



Recommendations by Legal Aid Network

Necessary Conditions for the National Unity Government (NUG) to Achieve Recognition from the United Nations and The International Community as a Legitimate Government

Why NUG should be Recognized as a Legitimate Government

(1) What it means to be a government.

The most basic duty of a government has always been to protect and secure the well-being of its people, this has been true since the establishment of the world's first and oldest government. However, this is not the case in Burma/Myanmar. In fact, the United Nations¹ has formally accused some national army leaders, led by Min Aung Hlaing, of committing international crimes against its own people. These crimes have only increased since the military coup on February 1, as the military council continues to commit hideous crimes against the people of Burma. The United Nations and international community, therefore, should never recognize the military leaders, who have plunged into international criminals, as a legitimate government of the country. On the contrary, the United Nations and the international community should recognize the NUG as the legitimate government of Burma for its commitment to protecting the people of this nation.

(2) The Legitimacy of a Government.

Article 20 (3) of the Universal Declaration of Human Rights (UDHR)² provides that the will of the people shall be the basis of the authority of government. The people of Burma have

¹ The UN IFFFMM, the Independent International Fact-Finding Mission on Myanmar, formed by the Human Rights Council

² The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

unanimously expressed their will in the 2020 November elections. When the National Army discarded the election outcomes and seized power, millions of people took over the streets in opposition to the military council, in a way that the peaceful Civil Disobedience Movement was activated. Having learnt that the people have expressed their will in both ways mentioned above, the United Nations and the international community must respond to their call and recognize the NUG as a legitimate government. Failure to do so, would undermine not only the UN Charter but also the UDHR. Thus, the NUG, which has the support of the absolute majority of the people, deserves the recognition as a legitimate government of Burma.³

(3) Recognition of a Government should be supportive towards global peace.

It is enshrined in the UN Charter that to develop friendly relations among nations, states must respect *“the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen peace.”* In South Africa, the 1983 constitution, which embeds an apartheid system, was declared nullified by the Security Council with its Resolution (554) in 1984, finding that the constitution was contrary to the principles of the UN Charter.⁴ Similarly, the 2008 Constitution drawn up by the Myanmar military dictatorship is also against the principles of the UN Charter. It is in this spirit that the Committee Representing Pyidaungsu Hluttaw (CRPH), which is formed by the elected lawmakers of the 2020 election, has abolished the Constitution in accordance with the will of the people, and is working for the emergence of a brand-new Federal Democracy Constitution, in which equal rights and self-determination of each people would have been guaranteed. Thus, CRPH/NUG is paving the way towards not only regional but also global peace.

Meanwhile, the military council continues to activate the 2008 Constitution just to impose more repression on the entire population, which clearly contradicts the way towards global peace.

³ UN Charter; Chapter I: Purposes and Principles Article 1, paragraph (2): To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

⁴ The UN Security Council Resolution No. 554 (1984):

1. Declares that the so-called “new constitution” is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the “new constitution” will further aggravate the already explosive situation prevailing inside apartheid South Africa.

As such, the international community should not support the military council in becoming an international terrorist organization that is threatening global peace and order.

(4) The International Obligation to Adopt International Law, International Legal Principles, International Criminal Law, International Humanitarian Law, and International Human Rights Laws

The international community may be obliged to observe the above-mentioned aspects as to whether NUG or military council should be recognized as a government of Burma. At the same time, the international community may be reminded that there has been a situation in the country where *peremptory norms/jus cogens* has been violated and the obligation of *Erga Omnes* has been failed. It is evident that the National Army continuously committed heinous crimes before and after the coup. Burma's case has already been at the ICJ⁵ for the crimes committed before the coup, and simultaneously the proceeding at the ICC by the prosecutor has also been underway.⁶

If the international community recognizes the military council as a legitimate government, it would send a global message of impunity for crimes committed against the people of Burma. To add insult to injury, the stated international laws and norms would have been mocked; the UN itself would breach the principle "Responsibility of States for Internationally Wrongful Acts"⁷ which was adopted by the International Law Commission and invoked by the ICJ. This would also encourage the military council to destroy all the evidence of crimes committed against the people, by implication, so that the proceedings at ICC and ICJ would be deterred. For all the reasons stated, the military council should never be regarded as a legitimate government.

(5) Why the formation of the Caretaker Government by the Military Council is unlawful.

The term "Caretaker Government" is commonly used in countries that practice Parliamentary Democracy. Burma had practiced a Parliamentary System in line with the 1947 Constitution after its independence. Then, Gen. Ne Win was named prime minister of the Caretaker

⁵ International Court of Justice (ICJ); 2021 28 January General List No. 178. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (THE GAMBIA v. MYANMAR), ORDER. <https://www.icj-cij.org/public/files/case-related/178/178-20210128-ORD-01-00-EN.pdf>

⁶ ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar, ICC Press Release: 14 November 2019. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>

⁷ Responsibility of States for Internationally Wrongful Acts. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Government in accordance with the consent of the parliament. However, the 2008 Constitution, to which the military council is holding tight, institutes the Presidential System. There is no provision in the entire 2008 Constitution that empowers the Union Legislative Assembly (also known as the *Pyidaungsu Hluttaw*) to appoint someone as the head of Caretaker Government, who is not elected.

The reason why the parliament agreed to form a Caretaker Government in 1958 was because Gen. Ne Win pressured the then government led by prime minister U Nu, using armed forces. Hence, in order to avoid the legacy of military coups in the country, the parliament constitutionally transferred power to the Ne Win regime. Moreover, the parliament even agreed to amend Article 116 of the 1947 Constitution since the caretaker regime led by Gen. Ne Win failed to hold an election after six months in power, so that the regime could remain in power. In contrast, the formation of the so-called caretaker government by the Min Aung Hlaing regime was totally unconstitutional given that the *Pyidaungsu Hluttaw* has no constitutional authority to do so.

Generally, in Parliamentary Democracy countries, the Caretaker Government is formed when the incumbent cabinet is dismissed through a motion of no confidence tabled by oppositions in parliament. In Burma, the military staged a coup when the *Pyidaungsu Hluttaw* opening session was due in accordance with the 2020 election outcome. None of the opposition parties had tabled a motion of no confidence against the government, not to mention that the 2008 Constitution does not provide for such a motion in parliament. Needless to say, the promulgation of the caretaker government is naturally unconstitutional. In addition, the military council even reorganized the Union Election Commission against the 2008 Constitution.⁸

(6) The Recognition of a government should be considered from the Aspect De jure and De facto power

In spite of the fact that the success of liberal democracy has been jeopardized in the early 21st century,⁹ the legitimacy of a government is often measured by elections. It is generally accepted as De jure legitimacy, while De facto legitimacy is justified by performing the solemn

⁸ “Appointment of the Chairman and members of the Union Election Commission,” The Republic of the Union of Myanmar, State Administrative Council Order No.7/2021 (2 Feb 2021).

<https://www.cinco.gov.mm/node/10474?d=1>

⁹ Pedro T. Magalhaes, “The Legitimacy of Modern Democracy: A Study of the political thought of Max Weber, Carl Schmitt and Hans Kelsen,” p.3.

<https://library.oapen.org/bitstream/handle/20.500.12657/48770/9781351654012.pdf?sequence=1>

duty of a government of protecting the well-being of its people. In terms of the overall well-being of the people, the legitimacy of De facto power may necessarily be determined by its performance, whether it performs the intrinsic responsibility of a government. The De facto status of EROs can basically be regarded as legitimate as they serve for the well-being of the people residing in their controlled territories, in the form of a local government. In contrast, the military council blatantly violated the duty to protect the people and thus disqualified itself to be regarded as a government.

In contrast with the military council, the NUG has the De jure power acquired through 2020 election; plus, some De facto EROs have also pledged to side with the NUG in order to uproot the military dictatorship and to build a Federal Democracy Union together. Taking into account all the above-mentioned factors, the NUG should be recognized as the legitimate government of Burma/Myanmar by the UN and international community without any dispute.

(7) The NUG has more potential to salvage the people of Burma from the peril of Covid-19.

Before the February 1 coup, the NLD administration was somewhat able to handle the pandemic effectively: all healthcare workers, doctors, and nurses actively co-operated in the government's covid-19 protective measures. However, most of the healthcare workers left their posts to join in the Civil Disobedience Movement and have refused to return to hospitals in defiance of the military council. International humanitarian aids and covid-19 reliefs are most likely to pour into the NUG as soon as it is recognized. This relief and support should be managed in cooperation with the health ministry of NUG and healthcare organizations based in the respective Ethnic States.¹⁰

If the military council was recognized as a government, all of the covid-19 relief aid and humanitarian support from the international community would come into the country through the regime. When Cyclone Nargis hit Burma in 2008, the regime blocked all the international humanitarian aids, international and local aid organizations were denied access and restricted delivery of relief aids to the devastated areas, and civil society organizations that were engaging in humanitarian work were intimidated.¹¹ The regime even approved their 2008 Constitution for

¹⁰ For instance, National Health Committee.

¹¹ Human Rights Watch, "I want to help my own people," State Control and Civil Society in Burma after Cyclone Nargis (April 28, 2010) <https://www.hrw.org/report/2010/04/28/i-want-help-my-own-people/state-control-and-civil-society-burma-after-cyclone>

political gain amid the catastrophic natural disaster, by which millions of people were suffering. We know that the military council will take advantage of the international recognition through covid-19 aid relief activities; and the international community should avoid contributing to the harm already devastating people of Myanmar. Therefore, the international community should consider that the official recognition of NUG as a legitimate government would save the people of Myanmar dually suffering from covid-19 and the repressions of the military regime. The United Nations should activate humanitarian intervention in terms of bringing in relief and aid, even if armed intervention is not possible, cooperation with the NUG would be more beneficial to protect lives of the people. Although humanitarian intervention with regards to armed forces may still be controversial in international law, providing humanitarian aid and relief to the victims of the pandemic is acceptable, in the sense of intervention.¹²

Furthermore, when the NUG is accepted as a legitimate government of Burma/Myanmar by the UN and international community, it can officially call on the UN Peacekeeping Operations for help in connection with the peace process in the country. The NUG, however, may be required to formally adopt a provisional constitution before demanding recognition from the UN. Having observed the situation of the six months, one can attest the need for a provisional constitution from the NUG.

Factors for the Formal Recognition of the National Unity Government (NUG)

The multi-ethnic diaspora has donated over nine million dollars (USD) under the Committee Representing Pyidaungsu Hluttaw (CRPH) ‘Acting Government’ before the formation of the National Unity Government (NUG). The CRPH opened a bank account in the United States, however, it has never stated transparently, even in general terms, how the money has been spent and continues to be spent. Similarly, after forming the NUG, it is unknown how the money has

¹² Anne Ryniker, The ICRC’s position on “humanitarian intervention”, p. 529. “ the term “humanitarian” should be reserved to describe action intended to alleviate the suffering of the victims. International humanitarian law recognizes the right to provide humanitarian assistance, and impartial humanitarian aid cannot be condemned as interference or infringement of a State’s national sovereignty.” Available at <https://www.icrc.org/en/doc/assets/files/other/527-532_ryniker-ang.pdf> Accessed 8 August 2021.

been transferred from the CRPH to NUG; transparency lacks in terms of financial management; and, financial regulations are kept secrets.

The public has the right to transparency from the government ministries, except to information that could compromise the national security of the country. The Information Act should be enacted, and provide people access to the requested information guaranteed by law. The people of Burma have a right to know how the CRPH/NUG spent and continues to spend the aforementioned donations in the past six months.

Ethnic states play an important role in forming the union. There are also the Ethnic Resistance Organizations (EROs) fighting effectively against the Military Council in some states. As a consequence of the armed resistance, there are some hundreds of thousands of ethnic people who are suffering the effects of the war. Likewise, every state has other necessities. In this kind of situation, the NUG fails to explain to what extent it has supported which state, according to financial principles. The federal financial committee was formed in the absence of representatives officially sent by the respective states and the NUG manages the finance alone. It needs ensure that a certain independent auditing institution, participated by those who have achieved certificates in international auditing, examines the financial records. It is even hard to know that the auditing is being performed in practice.

The CRPH/NUG agreed and hired an international law firm with five hundred thousand pounds sterling, numerically, (£500,000) and already paid the firm, at a minimum, fifty thousand pounds.¹³ Hiring the law firm remains a question. The CRPH/NUG has failed to explain to what extent such a huge amount of money would be beneficial to the interest of the country and its people. Thus, there might have been financial mismanagement in the past six months. Next, it may be presumed that the CRPH/NUG manages the finance in the absence of the federal fiscal system, and it will need to be reformed promptly.

If the United Nations (UN) and international community recognize the NUG as a formal government of the Republic of the Union of Burma/Myanmar, it would be able to receive more

¹³ It is a concrete information from an anonymous person in charge. If not correct, the CRPH/NUG should explain transparently and in detail to public.

aid funds from foreign countries as well as, at a minimum, withdraw officially one billion dollars deposited in the United States. Actually, that one billion comes from the natural resources of the ethnic states, which should be managed with the federal fiscal policy. Although reiterating, to apply the federal system, then apply the unitary system in practice is not suitable.

The constitution establishes the relation between the government and people. The Federal Democracy Charter produced by the CRPH is not a constitution, which means people cannot file grievances with the government at all. Besides, the provisions for a transparent and accountable government are not enshrined in the charter at all. The second amendment of the charter is coming out reportedly, whereas it would not be effective until several amendments are made, as it is not a legally binding constitution. Additionally, if the NUG government should find itself behaving in unaccountable manner, the public will be unable to oversee the NUG invoking the Federal Democracy Charter.

Requirements for Reformation

1. Provisional Constitution Requirements

Forming a legitimate government with the combination of De jure and De facto principles under the Federal Democracy Charter is extremely difficult; instead, it should be sought through a constitution. It is rather hard to explain to the international community about the nomination process of the President and Vice President without adopting the Provisional Constitution and in particular, the legitimacy of His Excellency Acting President Duwa Lashi La, including the ministers and deputy ministers, from the fundamentals of De facto. The dignity of the stated individuals and the legitimacy-seeking process should not be affected and hindered.

Historically, in 1958, General Ne Win who was not an elected person undertook the role as the prime minister of the Caretake Government. It is a lesson from history that the then parliament made him undertake the official duty of the prime minister, invoking article (116) of the 1947 Constitution. In the contemporary world, it can be seen that even the incumbent Myanmar military leaders are involved in the executive and legislative pillars, from the fundamentals of De facto and sought their legitimacy through the 2008 Constitution. The CRPH/NUG should revise their operation as a government without the constitutional underpinning and instead adopt a Provisional Constitution.

2. Term of the National Unity Government (NUG)

In the era of the National Coalition Government of the Union of Burma (NCGUB), the NCGUB itself had extended the term of the government for 22 years without the approval of any legislative assembly. Unfortunately, the following could not be examined: the competency and duty accomplishment of each minister including the prime minister; to what extent the basic principle of the federal system was enshrined; and whether the revenues were corrupted. Any replacement and effective action against those who were inefficiently discharge of duties assigned could not be found. In that way, the NUG should not go ahead another 22 years. In this regard, it can be learnt that even General Ne Win, regarded as a military dictator, sought the legitimacy at the beginning of his administration, ensuring respect for and complying with the constitution.

When the then Caretaker Government could not hold an election on February 13 of 1959, which was its six months anniversary, General Ne Win had to call the parliament in the end. He submitted to the parliament to amend the article (116) of the 1947 Constitution,¹⁴ thereby extending the term of the legitimacy, in terms of De facto. Finally, the election was held on the 6th day of February 1960.¹⁵

The Terms of the NUG government should be prescribed exactly. The military dictator Min Aung Hlaing has already declared to hold the election after two years. Terms of the NUG should not be prescribed over three years at most. The accountability of all the individuals serving in the NUG should be evaluated once six months have passed. On the other hand, the provisions regarding the suspension from duty and replacement would need to be enshrined in the Provisional Constitution to seek the accountability of each individual who is serving the duty. Besides, the president, prime minister and the respective ministries would need to submit the annual report in order to publicize how the duties have been served. In this way, it denotes that (without needing to hold accountable to the public and ethnic states) they are not an authoritarian government and are not managing, as they desire.

¹⁴ Win Tint Tun, "Burma amidst the Darkness", (Short History of the Political Movements of Burma in the Near Era-1948-2000), Episode (2), 'Bearing the Military Dictators from 1958 to 1962', 'Rehearsal or Caretaker Era for the Military Dictatorship', Page-240.

¹⁵ Ibid.

3. Termination of the Committee Representing Pyidaungsu Hluttaw (CRPH)

Some of the individuals from the CRPH are still involved as ministers in the NUG. If this number is still low, all the 17 elected persons of the CRPH may take the spaces of the ministers of the NUG. However, since the NUG has already been formed, the CRPH that once operated as a form of an Acting Government should cease to exist. However, the CRPH remains in place. Some of them take responsibility as ministers in NUG while retaining membership of the CRPH, overriding the NUG government is utterly inappropriate. Instead, the CRPH could have declared itself a government rather than manipulating the NUG. The CRPH ought to be terminated if the NUG is to be entrusted as peoples' government. Otherwise, as the institutional conflicts may emerge in between institutions, there may arise large obstacles to be running effectively in the long term.

4. The NUG should be held solely Accountable for Raising Funds Representing the Country through the Approval of the Federal Parliament and the Accountability of the Federal Financial Committee formed with the Representatives of the Ethnic States

Apparently, the CRPH is not a genuine parliament but only a committee that represents the parliament. Since the NUG government came into existence, the CRPH needs to be abandoned. That both of these entities are raising and managing funds on their own is not suitable. In fact, the institution to supervise the NUG is the parliament but not the CRPH. At the present, the federal parliament should be initiated, completely abandoning the CRPH. Most importantly, the federal parliament should be constituted with 65% of the elected persons at union level in the election held in November of 2020 and 35% of the representatives officially sent by the respective states, based on the states' provisional constitutions. The federal parliament should be established and run through such a combination. The NUG would need to manage the finance as the official government, ensuring submitting the budget proposal once six months to the federal parliament for approval.

5. The Role of the National Unity Consultative Council (NUCC)

It may be presumed that the National Unity Consultative Council (NUCC) came into existence after forming the CRPH.¹⁶ Mr. Min Ko Naing declared, on behalf of the NUCC, the

¹⁶ Chapter (5), Part (2), Federal Democracy Charter.

formation of the NUG on April 16 for the first time.¹⁷ In doing so, the formation of the NUCC has not been declared publicly and officially yet.¹⁸

The NUCC should not exist, as it is neither a government nor coalition forces nor parliament. Furthermore, institutional conflicts may appear more as a result. If among other personnel, the qualified ones are to get involved for the interest of the union, they should be allowed to serve in the cabinet or federal parliament, from the fundamental principle of De facto. If the NUCC is to continue to exist, it should not be above the NUG government. It should be only a consultative council without holding any executive power.

6. The Independent Judiciary and Judicial Review Power

The provisional constitution would need to be drawn and adopted at both the federal and state level. Accordingly, the independent federal Attorney-General and state Supreme Courts should be established and run promptly. The NUG may run independently during the period the federal parliamentary sessions cannot be held. Nevertheless, since the parliamentary system is applied, motion of no confidence against the NUG government and the supervision of the parliament would have to be accepted in the periods of the parliamentary sessions. Besides, the NUG itself must be placed under the judicial review power of the federal Supreme Court. If the NUG were reluctant to accept and care for the supervision of the parliament and the judicial review power of the court, further dictatorship-like government would arise while fighting against the military dictatorship. As a result, it would be difficult to have the recognition of the United Nations and the international community.

7. Building Trust through Finance, in the Principle of the Federal Union

The NUG should not keep its current financial regulations secret; rather, it should be released publicly. The NUG should get, at a minimum, the consent of the respective ethnic states regarding how to use one billion dollars (USD) deposited in the United States of America if the

¹⁷ Mr. Min Ko Naing's declaration on behalf of the National Unity Consultative Council (NUCC) regarding the formation of the National Unity Government (NUG). April 16, 2021. <https://crphmyanmar.org/nucc/>

¹⁸ Why does not the NUCC come publicly into existence? "We are discussing actively. As you know, we have many topics to discuss, though. It takes time when the scope of discussion area is relatively broad. However, what I can say is that I believe these active discussions will bring us great results and now I can only say this," said Mr. Moe Zaw Oo, the Deputy Minister of the Ministry of Foreign Affairs of the NUG at the press conference, on June 4. <https://www.youtube.com/watch?v=5H4xBhiI0ng> (2:17:00-2:18:40 min)

NUG is recognized as a formal government. In this matter, the NUG should negotiate and allocate that money with the respective states' governments formed, in accord with their respective Provisional Constitutions. One-fifth (one-fourth for the NUG and three-quarter for the states and local governments) would need to be considered, in terms of the norms of the federal system.

Legal Aid Network

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For more information, please contact;

Mr. Aung Htoo, M.A (Human Rights) R.L., Human Rights Lawyer
Program on Teaching Human Rights Law, Columbia University, New
York, USA. Founder of Legal Aid Network (LAN) and Principal of
Federal Law Academy
E.mail: legalaidnetwork@gmail.com
Website: legalaidnetwork.org
Tel: (46) 76 1156 215

Mr. Adalgiso Montinari: M.A Conflict Studies and Human Rights, University of
Utrecht, The Netherlands.
Senior Researcher & Program Facilitator - Legal Aid Network (LAN)
E.mail: legalaidnetwork@gmail.com

Mr. Kyaw Kyaw, B.Sc (Geology)
Strategy & Policy Consultant
Legal Aid Network (LAN)
E.mail: kyawkyaw@legalaidnetwork.org

Ms. Lu Awng (LL.B, B.A Com Arts)
Advocacy Coordinator, Legislative
Assemblies Legal Aid Network (LAN)
Email: lu.awng@legalaidnetwork.org

Ms. Ja Nu Pan (LL.B, LL.M, Ph.D)
Advocacy Coordinator for Legal and Constitutional
Campaign Legal Aid Network (LAN)
E.mail: janupan@legalaidnetwork.org

Mr. Lahpai Naw San (LL.B, D.L)
Advocacy Coordinator to Ethnic Resistance
Organizations Legal Aid Network (LAN)

E.mail: lahpai.nawsan@legalaidnetwork.org

Ms. Roi San Awng (LL.B, DBL, DML)
Advocacy Coordinator to National Legal
Communities Legal Aid Network (LAN)
E.mail: roisanawng@legalaidnetwork.org