/story/2021/12/1107262>

¹⁰⁶ GA Resolution 76/15, UN Doc., A/RES/76/15, 7 December 2021.

¹⁰⁷ <https://news.un.org/en/story/2021/12/1107262>

87. As indicated earlier, it is common practice in international law for recognition, whether by States individually, or collectively through international organizations, to sometimes be manifest in this fashion, by continuing to deal with a particular actor, implicitly accepting the basis on which they act. The fact that this basis has not been expressly re-validated does not change the way that, necessarily, the Permanent Representative is being accepted for what he claims to be. It would be different if somehow the Assembly had stated that it would continue dealings with this individual but now on some other basis. It did not do this and, indeed, the matter being addressed was and is only the specific issue of who represents the State of Myanmar at the United Nations, not also other possible forms of relationship actors can and may have with the organization (e.g. observer status). By continuing the *status quo*, the decision to defer simply continues the original basis on which the Permanent Representative was accredited at the United Nations, viz. as the representative of the State of Myanmar.
88. It should be recalled from above, and repeated, that the fact that the Credentials Committee has indicated that it will return to this issue, creating the possibility that a different position may be forthcoming, does not somehow qualify the representation that has been permitted. The Permanent Representative is able to fully act on behalf of Myanmar in all respects, as any other Permanent Representative given accreditation can do.
89. It is also important to note that this is a decision of the General Assembly, the body, as indicated, made up of all the member states of the United Nations, on the basis of unanimity. Members of the Assembly were free to agree with, or depart from, the recommendation of the Credentials Committee. The agreement could have been qualified, instead of unanimous. This decision is clearly linked to the decision the Assembly had already taken, reviewed in the next section, to express concern about the coup and call upon the military to enable democratic governance to be restored. The Assembly had essentially taken a position on the illegitimate nature of the coup regime. This decision on accreditation can be seen as the consequence of that, which is to deny the request of that regime to take over representation of the State at the UN. But in maintaining the *status quo*, the Assembly decided not merely to deny one authority the right to represent the State; it also continued to permit the Permanent Representative, who spoke for the NUG, to do this. This is not merely a decision about a particular representative: it is about the general matter of who is going to be treated as the government of the State before the UN as a whole. Such an implication is illustrated in the way the International Labour Organization Credentials Committee describes the effect of the General Assembly determination when representation is disputed:

The decision...effectively requires that the Credentials Committee determine which entity is internationally recognized as representing the Government of the Member State in the Organization.¹⁰⁸

9.2 International Court of Justice

¹⁰⁸ 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, para 16.

90. Myanmar has been a party to a contentious case brought by the Gambia under the Genocide Convention before the International Court of Justice (ICJ) since 2019—before the coup.¹⁰⁹ Hearings on the matter of Provisional Measures were held between 10-12 December 2019, where the two Agents for Myanmar were ministers of the then government, one of which being Aung San Suu Kyi.¹¹⁰ Hearings on preliminary objections were held between 21-28 February 2022. In this instance, the two Agents for Myanmar were two ministers of the SAC junta.¹¹¹ This latter phase in the proceedings took place after the General Assembly had made its decision on representation at the United Nations.
91. The International Court of Justice is an Organ of the United Nations, and so must stay within the boundaries of its competence under the Charter. According to aforementioned General Assembly Resolution 396(V), 14 December 1950, entitled “Recognition by the United Nations of the Representation of a Member State”, “whenever more than one authority claims to be the government entitled to represent a Member State at the United Nations and this question becomes the subject of controversy in the United Nations...the attitude adopted by the General Assembly...should be taken into account in other organs of the United Nations and in the specialized agencies.”¹¹² Given this, some speculated that, following the General Assembly decision, the Court might deny the SAC junta ministers the right to appear as Agents before the Court, and permit NUG representatives to take their place, as the NUG requested.¹¹³
92. However, it is important to appreciate the nature of the forum and activity performed at the ICJ. These are legal proceedings, the actors before the Court performing a narrow legal function relating to a specific case. They could not be further removed from the kind of full-spectrum, political representation of the kind performed by the Permanent Representative to the General Assembly. Moreover, as happened in the 2022 hearing, Agents usually serve a quasi-bureaucratic, not substantive role, with only one of the pair speaking, and typically doing so simply to open the oral submissions for the State and offer very brief introductory remarks on the substance. The vast majority of the oral submissions, covering all substantive matters, are then made not by the Agents but by expert legal counsel, who are typically independent legal professionals hired for the purposes of serving as advocates in the Court. These ‘representatives’ are present to serve justice and the Court, by enabling arguments to be put forward which will then be determined by the Court. Their job is to put the best case for the State that has instructed them, but in doing this they are not somehow acting as representatives of that State. Thus regardless of who acts as Agent, most of the legal proceedings are conducted by individuals who are acting for, but by definition are not ‘representatives’ in the sense of being part of the government of, the State concerned. Moreover, it is important to recall the distinction between the government and the State in international law. At the commencement of the 2022 proceedings, the President of the Court, Judge Joan Donoghue, made the pointed comment that “I note that the parties to a contentious

¹⁰⁹ See <https://www.icj-cij.org/en/case/178>

¹¹⁰ See <https://www.icj-cij.org/public/files/case-related/178/178-20191210-ORA-01-00-BI.pdf> , page 6.

¹¹¹ See <https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf> page 6.

¹¹² UN Doc. A/RES/396(V), paras 1 and 3.

¹¹³ <https://gov.nugmyanmar.org/2022/02/21/union-minister-for-foreign-affairs-zin-mar-aung-press-statement-on-icj/>

case before the Court are States, not particular governments.”¹¹⁴ The implications of this for counsel is that their arguments concern the legal obligations of Myanmar, not any particular government of that State. It is possible, then, to understand the role of advocates in such proceedings, when it comes to making the best case for their client, as being focused on the State rather than the government of that State, not least because, as happened in this situation, governments can change in the course of proceedings. Furthermore, there is no ‘international bar’ that adopts and enforces norms concerning issues of representation, including in situations where there is a dispute concerning the entitlement of the actor purporting to instruct independent counsel to represent the State involved. Taking all this into account, it isn’t possible to draw a clear conclusion from the involvement of counsel at this phase in the proceedings that the individuals involved necessarily understood their role as acting in the best interest of the particular regime acting as governmental Agents at that moment, as distinct from the State of Myanmar.

93. The same approach also applies to the question of what can, or not, be concluded from the 2022 hearing when it comes to the Court’s position. President Donoghue followed her comment quoted earlier by observing that “The Court’s judgments and its provisional measures orders bind the States that are parties to a case.”¹¹⁵ Reading between the lines, this and the preceding sentence might be viewed as an indication that the appearance of SAC officials as Agents at this particular phase in the proceedings should not somehow be taken as a broader acknowledgement by the Court that the SAC is being accepted as the legitimate representative of Myanmar. Indeed, given the aforementioned very limited manner performed by State Agents in oral proceedings before the Court, there is not an equivalent procedure to that of the General Assembly Credentials Committee, whereby the Court would somehow determine, in the same substantive manner, who can and should act as Agent for a State before it. In particular, unlike at the General Assembly, there was no prior determination that could serve as a *status quo* that could be followed. The prior situation had simply been that different actors had presented themselves before the Court to perform the role of Agents for the State in the case—not an uncommon situation for the Court bearing in mind how protracted proceedings there can be. And that shift being irrelevant to the question of which actor is bound by the Court’s provisional orders and judgments, as pointed out by Judge Donoghue, underscores the irrelevance of particular representation at any given stage in the proceedings, as far as the question of which actor’s obligations are being determined is concerned. This irrelevance is significant to the potential implication of President Donoghue’s statement: one might see this as the President reminding everyone that for the specific purposes of determining which legal person’s obligations are being adjudicated, the question of the government of that legal person is not in play.
94. When assessing whether or not an international organization has acted within the scope of its powers—in this case, whether an Organ of an international organization has done so—the usual approach is to adopt a presumption that the act is *intra vires*, and consider whether this can be rebutted by clear evidence to the contrary. In this instance, the special considerations reviewed in the previous two paragraphs suggest that significance of presence of the two SAC Agents in the 2022 proceedings is ambiguous at best when it comes to what can be assumed about a more general acceptance by the

¹¹⁴ <https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf> page 11.

¹¹⁵ <https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf> page 11.

Court of the SAC to be the representative of the State. If it cannot be assumed from this that the Court intended such acceptance, then equally it cannot be assumed that the Court was necessarily contradicting the decision of the General Assembly. This conclusion fits within the general presumption that the Court was acting *intra vires*.

95. In consequence, the presence of the two SAC officials as Agents in the 2022 hearing sets no general precedent on the question of who can and should represent Myanmar as a matter of international law. Additionally, it is also important to acknowledge that their appearance in this capacity took place five months after the key date for present purposes, that when the Declaration was made public in August 2021.

9.3 Conclusion and relevance to the ICC

96. **The significance for the ICC of the practice of the General Assembly on the representation of Myanmar in particular, and the situation at one stage of proceedings before the International Court of Justice is as follows. A decision by the ICC to accept the Declaration as valid would follow from the equivalent decision made by the United Nations General Assembly in December 2021 to recognize an official acting on behalf of the NUG to represent Myanmar as the Permanent Representative of Myanmar to the United Nations. This is not contradicted by the presence of two SAC ministers as Agents for Myanmar in oral proceedings at the International Court of Justice in 2022, since that presence cannot be understood to have necessarily operated on the basis of a more general acceptance by the Court on the merit of the SAC's claim to be the government of the State.**

10. Legal Standards—Specific to Myanmar—Recognition

10.1 Significance

97. It will be recalled that there is no general standard in international law drawn from the practice of states requiring governments to be somehow legitimate before they are entitled to represent the State. However, States can and do sometimes chose to adopt as applicable such a standard in a specific case, something which they are free to do.
98. A strong case can be made that States have chosen to do this in the case of Myanmar, through their practice of recognition, determining that the junta is not to be treated as the legitimate government of the State, and that the NUG is to be treated as acting in this capacity.
99. The evidence for this is based on the combination of widespread condemnation of the illegitimacy of, and human rights abuses perpetrated by, the junta and an associated affirmation of the legitimacy of the authorities that had been removed and now form the NUG, with the specific decision taken by States in the General Assembly to vote in a manner that implies recognition of the NUG as the government of the State.

10.2 Recognition of the illegitimacy of the junta, violations perpetrated by it, and calls for the restoration of legitimate government

100. The General Assembly has long expressed concerns about the undemocratic nature of governance, and grave and systematic human right abuses in Myanmar.¹¹⁶ On 18 June 2021, the General Assembly adopted a resolution strongly condemning the violence in Myanmar and expressing concern about the coup.¹¹⁷ The resolution was adopted with 119 votes in favour, 1 against (Belarus), 36 abstentions and 37 non-voting.¹¹⁸ 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.¹¹⁹

101. The UN Security Council has met several times since the February 2021 coup and issued a series of press and presidential statements expressing concern regarding the situation in Myanmar although falling short of adopting a resolution with agreed actions. Directly after the coup, 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.¹²⁰ On 10 March 2021, the Council issued a presidential statement reiterating its previously-expressed concerns, and also “strongly condemn[ing] the violence against peaceful protesters”.¹²¹ Subsequent statements from the Security Council have reiterated its concern for the deteriorating security and humanitarian situation in the country and reaffirming its support for ASEAN to find a solution to the crisis.¹²²

102. The United Nations Human Rights Council has also held several discussions on the situation in Myanmar since the coup. On 21 February 2021 it held a special session on Myanmar in which a resolution was adopted deploring “the removal of the Government elected by the people of Myanmar in the general election held on 8 November 2020”, and calling “for the restoration of the elected Government.”¹²³ 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

¹¹⁶ 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;

¹¹⁷ GA Res, 75/287, 25 June 2021.

¹¹⁸ <https://digitallibrary.un.org/record/3929594?ln=en>

¹¹⁹ Ibid.

¹²⁰ UNSC Press Statement, 4 February 2021, UN Doc SC/14430.

¹²¹ UNSC Presidential Statement, 10 March 2021, UN Doc S/PRST/2021.

¹²² For an overview of the Security Council deliberations on Myanmar, see Security Council Report website:

<https://www.securitycouncilreport.org/myanmar/>

¹²³ HRC Res, 21 February 2021, A/HRC/RES/S-29/1.

international community must refuse to recognize this illegal regime.”¹²⁴ The Special Rapporteur has presented his subsequent country and thematic reports to the Human Rights Council highlighting what he has considered has been ongoing crimes against humanity committed by military junta.¹²⁵ The Human Rights Council has also adopted further resolutions outlining its concern of the human rights situation in the country and the range of measures to address these, most recently at its 49th session on 29 March 2022.¹²⁶

103. As well as numerous international bodies, senior UN officials and experts have also repeatedly condemned the military coup. The UN Secretary-General has issued repeated statements calling for the coup to be reversed and civilian rule to be restored,¹²⁷ as has his Special Envoy on Myanmar.¹²⁸ The UN High Commissioner for Human Rights has also been a vocal critic of the military junta.¹²⁹

10.3 Implied recognition of the NUG through General Assembly accreditation

104. The aforementioned decision by the General Assembly to allow an individual who is acting on behalf of the NUG to continue to represent Myanmar at the General Assembly is significant not only, as indicated earlier, as a UN matter. It is also legally significant in general international law, as, effectively, a collective act of recognition by all the States whose agreement was needed for the relevant decision to be passed unanimously.
105. States have collectively agreed on a position that is not usually taken, but is adopted from time to time in particular situations: that a particular government in a State is the government they are going to recognize as the government of that State. This is an enhanced version of the general practice of ‘recognition’ as described earlier, because it is adopted collectively, in the context of the prior determination by the same States in the same forum to take a collective position on the substantive matter of the illegitimacy of the junta, itself also an unusual step to take.
106. This places the claim of the NUG to represent the State of Myanmar in an exceptional position when compared to the ordinary claims made by governments in States, let alone such claims where authority is disputed. Implicitly, States decided, unusually, to

¹²⁴ 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/>.

¹²⁵ For more details see the website of the Special Rapporteur

¹²⁶ HRC Res, 29 March 2022, A/HRC/49/L.12

¹²⁷ 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>. See also 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>.

¹²⁸ 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>.

¹²⁹ 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>.

make a choice. And they did so as a general matter, since the decision was adopted unanimously.

107. It can also be argued that this is not simply a general diplomatic position adopted by States, but also has binding legal effect. General Assembly resolutions can have a dual status in international law—internal to the UN (in this case, effective in determining an accreditation issue), and external, as a matter of international law, as evidence of the practice and *opinio juris*—a sense that the practice is to have legal significance—that taken together constitutes a norm of international law.
108. A case can be made that States implicitly intended this act of collective recognition to have legal significance (the *opinio juris* element), in the sense that the NUG *should* be, as a matter of obligation, recognized as the government of Myanmar, for as long as the NUG representative is permitted to represent the State at the United Nations. The UN is the main plenary international organization, the central forum for international diplomatic activity, where all global issues between States are to be addressed. It would make no sense to permit one government to act for the State here, if then another actor could also lawfully act for the State in a general diplomatic sense elsewhere. Activity of the latter kind would undermine the very functioning of the United Nations and thus go against the object and purpose of the UN Charter itself. Making a decision on accreditation, then, presupposes a more general position, even if the States who voted for that decision have not made individual express statements of recognition. It is also significant that this is a unanimous decision. States who may have objected to the implication of this decision had an opportunity to abstain or vote against, and this could conceivably place them in the category of an objector when it came to the formation of a new rule in customary international law. Not a single State did this.
109. Because of the foregoing, the accreditation vote can be seen as an example of what is termed ‘instant custom’, where States agree collectively on a particular norm that is in operation from that moment onwards. As UN membership is virtually universal, a Resolution adopted unanimously, as was the case here, more than meets the quantum requirement when it comes to the number of States whose support is needed for a rule of international law to be adopted as a matter of customary international law.

10.4 Significance for the ICC

110. **For the ICC to accept the NUG as capable of engaging the State of Myanmar so as to render the Declaration legally effective would be to follow from, be consistent with, and in one respect potentially *required by*, two related positions adopted by States and the United Nations that have direct legal significance to the entitlement of the NUG to represent the State in international law as a general matter (i.e. not just before the United Nations General Assembly). In the first place, there has been a consistent and widespread determination by both States and all the main relevant United Nations bodies and officials that the junta is illegitimate both as a general matter—based on how it was constituted—and in terms of the abuses it has perpetrated against the people of Myanmar. In the second place, there has been an act of collective recognition of the NUG as the government of that State by almost all the world’s states when they voted unanimously in the General Assembly on accreditation before that body. Moreover, a case can be made that this collective recognition was intended to have legal standing, in rendering**

obligatory the recognition of the NUG as the government of Myanmar. Since this was made unanimously, it has had the intended legal effect in terms of creating a rule of customary international law requiring the NUG to be accorded this status. In consequence, the ICC would be required to accept the Declaration as valid as far as the question of the NUG's capacity to act on behalf of Myanmar to issue it is concerned.

11. Legal Standards—Specific to the ICC Statute – preference for bringing states on board

111. According to aforementioned General Assembly Resolution 396(V), 14 December 1950, entitled “Recognition by the United Nations of the Representation of a Member State” stipulates that “whenever more than one authority claims to be the government entitled to represent a Member State at the United Nations and this question becomes the subject of controversy 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.”¹³⁰ This reflects a general principle of treaty interpretation, that the object and purpose of a treaty should be borne in mind when determining how to understand how a particular provision in the treaty is to be interpreted.
112. For present purposes, the object and purpose of the ICC Statute is to end impunity for serious crimes through the exercise of criminal jurisdiction with respect to such crimes, nationally and, if that does not happen, internationally. The relevant preambular paragraphs are as follows:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
[...]

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court ...with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

113. The effect of the foregoing is that the parties to the Statute were and are not agnostic on whether or not the Court should be able to exercise jurisdiction. Their stated commitment to ending impunity, necessarily requiring the exercise of criminal jurisdiction, and, within this, their commitment to creating an international form of jurisdiction to complement national jurisdiction, presupposes that the international

¹³⁰ General Assembly Resolution 396(V), 14 December 1950, UN Doc. A/RES/396(V), para 1.

jurisdiction they are creating can be exercised when required to avoid impunity. Thus as a matter of the Statute, the alternative scenarios of international jurisdiction being either possible, or not, are not treated as equal. The States Parties have created the ICC precisely because they wish to enable the possibility of international jurisdiction (which then comes into operation if there is no effective national process, according to the principle of complementarity).

114. In consequence, given that, absent a Security Council referral, some sort of consensual link to the State of nationality and/or the territorial State—being a party to the ICC Statute, or giving its consent as a non-party—is a precondition to jurisdiction (see the explanation at the start of this Opinion), the object and purpose of the Statute manifests a clear preference in favour of the establishment of such a consensual link where possible. The more such consensual links occur – the more States become parties to the ICC Statute, or, as non-parties, refer situations to it – the greater likelihood the ICC is going to be able to serve the purpose for which it was created, to fill in gaps in the enforcement of international criminal law when national processes don't operate, and thereby reduce impunity. Of course, the ICC has limited resources, and does not necessarily have the capacity, therefore, to fill in all such gaps where they exist. But that is a matter to be addressed when discretion is exercised in determining which particular cases to take on (for example by prioritizing extreme violations), rather than which territorially-defined areas can, in principle, and as a general matter, fall within the jurisdiction of the Court. On that general matter, States Parties clearly intended as wider scope as possible, irrespective of resource and capacity considerations (which could be applied at a different stage).
115. This makes the ICC Statute a special kind of treaty in international law, where States Parties have made pledges to objectives that presuppose as wide as acceptance as possible by other States. This does not mean that the States Parties to the ICC Statute have thereby somehow themselves manifested such acceptance on behalf of other non-party States without their consent. But what it does mean is that where there is a situation, as here, when a decision has to be made as to whether acceptance has or has not happened, the position of the States Parties is not to treat either outcome as equally welcome when it comes to whether the object and purpose of the treaty would be served. This does not mean that the ICC can accept any actor purporting to be the government of a State for the purposes of providing a valid Declaration. What it means is that assuming that the Court would be acting in a consistent manner with the position in international law when it came to the entitlement of the actor before it to act as the government of the State, there is an additional normative factor, internal to the ICC Statute, which would treat a decision to accept as valid a Declaration made by that actor as a means by which the ICC fulfils its object and purpose to close the impunity gap by enhancing, where possible, the opportunities for the crimes that fall within the Statute to be subject to criminal prosecution. What this suggests, then, is that if the NUG's claim to be the government of Myanmar is valid as a matter of international law, which, as indicated by the foregoing analysis, it is, then the ICC is under an obligation as a matter of the Statute to accept as valid a Declaration made by it for the purposes of Article 12(3).
116. To summarize, **as a matter of the internal law of the ICC Statute which the ICC must comply with, given that, for the reasons set out above, treating the NUG as the government of the State of Myanmar is consistent with all the different**

relevant areas of international law and, indeed, a *sui generis* rule of international law adopting such treatment as a legal norm that may well have been established, the object and purpose of the Statute, to end impunity, requires the ICC to accept the Declaration as valid for the purposes of Article 12(3).

13. Conclusion

[The following is a repeat of the executive summary set out at the start of this Opinion, itself based on the bolded text summaries at the end of certain sections.]

The International Criminal Court (ICC) is legally entitled and, indeed, legally required, to accept the Declaration made public on 20 August 2021 issued by the National Unity Government (NUG) under Article 12(3) of the ICC Statute as valid under that Article as an acceptance of the Court’s jurisdiction by the State of Myanmar.

The NUG is the legitimate government of Myanmar as a matter of domestic law, since it is formed of members who were elected under the Constitution, is committed to democratic, pluralistic and Constitutional rule, the rule of law and promotion of human rights and is the only alternative to the military junta/SAC, which is manifestly and inherently illegitimate, un-Constitutional and undemocratic, and engaged in widespread, systematic and grave human rights violations. It is also notable that the question of de facto control exercised within the country is in flux, with significant areas and population groupings not under the control of the junta while the NUG is also aligned with armed actors that control significant parts of the country.

The analysis in this Opinion leading to the foregoing conclusion about legal status of the Declaration cascades through the different applicable legal regimes, from the general to the specific. It begins with the recognition of governments as a general matter, not specific to Myanmar, as a matter of the rules of customary international law based on the practice of States on the subject, and the implications of this for the ICC’s position on the Declaration. It then turns to the accreditation of representatives of member States before the UN General Assembly, again as a general matter, again explaining the implications for the Declaration. The focus then moves to these same two legal regimes as they have been applied to the situation of Myanmar, with further, more specific, implications for the Declaration. Finally, the *sui generis* legal position of the ICC is addressed, revealing further, distinctive norms applicable to the question of the legal status of the Declaration as far as the Court is concerned.

As far as the ICC acting in a manner that is consistent with the general position in international law applicable to States when they recognize governments of other States, the ICC is free to decide whether or not to recognize the NUG as being a valid authority to issue the Declaration on behalf of Myanmar, and, if it decides in the affirmative, it can do this on any basis. In particular, there is no legal requirement to adopt a consideration based on the level of control exercised over Myanmar by the NUG.

When it comes to the significance of the practice of the UN General Assembly on the accreditation of representatives of Member States, 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. Bearing in mind the manifest similarities between this practice and the situation in Myanmar at the time the Declaration was issued, it follows that a decision by the ICC to accept the NUG as being a valid authority to issue the Declaration on behalf of Myanmar would be consistent with, and would follow from, a diverse set of precedents set by this UNGA practice as a simple matter of fact. Moreover, more specifically, if such a decision were to manifest not only factual coincidence with these precedents, but also to be partly made *on the basis of similar normative considerations*, it would also be consistent with, and, indeed, follow from, a diverse set of precedents to do this set by the UNGA.

The significance for the ICC of the practice of the General Assembly on the representation of Myanmar in particular, and the situation at one stage of proceedings before the International Court of Justice is as follows. A decision by the ICC to accept the Declaration as valid would follow from the equivalent decision made by the United Nations General Assembly in December 2021 to recognize an official acting on behalf of the NUG to represent Myanmar as the Permanent Representative of Myanmar to the UN. This is not contradicted by the presence of two SAC ministers as Agents for Myanmar in oral proceedings at the International Court of Justice in 2022, since that presence cannot be understood to have necessarily operated on the basis of a more general acceptance by the Court on the merit of the SAC's claim to be the government of the State.

For the ICC to accept the NUG as capable of engaging the State of Myanmar so as to render the Declaration legally effective would be to follow from, be consistent with, and in one respect potentially *required by*, two related positions adopted by States and the United Nations that have direct legal significance to the entitlement of the NUG to represent the State in international law as a general matter (i.e. not just before the United Nations General Assembly). In the first place, there has been a consistent and widespread determination by both States and all the main relevant United Nations bodies and officials that the junta is illegitimate both as a general matter—based on how it was constituted—and in terms of the abuses it has perpetrated against the people of Myanmar. In the second place, there has been an act of collective recognition of the NUG as the government of that State by almost all the world's states when they voted unanimously in the General Assembly on accreditation before that body. Moreover, a case can be made that this collective recognition was intended to have legal standing, in rendering obligatory the recognition of the NUG as the government of Myanmar. Since this was made unanimously, it has had the intended legal effect in terms of creating a rule of customary international law requiring the NUG to be accorded this status. In consequence, the ICC would be required to accept the Declaration as valid as far as the question of the NUG's capacity to act on behalf of Myanmar to issue it is concerned.

Finally, as a matter of the internal law of the ICC Statute which the ICC must comply with, given that, for the reasons set out above, treating the NUG as the government of the State of Myanmar is consistent with all the different relevant areas of international law and, indeed, a *sui generis* rule of international law adopting such treatment as a legal norm that may well have been established, the object and purpose of the Statute, to end impunity, requires the ICC to accept the Declaration as valid for the purposes of Article 12(3).

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London, 15 August 2022

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