

SAC-M Briefing Paper: Recognition of Government

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1. Summary

- This briefing paper presents international law and practice on recognition of governments.
- International law generally lacks guidance regarding the recognition of governments by other States or international institutions.
- The decision to recognise a new government can be made bilaterally by other States, but as a general rule most States avoid doing this.
- One reason is so that in situations like Myanmar after the 2021 coup, a State can seek to maintain a diplomatic presence in the country, while trying to avoid legitimising an entity that has taken power unlawfully.
- Note that a decision on who represents a State in the United Nations is handled by the UN General Assembly, and so it is a question and process that is different to recognition [For a discussion of this, see SAC-M's briefing paper "Myanmar's Representation in the United Nations"].¹
- Despite the usual practice of States not recognising governments, sometimes their actions can suggest recognition, for example decisions on who attends a meeting or who is allowed to access money held abroad.
- When the recognition of a new government is considered, three tests are usually applied: the entity's *effective control* of the territory; its *democratic legitimacy*; and its *adherence to international law*.
- This briefing paper gives an overview of the implications of recognition and outlines what the tests for recognition broadly entail. It then considers which entity in Myanmar best meets the criteria of being its government.

2. Introduction

As of mid-August 2021, more than six months after the Myanmar military (the Tatmadaw) launched its coup d'état on 1 February, neither the military

junta nor the National Unity Government (NUG) established by elected parliamentarians on 16 April have been widely recognised internationally as the government.

The question of international recognition of a government typically only arises in situations where government is contested, as is the case now in Myanmar. Normally, governments do not seek explicit recognition from other States. The government of a State is usually obvious, because a single entity or leader clearly controls the State institutions, and the general population perceives that entity/leader to be the government. Foreign countries usually do not make statements recognising a new government, although many foreign leaders are known to congratulate election winners.

This briefing paper focuses on issues related to recognition of governments by States (other countries). It does not address the political representation of States in the UN: that is addressed in a separate SAC-M briefing paper.²

3. Recognition of States or governments?

Recognition of States, and recognition of governments, are different legal and political questions. States are generally well-established and recognised (with limited exceptions such as in Taiwan and Kosovo). Globally, governments often change, and questions arise about recognition of them.

International practice now favours recognition of States rather than recognition of governments. Recognition of a State indicates that it is an international entity with defined territory and a defined population and that it is a subject of international law and is able to enter into international legal obligations. This involves acceptance of whatever entity performs effective governmental functions within the territory of the

State, without any moral or political judgement as to the legitimacy or otherwise of that entity.

In general, most States do not practice recognition of governments. For States, recognising or refusing to recognise a government has political implications, and sometimes geopolitical implications. It can imply acceptance of the moral basis of the government. A State may be concerned that, following a coup, a military government has control over another State. It may be concerned that recognising the new government implies acceptance of its legitimacy or the legitimacy of the coup.

The broad rationale for the policy of not recognising governments is that, where authority in a country is contested, foreign recognition of a leader or entity may amount to interference in internal affairs, in violation of that State's sovereignty (often referred to as the "Estrada Doctrine," named after a minister who introduced this in Mexico in the 1930s).

The purported intention of the approach is to avoid interference in the affairs of other States (not dissimilar in principle to the contemporary "non-interference" principle of ASEAN). Yet this policy can also rationalise relations with new governments regardless of how they came to power, and so has been criticised for not penalising those who seize power by unlawful means, thus effectively benefiting bad actors.

The general preference to recognise States and not governments, does not resolve entirely the question of recognising governments. There are many circumstances in which a State is required to express a view on when an entity is the government of another State or not. For example, a State must do so when it establishes or continues an embassy in another State or accepts the establishment or continuation of an embassy of that State in its own capital. It may also do so when it is a party to an international treaty with that State. And a State may need do so when it is part of a decision of an intergovernmental organisation, such as the United Nations, as to which entity represents that State in the organisation.

The practice of recognising States, therefore, does not remove the need to address the issue of recognising governments.

4. Why is recognition of governments important?

Symbolism

Critically, recognition carries an unquantifiable symbolic importance, particularly where there is a competition between democracy and human rights versus self-interest and authoritarianism pursued through violence. In such situations where authority and values are contested, any international recognition may provide political or strategic advantage and a morale boost to one side over another. This is now the case in Myanmar where the coup is not a *fait accompli* and both parties claiming to be the government are seeking recognition. For example, one way or another, acts of recognition could have impacts on morale and decision-making within Myanmar's military.

Diplomatic relations between States

Most States with a diplomatic presence in Myanmar will likely want to maintain it, even if some may change the ways in which they deal with military institutions following the coup.

There are many reasons States seek to maintain diplomatic relations. Even when an entity unlawfully seizes power, most States usually still see benefits in maintaining relations, even if this consists of a limited diplomatic presence. This is particularly the case for neighbouring countries, which will usually want diplomatic relations with the authorities in control of State institutions, so they can discuss issues of mutual concern, such as refugee situations and transboundary crime. For States involved in humanitarian assistance, the effect of diplomatic relations on the delivery of humanitarian activities will also be a consideration. Other factors considered include trade and geopolitical dynamics.

Bilateral diplomatic relations are routinely handled by a State's embassy in that country, liaising with the host government. Usually, this arrangement is

reciprocal, with both States hosting an embassy of the other country. This requires that foreign diplomats are provided with the necessary permissions to be in the country, including the issuance of visas.

States are therefore reluctant to take actions that could lead to the junta closing their embassies in Myanmar or denying visas to their key staff. In the view of many States, the closure or downsizing of an embassy would negatively affect international cooperation in areas such as health, refugee repatriation, transboundary crime and other cross-border issues. This is a key reason why many States, despite not recognising the junta as the government, have also avoided explicitly recognising the NUG as the government.

It remains unclear how many States will respond to requests by the junta to send junta-appointed diplomats to Myanmar embassies. States could either ignore these requests, or deny them. But the junta could reciprocate by either delaying or rejecting applications from foreign diplomats to come to Myanmar.

Entering international treaties

Recognition also affects how the State enters international agreements, including multilateral treaties. Only certain individuals have authority to express the State's consent to be bound by a treaty. This is typically the Head of State or Head of Government (President or Prime Minister), the Minister for Foreign Affairs, or another lawfully accredited representative delegate.³

Access to finance and property

Recognition can affect access to revenues such as from resource extraction involving foreign companies, to loans and cash from international financial institutions, and to foreign currency reserves and other assets held in banks outside the State. In situations where claims to government are disputed, the question of recognition can create practical and legal complexities. For example, following a disputed presidential election in Venezuela in 2018, UK courts in 2020 became involved in assessing which candidate the UK government considers to be the legitimate leader

and thereby representative of Venezuela, and who in turn has rights to access about one billion dollars of gold bullion held in a London bank.⁴

On 4 February 2021, the United States Federal Reserve Bank in New York reportedly automatically blocked an attempt by the junta, through Myanmar's Central Bank, to access around one billion dollars in Myanmar government reserves held there. The following week the US Administration announced its introduction of measures in response to the coup, including sanctions and steps to prevent the military from accessing those specific funds.⁵ This act does not necessarily have any implication in terms of the recognition question. However, if the US were to recognise the NUG as Myanmar's government, and the NUG were to attempt a withdrawal from these funds, the US would likely consider the transaction differently, opening the possibility for the NUG to access the reserves.

The World Bank informed the junta on 22 February 2021 that payments to Myanmar were suspended, and the Asian Development Bank followed similarly in March 2021.⁶ This suggests they do not recognise the junta as an administration that would responsibly and effectively use loans in line with international standards including respect for human rights.

In another matter involving the UK, as of August 2021 there is an ongoing property dispute involving the official residence of Myanmar's Ambassador to the UK. It is unclear if this will proceed to a court. However, if it did, this may necessarily involve a judicial assessment of the UK government's position on recognition, as in the Venezuela case.⁷

Immunities

Recognition can also affect diplomatic immunities and privileges, including the status of diplomats serving abroad and the ability of officials to travel. Under customary international law, senior officials such as the Head of State and the Foreign Minister enjoy "functional immunity" from prosecution when they travel abroad on official duties. Under this principle, whoever is recognised internationally as the constitutionally lawful Head

of State and Foreign Minister can enjoy immunity from criminal jurisdiction while they travel, including freedom from arrest. Note the invalidation of immunities for perpetrators of crimes under international law is not yet well established or tested.

Political representation internationally

Political representation in international forums is linked to recognition, but it is decided by different procedural issues. Representation in UN bodies would give the entity a greater platform to encourage States and international organisations to take action according to the entity's own policies. Depending on who is recognised as the lawful representative of Myanmar, the interests of Myanmar's people would be pursued very differently in these forums, if pursued at all. As of August 2021, Myanmar is unrepresented in many forums, including for example in the UN Human Rights Council, and in recent global meetings such as the UN World Health Assembly and the International Labour Conference. For more on this, see SAC-M's Briefing Paper.⁸

5. Is there international law on this issue?

International law lacks agreed or established guidance regarding the recognition of governments by other States or international institutions. Individual States have the flexibility and discretion to decide whether to recognise a foreign government, based upon their own political and policy considerations.

Under international law, regardless of who is recognised as leading the government of Myanmar, institutions that are clearly part of the State, including the military, are bound by international law, including obligations under international human rights law and international humanitarian law.

While States have the prerogative to recognise who they like, they are also obliged to not recognise as lawful a situation which constitutes a serious breach of a peremptory norm (fundamental value) of international law. A military

coup in itself is not typically considered as such, but the commission of crimes against humanity in the context of a coup may be a serious breach.⁹ States should refrain from providing or implying legal legitimacy to the unlawful situation that is the junta's attempt to enforce its rule.

6. What criteria do States use to consider recognition of governments?

Although international law does not provide specific guidance or requirements on the issue, there are criteria generally applied by States when considering the type of engagement they have with entities claiming to be the government of another State.

The two main criteria typically considered are: *effective control* exercised; and *legitimacy* held. Adherence to international law can be a third factor in considering recognition.

Effective control

The "effective control" standard is that, for an entity to be recognised as government, it must perform as one, including by exercising control over all or much of the State's territory. Control is exercised through administrative institutions, for instance government ministries and departments. Control is also exercised through security institutions, typically police and armed forces. These institutions do not need to be fully effective everywhere in the country, but should clearly be the primary authority, commanding obedience from the population.

Legitimacy

The "legitimacy" test requires that, for an entity to be recognised as government, it should have come to power through a due process and that it is generally accepted by the population. This is generally understood as requiring a democratic election to be held and its results respected. In any event, a new government should not be considered to be legitimate if it came to power unlawfully, by violating the constitution or international law. Whether or not the general

population appears to recognise the entity as the country's government is an additional indication of legitimacy. This does not necessarily require the government to be popular among the country's residents. Yet generally the public should view the entity as the government, including by habitually obeying its laws and orders as such.¹⁰

Compliance with international law

An entity's demonstrated willingness and capacity to comply with international law, including international human rights law, may also inform assessments on whether or not it should be recognised as the government. An entity that is clearly unwilling or unable to follow its international law obligations, which have been voluntarily entered into by the State, lacks credibility in its claim to be the government.

Other considerations

It is important to note that these criteria, despite being in use since at least 1950, are not firmly established or uniformly followed, and are not necessarily weighted equally.¹¹ The criteria can be subjective, and tend to be applied inconsistently, often depending on political and foreign policy considerations of States and organisations. Decisions on recognition can be opaque, and the rationale is not always explained, especially when those making the decision are not subject to democratic scrutiny and accountability.

Furthermore, States and commentators sometimes use the terms *de facto* and *de jure* when authority in a country is contested. The *de jure* status means the government is legal and legitimate while suggesting it may not exercise control in practice. *De facto* status means the government is in actual control while suggesting it may not have legal legitimacy. A *de jure* government may enjoy benefits of legal legitimacy, such as access to foreign currency reserves, and political representation. But the *de facto* government remains important for other matters, such as allowing access to humanitarian agencies.

Another issue is the type of recognition: implied or explicit. A State may imply recognition by meeting with one entity, and not meeting with the other. Or

it could explicitly recognise one entity by saying its chief is the country's leader. There is no strict rule on the definition or difference between implied recognition and explicit recognition. Implicit recognition can be so close to explicit recognition that many perceive it as equivalent. Politically, however, explicit recognition is generally seen as being more significant than implied recognition, because it constitutes a clear affirmation of that entity's claim to be the government. And legally, explicit recognition can have practical implications, such as by enabling the entity to enjoy the benefits of being seen as representing a State.

7. What entity meets the criteria to be recognised as Myanmar's government?

The military junta

In terms of democratic and legal legitimacy, the military's coup of 1 February 2021 was a manifest violation of Myanmar's 2008 Constitution. Both the reasoning for and the method of declaring a state of emergency were outside the Constitution and the law. Actions taken by the junta, appointed by the military as part of the coup, in reference to the Constitution are unlawful, including the arbitrary detention of officials and attempts to reorganise the government and judiciary.

In relation to an assessment of *de facto* legitimacy, the junta is also struggling to assert effective control anywhere in the territory of Myanmar, perhaps apart from the capital, with attempts to rule besieged by ongoing protests, strikes and coordinated civil disobedience across sectors from government staff to the private sector. In its efforts to assert control, the junta has been involved in serious violations of international law, including tactics designed to instil terror in the population, with acts involving killings and torture and arbitrary detention potentially amounting to crimes under international law.

The National Unity Government

In terms of democratic and legal legitimacy, the NUG was established by the Committee

Representing the Pyidaungsu Hluttaw (CRPH), a group of parliamentarians who were elected by Myanmar voters in November 2020 but who on 1 February 2021 were subsequently prevented by soldiers from physically convening the parliament in Nay Pyi Taw as planned. The NUG was formed, with reference to due process, with the objective of reflecting the will of the population as it was expressed in credible elections. It was formed through the collective effort of democratic forces in the country.

The NUG represents a coalition between elected parliamentarians, and, among others, ethnic-based political parties supported by Ethnic Armed Organisations (EAOs) in Myanmar, many of which exercise effective control over extensive territories. Some EAOs have acted as de facto governments for many years, including through delivery of services. Since February 2021, services provided in areas administered by EAOs have had to respond to a massive increase in demand, with thousands of people seeking shelter in their territories, and refusing to engage with the junta out of fear and resistance. Increasingly, the NUG is establishing systems in partnership with these organisations to deliver services to Myanmar's population, including for health.

The NUG is broadly recognised by the population as the only legitimately established governmental body, and it has in place a ministerial structure that is involved in the issuance of policy and communiques. The NUG plays a focal point in the nationwide democratic movement, including through coordination with various elements of the Civil Disobedience Movement (which is understood to include tens of thousands of government staff aligned to the NUG) and General Strike Committees, along with other actors including the emerging People's Defence Forces. The NUG has also demonstrated commitments to respecting international law, including through its engagement with States and in political bodies of the UN in New York, and it has lodged a declaration accepting jurisdiction of the International Criminal Court pertaining to the situation in Myanmar.¹²

Conclusion

The junta in Myanmar has no democratic legitimacy. It is self-appointed, not elected. This military is persistently involved in violations of international human rights law and international criminal law. Unlike the junta, the NUG carries significant democratic legitimacy as the government appointed by the recently elected parliamentarians and its members have demonstrated far stronger commitment to international law.

The junta does have contrived control in the capital, Nay Pyi Taw. Yet despite its strong presence in Myanmar's major cities, resistance to its authority persists, and the junta cannot claim to have control over the rest of the country.

The junta is unable and apparently unwilling to deliver basic services, including to address the COVID-19 health crisis. At the same time, EAOs aligned with the NUG continue controlling territory in Myanmar's border areas, and increasingly the NUG is finding ways to deliver services to the population, including in partnership with ethnic-based organisations.

Ultimately, the political assessments of individual States will determine which entity, if any, they might choose to recognise as Myanmar's government. However, SAC-M's assessment of the criteria above concludes that the NUG meets the criteria for international recognition as the government of Myanmar.

The Special Advisory Council for Myanmar is a group of independent international experts, who came together in response to the February 2021 military coup in Myanmar, to support the peoples of Myanmar in their fight for human rights, peace, democracy, justice and accountability. For information about SAC-M and details of our work, please visit <https://specialadvisorycouncil.org/>

¹ SAC-M, "Myanmar's representation in the United Nations," 11 August 2021, Briefing Paper, available at: <https://specialadvisorycouncil.org/briefings/>

² SAC-M, "Myanmar's representation in the United Nations," 11 August 2021, Briefing Paper, available at: <https://specialadvisorycouncil.org/briefings/>

³ The Head of State could for example be the President (in the case of Myanmar) or a monarch. A Prime Minister would normally be considered the Head of Government if that is provided for in the country's constitution or in interim arrangements in place in transitional situations. In Myanmar, for several decades there has been no Prime Minister position. Under the 2008 Constitution, which the junta consistently refers to as remaining applicable, there is no Prime Minister position contemplated. However, note that under the 2021 Federal Democracy Charter, section 3(8) states that "The governance system of the Federal Union is a Parliamentary System led by the Prime Minister. It is a system where a Head of State or President of the Union is in the parliamentary system." The Federal Democracy Charter was developed following the coup, involving and including as its members: Elected parliamentarians; Political Parties; Civil Disobedience Movement (CDM), forces of General Strike Committee, activists CSOs including Women and Youth Organizations; and Ethnic Armed Organizations (see Chapter II of the Charter). Regarding a "lawfully accredited representative," this typically means someone who has clearly been authorised, by the Head of State or Head of Government or Foreign Minister, with "full powers" to enter agreements on behalf of the State. This authority can only be delegated to a specific person, not to an office or diplomatic position. See the 1969 Vienna Convention on the Law of Treaties, article 7: "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an

international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

⁴ See: "Maduro Board of the Central Bank of Venezuela (Respondent/Cross-Appellant) v Guaidó Board" of the Central Bank of Venezuela (Appellant/Cross-Respondent," available at: <https://www.supremecourt.uk/cases/uksc-2020-0195.html> (accessed 23 June 2021). For an overview of case developments as of December 2020, see: Twenty Essex, "Supreme Court grants Guaidó Board permission to appeal in Venezuela Gold dispute," 14 December 2020, available at: <https://www.lexology.com/library/detail.aspx?g=e2f5bfb9-135f-441d-ab7f-37c61fdd9ebf> (accessed 23 June 2021). See also: Marc Jones and Angus Berwick, "UK court recognises Guaido as Venezuela's president in gold dispute," 2 July 2020, Reuters, available at: <https://www.reuters.com/article/us-venezuela-gold-britain-idUSKBN2431CG> and Marc Jones, "UK court overturns Venezuela judgement in \$1 billion gold tug-of-war," 5 October 2020, available at: <https://www.reuters.com/article/venezuela-gold-boe-idUSKBN26R09H> and "London court hearings over Venezuela gold to resume in July, official says," Reuters, 1 June 2021, available at: <https://www.reuters.com/world/americas/london-court-hearings-over-venezuela-gold-resume-july-official-says-2021-06-01/> (both accessed 23 June 2021).

⁵ Simon Lewis and Humeyra Pamuk, "Exclusive: U.S. blocked Myanmar junta attempt to empty \$1 billion New York Fed account - sources," 4 March 2021,

Reuters, available at: <https://www.reuters.com/article/us-myanmar-politics-usa-fed-exclusive-idUSKCN2AW2MD> (accessed 23 June 2021). See also : "Remarks by President Biden on the Administration's Response to the Coup in Burma," 10 February 2021, The White House, available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/10/remarks-by-president-biden-on-the-administrations-response-to-the-coup-in-burma/> (accessed 23 June 2021).

⁶ David Lawder, "World Bank halts payment requests on Myanmar projects made after Feb 1 coup," 25 February 2021, available at: <https://www.reuters.com/article/uk-myanmar-politics-worldbank-idUKKBN2AP2DT> (accessed 14 July 2021). ADB, "ADB Statement on New Developments in Myanmar," 10 March, available at: <https://www.adb.org/news/adb-statement-new-developments-myanmar> (accessed 23 June 2021).

⁷ See: "Myanmar Junta Faces UK Legal Action over Claims to Ambassadorial Home in London," 5 May 2021, The Irrawaddy, available at: <https://www.irrawaddy.com/news/burma/myanmar-junta-faces-uk-legal-action-claims-ambassadorial-home-london.html> and Martyn Brown, "Burmese ambassador in London in stand-off as junta tries to evict him after coup, 14 May 2021, Express, available at: <https://www.express.co.uk/news/uk/1436247/Burmes-e-ambassador-London-stand-off-junta-eviction-coup> (both accessed 23 June 2021). For likely updates on the case, see the website of the "Myanmar Accountability Project," at: <https://the-world-is-watching.org/>.

⁸ SAC-M, "Myanmar's representation in the United Nations," 11 August 2021, Briefing Paper, available at: <https://specialadvisorycouncil.org/briefings/>

⁹ See the International Law Commission's "Draft Articles on the Responsibility of States for Internationally Wrongful Acts," August 2001: "CHAPTER III, SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW. Article 40, Application of this chapter: 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation," and "Article 41, Particular consequences of a serious breach of an obligation under this chapter: 1. States shall cooperate to bring to an end through lawful means any serious breach within the

meaning of article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law."

¹⁰ H. Lauterpacht, *"Recognition in International Law"*, Cambridge University Press, 1947, page 88. "It is a fundamental rule of international law that every independent State is entitled to be represented in the international sphere by a government which is habitually obeyed by the bulk of the population of that State and which exercises effective authority within its territory." Note while Lauterpacht affirmed at the time that recognition of such governments by other States was a matter of international law, State practice since then renders this point outdated.

¹¹ An earlier draft of a 1950 General Assembly resolution on recognition had apparently included these three factors as among those to be considered in any determination on the issue, although this was not codified in the resolution. See: Christine Chinkin et al, "Legal Opinion," 2008, available at: <http://www.birmaniademocratica.org/GetMedia.aspx?id=8d671814cf8c422eab6074bf46e7ab23&s=0&at=1> (accessed 6 August 2021).

¹² See "National Unity Government of the Republic of the Union of Myanmar accepts the jurisdiction of the International Criminal Court," 20 August 2021, available at: <https://mobile.twitter.com/NUGMyanmar/status/1428739347717648389> (accessed 22 August 2021).