

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

A. Introduction

1. The international community avoids, where possible, judgments regarding the legitimacy of individual Member State governments. As a general matter the legal capacity of a regime to assert rights, incur obligations or authorise acts on behalf of a State is not subject to any systematic process of assessment on democratic grounds. For this and other reasons most governments avoid formal recognition of new governments. International organizations, however, cannot avoid determining who they will accept as entitled to act on behalf of a Member State, and in certain cases they have taken positions on the legitimacy of governments, especially where they have flouted the choice of the people clearly expressed through an election or otherwise.

2. There are two dimensions to state participation in the UN General Assembly: membership and representation. Membership of the United Nations is governed by Articles 4 to 6 of the UN Charter. Representation refers to the presence in the General Assembly of the delegate representing the Member State, and is dealt with in Rules 27-29 of the General Assembly's Rules of Procedure.¹ It is the latter with which we are concerned.

3. No specific criteria have been authoritatively articulated to govern the General Assembly's credentials decisions.² Resolution 396(V), 14 December 1950, entitled "Recognition by the United Nations of the Representation of a Member State", provides in its 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;"

4. The penultimate draft of Resolution 396(V) had followed the "Purposes and Principles" formulation with a supplemental recommendation that

¹ UN Doc A/520/Rev.15, 30 October 2000.

² See "Legal Aspects of Problems of Representation in the United Nations", Memorandum Prepared for the Secretary-General, UN Doc S/1466, 9 March 1950.

“the following should be among the factors to be taken into consideration in determining any such question:

- (i) The extent to which the new authority exercises effective control over the territory of the Member State concerned and is generally accepted by the population;
- (ii) The willingness of that authority to accept responsibility for the carrying out by the Member State of its obligations under the Charter;
- (iii) The extent to which that authority has been established through internal processes in the Member State.”³

This elaboration was ultimately not accepted by the *Ad Hoc* Political Committee.⁴

B. Practice of the UN Credentials Committee

5. In most cases, accreditation at the UN is a formality whereby the General Assembly approves individual delegates to represent Member States. According to this procedure, the Head of State 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.⁵ The documentation is referred to a Credentials Committee appointed by the General Assembly at the beginning of each regular session. Thus, the review of the credentials of UN Member States is an annual process. The Credentials Committee examines the credentials and determines whether they are complete and have been issued by the proper authority, but it does not generally inquire into the legitimacy of the issuing authority. The Committee then submits a report to the General Assembly recommending either rejection or approval of the credentials.⁶ Typically, the General Assembly adopts the Committee’s recommendations without discussion.

6. In making its recommendation to the General Assembly, the Credentials Committee will generally not look beyond the credentials of the nominated representative of a Member State to consider the legitimacy of the issuing entity. But practice reveals at least two situations in which the Committee may feel compelled to do so: first, when the government of a Member State is voted out in a democratic election, but refuses to relinquish power; second, where two rival delegations originating from the same state, each claiming to be the representative government of the Member State, submit competing credentials. A credentials challenge can be initiated in two ways. A UN Member State may challenge the credentials of the government of another Member State under a specific agenda item in the General Assembly. Alternatively, where rival delegations are each vying to be the representative of a single Member State, those delegations may submit competing credentials to the Secretary-General.

(a) Credentials practice 1945-1990

7. In its first 45 years, the UN General Assembly was faced with eight major credentials contests. These should be briefly reviewed.

³ UN Doc A/AC.38/L.45, 21 November 1950, 9.

⁴ *Ibid.*, 16.

⁵ Rule 27, Rules of Procedure of the General Assembly, UN Doc A/520/Rev. 15.

⁶ *Ibid.*, Rule 28.

8. South Africa (1970-1994): The General Assembly took up the question of racial discrimination in South Africa at its first session in 1946.⁷ Over the next quarter-century, both the General Assembly and the Security Council repeatedly urged the South African Government to abandon the “inhuman and aggressive”⁸ racist policies of apartheid and conform to the human rights provisions of the Charter and the Universal Declaration of Human Rights.⁹ South Africa insisted that the existence of apartheid was a purely domestic issue outside the scope of the UN’s competence. Recognizing that the South African Government was unrepresentative of the people as a whole, the Credentials Committee rejected the credentials of the South African delegation in 1970.¹⁰ This was interpreted by the President of the General Assembly as not barring it from participating in the work of the Assembly, and from 1970 until 1972 the General Assembly neither accepted nor rejected the delegation’s credentials but did not interfere with South African participation.¹¹ In 1973, the General Assembly voted to “reject the credentials of the representatives of South Africa.”¹² This denial of credentials was reaffirmed by the Assembly in 1974.¹³ The President of the 1974 session interpreted the rejection of the credentials of the South African delegation as a bar from participation in the work of the Assembly, a ruling confirmed by the General Assembly, “leaving open the question of the status of the Republic of South Africa as a member of the United Nations, which ... is a matter requiring a recommendation from the Security Council”.¹⁴ The Security Council did not expel South Africa from the United Nations.¹⁵ But it did impose an arms embargo in 1977¹⁶ and went so far as to declare the constitution “null and void” in 1984.¹⁷ The democratic elections in South Africa in April 1994 normalized South Africa’s relations with the UN, and it was officially welcomed back to the General Assembly in July 1994.¹⁸

9. 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 UN was presented with a choice between two governments, each in control of a portion (far from equal) portion of territory and population, each claiming to represent the single state of China.¹⁹ It took until 1971 to achieve the two-thirds vote requirement and seat the Peoples’ Republic of China.²⁰

⁷ See GA Res 44 (I), 8 December 1946, regarding the treatment of Indians.

⁸ GA Res 2506 (XXIV), 21 November 1969 (noting with concern “that the government of South Africa continues to intensify and extend beyond the borders of South Africa its inhuman and aggressive policies of *apartheid*”).

⁹ See UN Doc S/11532, 18 October 1974, para. 17.

¹⁰ Statement by the President of the General Assembly, Mr. Edvard Hambro (Norway), concerning the credentials of the delegation of South Africa, UN Doc A/PV.1901, 11 November 1970, paras 285-86.

¹¹ The Assembly approved all credentials except those of the representative of South Africa, GA Res 2636 (XXV), 13 November 1970.

¹² 28 UN GAOR (2141st plen mtg), 5 October 1973, 7.

¹³ GA Res 3206 (XXIX), 30 September 1974.

¹⁴ Ruling by the President of the General Assembly, Mr. Abdelaziz Bouteflika (Algeria), concerning the credentials of the delegation of South Africa, UN Doc A/PV.2281, 12 November 1994,, paras 159-160, para 185.

¹⁵ Suspension or expulsion of South Africa from the UN was blocked by the veto of three Permanent Members (France, United Kingdom, United States). 29 SCOR, 1808th Meeting of the Security Council, 20 October 1974.

¹⁶ SC Res 418, 4 November 1977.

¹⁷ SC Res 554, 17 August 1984.

¹⁸ GA Res 48/258, 6 July 1994.

¹⁹ See J Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2nd edn, 2006) 198-221.

²⁰ See GA Res 2758 (XXVI), 25 October 1971; B Roth, *Governmental Legitimacy in International Law* (Oxford: Clarendon Press, 1999), 261-263.

10. 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 made by the representative of the United States that it refuse accreditation to the Hungarian delegation.²¹ The General Assembly approved the Committee's report.²² 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.²³

11. 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 accepted the Kasavubu delegation, ruling that to entertain Lumumba's constitutional objection would constitute "an intervention in the domestic affairs of the Republic of the Congo..."²⁴

12. Yemen (1962): On 26 September 1962, a *coup d'état* was carried out by the armed forces against the monarchy. When the two contestants issued competing credentials, the Committee accepted those of the Republican delegation, a decision ratified by the General Assembly.²⁵

13. Cambodia (1973-74): In March 1970 the Cambodian Head of State was ousted by the Prime Minister, General Lon Nol, who established the "Khmer Republic". In May 1970, Prince Sihanouk announced in Beijing the formation of a government in exile, the Royal Government of National Unity of Cambodia. The international community was divided in response to the Cambodian crisis. At its 1973 and 1974 sessions, the General Assembly voted to defer determination of the matter to the following year, concluding that although the Royal Government had established authority over a portion of the territory, the Lon Nol Government "still has control over a preponderant number of the Cambodian people"²⁶ The status quo was maintained until the Lon Nol government's resistance ended with the fall of Phnom Penh in April 1975.

14. Cambodia (1979-90): In December 1978 the Vietnamese army captured Phnom Penh and installed a new government of Kampuchean Communists. However, the Khmer Rouge maintained a foothold within the national territory along the Thai border, and presented themselves as the government of Kampuchea in resistance to foreign occupation. International opposition to the Vietnamese invasion was overwhelming. Security Council condemnation was blocked only by the veto.²⁷ The General Assembly demanded an "immediate withdrawal" of

²¹ 1956 Report of the Credentials Committee, UN Doc A/3536, 13 February 1957, 1.

²² GA Res 1009 (XI), 21 February 1957.

²³ 1961 Report of the Credentials Committee, UN Doc A/5055, 2; 1962 Report of the Credentials Committee, UN Doc A/5395, 2.

²⁴ 1960 Report of the Credentials Committee, paras 8, 10. The General Assembly confirmed this decision (GA Res 1498 (XV), 22 November 1960). See Roth, 268-274.

²⁵ GA Res 1871 (XVII), 20 December 1962.

²⁶ GA Res 3238 (XXIX), 29 November 1974.

²⁷ UN Doc S/13027, 15 January 1979.

Vietnamese forces.²⁸ The Credentials Committee voted to accept the delegation of the Khmer Rouge above that of the People's Republic, a decision confirmed by the General Assembly.²⁹ The credentials contest was repeated from 1979 until 1991, when the parties reached an accord.³⁰

15. No clear answers emerge from this experience as to the principles to be adopted in evaluating a challenge to the credentials of the nominated representative of a Member State. The Chinese case 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 denominator appears to have been control of the capital and the state apparatus. The presumption in favour of the established government was indeterminate in the Congo case, was disregarded by half the membership in the first Cambodian case and did not attract significant support in the Yemen case. On the whole, these earlier credentials controversies appear to have been dominated by the traditional criterion of recognition of effective control. But the practice showed that the Credentials Committee retained a discretion to decline to recognise the credentials of a government imposed by force, external or internal, or otherwise demonstrably unrepresentative. It did so whether or not there was a rival government whose credentials could be recognised. Evidently these decisions did not themselves operate to change the internal political situation, but they had significance in marking the international illegitimacy of the questioned regime, and they added to the pressure to remedy the situation, whether by democratic elections or some form of national reconciliation agreement.

(b) Credentials practice since 1990

16. The 1990s saw an increased willingness on the part of the Credentials Committee to accredit governments not in territorial control. In its decisions regarding Haiti, Sierra Leone, Afghanistan and Cambodia, the Committee was prepared to depart from the default rule of effective territorial control where this could be justified by other factors.

17. One example is **Afghanistan**. From 1996-2000 the Credentials Committee affirmatively deferred decisions regarding Afghanistan. This excluded the Taliban from UN representation despite that group's general control over Afghanistan, and instead accredited the representatives of ousted President Rabbani.³¹ This process continued until 2001, when the Interim Authority was appointed for Afghanistan in the aftermath of the US-led invasion, 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.³²

18. Another example concerns the third credentials dispute involving **Cambodia**. The 1997 dispute arose when credentials were submitted by both Ranariddh's Royalist Party and Hun

²⁸ GA Res 34/22, 14 November 1979.

²⁹ 1979 Report of the Credentials Committee, UN Doc A/34/500, 20 September 1979; GA Res 34/22, 14 November 1979.

³⁰ UN doc S/21732 & A/45/490, 17 September 1990. See Roth, 280-283.

³¹ See First 1996 Report of the Credentials Committee, UN Doc A/51/548, 23 October 1996, para 6; 1997 Report of the Credentials Committee, UN Doc A/52/719, 11 December 1997, para 10; First 1999 Report of the Credentials Committee, UN Doc A/54/475, 18 October 1999, para 9; First 2000 Report of the Credentials Committee, UN Doc A/55/537, 1 November 2000, para 9.

³² Credentials of representatives to the fifty-sixth session of the General Assembly: Report of the Credentials Committee, UN Doc A/57/724, 20 December 2001, para 4.

Sen's CCP 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".³³ The two parties eventually agreed to form a coalition and, in December 1998, the General Assembly accepted the Committee's recommendation to seat Cambodia's new coalition government.³⁴

19. The case of **Haiti** in particular demonstrates that effective control is not necessarily the deciding factor in cases where rival governments exist for a single state, especially where one of the rivals was democratically elected. In September 1991, the Haitian military took over the government of Haiti in a coup led by General Raoul Cedras.³⁵ The coup ousted President Jean-Bertrand Aristide, who had been elected in December 1990. Despite the effective control exercised by the military government, the Credentials Committee did not accept the credentials issued by that government.³⁶ 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 key operative provision 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..."³⁷

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

20. In the case of **Sierra Leone**, Ahmed Tejan Kabbah was popularly elected to power in 1996. These were the first free, multi-party elections to be held in the country in decades. When the military drove President Kabbah from power less than a year after the elections, it was not so much a revolutionary takeover as a step back to the type of military dictatorship that had previously ruled Sierra Leone. Nevertheless, the people of Sierra Leone rejected the coup, responding with civil disobedience and demanding the restoration of the democratically elected government. The Credentials Committee recognized the credentials issued by the Kabbah government.³⁸

21. To summarise, the Credentials Committee has been willing to approve the credentials of democratically elected governments and groups in restored democracies even in circumstances where they were not in control of the country concerned. It is true that the overwhelming majority of credentials issued by Member States are accepted by the Committee and the General Assembly without question. But where a situation arises from internal or external repression – especially a refusal to accept the outcome of a freely-conducted election – the Credentials

³³ See the 1997 Report of the Credentials Committee, para 4.

³⁴ UN Doc. A/53/PV.80, 7 December 1998, 2.

³⁵ Letter dated 20 November 1991 from the Permanent Representative of Haiti to the United Nations addressed to the Secretary General, UN Doc A/46/695, 20 November 1991

³⁶ 1992 Report of the Credentials Committee, UN Doc A/47/517, 9 October 1992.

³⁷ SC Res 940, 31 July 1994, 2.

³⁸ First 1997 Report of the Credentials Committee, para 7.

Committee may consider other factors such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record.

C. The case of Myanmar/Burma

(a) *The internal situation*

22. The United Kingdom granted independence to Burma in January 1948. Until 1962, Burma existed as a parliamentary democracy based on the Constitution of 2 September 1947. However, military leaders toppled the government in a coup in 1962. The leader of the coup, General Ne Win, installed a one-party military regime with military tribunals and operated without a constitution. A new constitution was drafted in 1974, but one-party rule continued.³⁹

23. By 1988, widespread dissent and demonstrations began in reaction to two factors, firstly, the suppression of all civil and political rights since the 1962 overthrow of the constitutional Government; and secondly, the economic failure caused by the “Burmese Way to Socialism.” From March to June 1988, serious clashes took place; hundreds of civilians were arrested, many were severely injured or died from ill-treatment in detention and many persons were summarily or arbitrarily executed. It is reported that between 8 August 1988, when a nationwide strike was held, and 12 August 1988 approximately 3,000 persons were killed.⁴⁰ On 18 September 1988, the military took power, establishing a new ruling junta called the State Law and Order Restoration Committee (SLORC). This body continues to rule under the name of the State Peace and Development Council (SPDC).⁴¹ In 1989, SLORC changed the name of the country from Burma to Myanmar, a unilateral change not recognized by the country’s democratic leadership or many states.⁴²

24. In its efforts to secure “order restoration” the SPDC used military force to suppress political demonstrations. Thousands were killed and many more fled. The military government placed Aung San Suu Kyi, the emerging leader of the National League for Democracy (NLD), the main opposition party, under house arrest. Recipient of the Nobel Peace Prize in 1991, Aung San Suu Kyi has spent most of the time since then in detention.

25. Some hope for a return to democracy and legitimate government appeared in 1990 when the SPDC, responding to widespread discontent with the political situation, announced multi-party democratic elections. When these elections were held on 27 May 1990, the electorate showed overwhelming support for the NLD, electing NLD members to over 80% (392 out of

³⁹ See generally S Myint, *Burma File: A Question of Democracy* (Times Academic Press, Singapore, 2004); M Weller (ed), *Democracy and Politics in Burma* (Government Printing Office of the National Coalition government of the Union of Burma, 1993).

⁴⁰ See e.g. US Department of State, *Anniversary of the 1988 Popular Democratic Uprising in Burma*, 8 August 2007, <http://www.state.gov/r/pa/prs/ps/2007/aug/90409.htm>; News and Information Bureau, All Burma Students League, http://www.burmalibrary.org/reg_burma/archives/199705/msg00235.html.

⁴¹ See Substitution of Expressions Law 1997, s2(A).

⁴² The name change has not been recognized by a number of governments. The policy of the United Kingdom is to refer to Burma rather than Myanmar, on the basis that “Burma’s democracy movement prefers the form ‘Burma’ because they do not accept the legitimacy of the unelected military regime to change the official name of the country.” See <http://www.fco.gov.uk/en/about-the-fco/country-profiles/asia-oceania/burma>. Likewise, the United States, Australia and Canada also officially use the title of “Burma,” see <http://www.state.gov/r/pa/ei/bgn/35910.htm>, http://www.dfat.gov.au/GEO/burma/burma_brief.html and <http://geo.international.gc.ca/cip-pic/geo/burma-bb-en.aspx> (all last accessed 2 May 2008)

485) of the parliamentary seats. The SPDC initially acknowledged the elections and claimed to be implementing a transition to democracy.⁴³ At the same time, the military junta continued to arrest and detain members of the NLD. In the event, the SPDC effectively disregarded the results of the elections. By joint initiative in 1998, the NLD and four ethnic nationality parties which had won seats in parliament in the 1990 elections combined to form the Committee Representing the People's Parliament (CRPP).

26. The military regime's purported moves toward a democratic transition have been shown to be empty gestures. In 1992, the head of the military regime announced plans to draft a new constitution and convened a convention for that purpose the following year. Of the delegates to this convention, only 15% were from among the representatives elected in 1990. The military regime appointed most of the delegates to the convention. Debate in the convention, which has met sporadically in the years since, is subject to restrictions, including rules barring challenges to the military, and the possibility of imprisonment for criticism of the convention itself. These conditions led the NLD to walk out of the convention in 1995. Since then, the convention has not included key political representatives nor has it addressed the concerns of ethnic parties.⁴⁴ The convention has brought no progress toward democratic reform.

27. The seven-point road map for national reconciliation and democratic transition announced by General Khin Nyunt in 2003 has similarly been shown to be empty of content. According to the UN Special Rapporteur on the situation of human rights in Myanmar, as of 2005 the road map had "failed to deliver any tangible progress, as the political environment remains severely repressed and the inbuilt anti-democratic conditions of the National Convention remain firmly in place".⁴⁵ In 2006 the Special Rapporteur declared that "the persecution of members of political parties in opposition shows that today, the road map for democracy faces too many obstacles to bring about a genuine transition."⁴⁶

28. Violence erupted again in late September 2007, after thousands of Buddhist monks and civilians staged peaceful street protests against the military regime for several days. Notwithstanding pleas for restraint,⁴⁷ the military regime used force to put an end to the protests, and on its own count, detained nearly 3,000 people.⁴⁸

⁴³ Communication dated 5 June 1991 from the Ministry of Foreign Affairs of the Government of the Union of Myanmar to the Embassy of France in Yangon, annex to UN Doc A/46/226, 7 June 1991.

⁴⁴ PS Pinheiro, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the Economic and Social Council and the Commission on Human Rights*, UN Doc E/CN.4/2006/34, 7 February 2006, para 23; PS Pinheiro, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly and the Human Rights Council*, UN Doc A/HRC/6/14, 7 December 2007, para 10.

⁴⁵ Report of the Special Rapporteur of 7 February 2006, para 14..

⁴⁶ Report of the Special Rapporteur of 7 December 2007, 2.

⁴⁷ See, e.g., United Nations Press Release, 26 September 2007, "High Commissioner for Human Rights Cautions Myanmar Authorities Against Crackdown", available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/BC0D1310EDF04CB2C1257362004FFAF8?opendocument> (last accessed 2 May 2008): "The High Commissioner for Human Rights urges the Myanmar authorities to allow the peaceful expression of dissent in the country and to abide by international human rights law in their response to the widespread peaceful street protests. 'The use of excessive force and all forms of arbitrary detention of peaceful protestors are strictly prohibited under international law,' the High Commissioner said."

⁴⁸ See "Burma still hunting protesters", BBC News, 17 October 2007, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/7048230.stm> (last accessed 2 May 2008).

29. In February 2008, the SPDC announced a nationwide referendum on a new constitution following the proposed 2010 elections. On 2 May 2008, the President of the UN Security Council took note of “the commitment by the Government of Myanmar to ensure that the referendum process will be free and fair. The Security Council underlines the need for the Government of Myanmar to establish the conditions and create an atmosphere conducive to an inclusive and credible process, including the full participation of all political actors and respect for fundamental political freedoms.”⁴⁹

30. On 2 and 3 May 2008, Cyclone Nargis struck, sweeping through the Irrawaddy delta region and Yangon. The UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator has estimated that over 100,000 died as a result of the cyclone.⁵⁰ According to the Red Cross, the cyclone death toll could be as high as 128,000.⁵¹

31. Despite the devastation caused by the cyclone, the military government pushed ahead with the vote for a draft constitution but postponed polling in the areas hardest hit by the cyclone, including Yangon. Approximately 4.5 million voters in the cyclone zone were eligible to cast ballots in this second round of voting on 24 May 2008. On 26 May, the military regime claimed approval of the draft constitution. As at 27 May, the United Nations approximated that, of the 2.4 million people estimated to have been badly affected by the cyclone, aid had reached only 1 million people.⁵² However, according to State media reports, 93% voted in the second round, with 92.93% endorsing the charter. Nationally, media reports stated that the constitution was approved by 92.48%, with a 98% turnout.

32. Under the new constitution, one quarter of the seats in parliament are reserved for soldiers appointed by the commander-in-chief. The military will have broad powers to declare a state of emergency and take direct control of the government. Amending the constitution will prove virtually impossible without the military’s consent, as three-quarters of parliament must approve any changes before approval by voters in a referendum. The constitution bans NLD-leader Aung San Suu Kyi from seeking office because she is the widow of a foreign national: this has prompted criticism from both developed and developing countries.⁵³

(b) The position in international forums

33. The SPDC has ignored condemnation from the United Nations and other bodies. It retains power not through consent of the people but through well-documented violations of human rights and suppression of the political opposition.⁵⁴

⁴⁹ S/PRST/2008/13 of 2 May 2008.

⁵⁰ Press Conference on Myanmar by Emergency Relief Coordinator, 12 May 2008, available at http://www.un.org/News/briefings/docs/2008/080512_Myanmar.doc.htm (last accessed 30 May 2008).

⁵¹ CNN news article, “UN: Myanmar deaths could exceed 100,000”, available at: <http://edition.cnn.com/2008/WORLD/asiapcf/05/15/myanmar/> (last accessed 30 May 2008).

⁵² Press Conference by Emergency Relief Coordinator on Recent Trip to Myanmar, 27 May 2008, available at: http://www.un.org/News/briefings/docs/2008/080527_Holmes.doc.htm (last accessed 30 May 2008).

⁵³ See, e.g. “US Criticizes Burma’s New Draft Constitution”, VOA News, 20 February 2008, available at <http://voanews.com/English/2008-02-20-voa54.cfm> (last accessed 2 May 2008); “ASEAN Expresses Concern Over Burma’s Election Ban Against Aung San Suu Kyi”, VOA News, 20 February 2008, available at <http://voanews.com/English/2008-02-20-voa13.cfm> (last accessed 2 May 2008).

⁵⁴ See PS Pinheiro, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc A/HRC/4/14, 12 February 2007, 2.

34. The “Situation in Myanmar” and the “Situation of human rights in Myanmar” have been the subject of 14 General Assembly Resolutions between 1991 and 2008.⁵⁵ Most recently, the Assembly expressed concern “at the situation of human rights in Myanmar, and in particular at the recent violent repression of peaceful demonstrations, including through beatings, killings, arbitrary detentions and enforced disappearances”; it condemned “the use of violence against peaceful demonstrators who were exercising their rights to freedom of opinion and expression and to peaceful assembly and association, and expresse[d] its condolences to the victims and their families.” It referred to:

“(a) The ongoing systematic violations of human rights and fundamental freedoms, including civil, political, economic, social and cultural rights, of the people of Myanmar, as described in resolution 61/232 and in previous resolutions of the General Assembly, the Commission on Human Rights and the Human Rights Council;

(b) The arbitrary detentions, including the use of physical violence, in response to peaceful protests, and the extension, once again, of the house arrest of the General Secretary of the National League for Democracy, Daw Aung San Suu Kyi, as well as the continuing high number of political prisoners, including other political leaders, persons belonging to ethnic nationalities and human rights defenders;

(c) The major and repeated violations of international humanitarian law committed against civilians, as denounced by the International Committee of the Red Cross in June 2007;

(d) The discrimination and violations suffered by persons belonging to ethnic nationalities of Myanmar, particularly in border and conflict areas, and attacks by military forces and non-State armed groups on villages in Karen State and other ethnic States in Myanmar, leading to extensive forced displacements and serious violations and other abuses of the human rights of the affected populations;

(e) The absence of effective and genuine participation of the representatives of the National League for Democracy and other political parties and some ethnic nationality groups in the National Convention and the slow pace of the democratic reform;

(f) The continuous deterioration of the living conditions and the increase of poverty affecting a significant part of the population throughout the country, with serious consequences for the enjoyment of their economic, social and cultural rights...⁵⁶

35. On the other hand Security Council action has been blocked by the vote of Permanent Members. On 12 January 2007, a draft Security Council resolution on “the situation in Myanmar”⁵⁷ was vetoed by China and the Russian Federation.⁵⁸ The draft resolution, *inter alia*, “[c]alls on the Government of Myanmar to cease military attacks against civilians in ethnic

⁵⁵ See GA Res 46/132, 17 December 1991; GA Res 47/144, 18 December 1992; GA Res 48/150, 31 January 1994; GA Res 49/197, 9 March 1995; GA Res 50/194, 11 March 1996; GA Res 51/117, 6 March 1997; GA Res 52/137, 3 March 1998; GA Res 53/162, 25 February 1999; GA Res 54/186, 29 February 2000; GA Res 55/112, 1 March 2001; GA Res 56/231, 28 February 2002; GA Res 60/233, 23 March 2006; GA Res 61/232, 13 March 2007; GA Res 62/222, 28 February 2008.

⁵⁶ GA Res 62/222, 28 February 2008.

⁵⁷ UN Doc S/2007/14. The result of the vote on the draft was 9 in favour to 3 against (China, Russian Federation, South Africa), with 3 abstentions (Congo, Indonesia, Qatar).

⁵⁸ 5619th Meeting of the Security Council, 12 January 2007, UN Doc S/PV.5619.

minority regions and ... to begin without delay a substantive political dialogue, which would lead to a genuine democratic transition...” Following the failure of the resolution, the situation was not considered by the Security Council until 5 October 2007, when it received a briefing from the Special Envoy of the Secretary-General.⁵⁹ The President of the Security Council then issued a Statement on 11 October 2007,⁶⁰ described below.

36. The situation has been the subject of concern for the United Nations Human Rights Council (HRC). This led the HRC, on 25 March 2008, to “extend for one year the mandate of the Special Rapporteur on the situation of human rights in Myanmar, in accordance with Commission on Human Rights resolutions 1992/58 and 2005/10 of 14 April 2005.”⁶¹ In a Resolution of the same date, the HRC, expressing concern:

“at the continuing deterioration of the living conditions and the increase in poverty affecting a significant part of the population throughout the country, with serious consequences for the enjoyment of their economic, social and cultural rights;

... at the situation of human rights in Myanmar, including the violent repression of the peaceful demonstrations of September 2007, and the failure of the Government of Myanmar to investigate and bring to justice the perpetrators of these violations;

...also at the continuing high number of political prisoners, including those detained in the wake of the peaceful protests of September 2007, and the extension of the house arrest of the General Secretary of the National League for Democracy, Daw Aung San Suu Kyi,

1. *Strongly condemns* the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar, continued arbitrary detentions and the continuing high number of political prisoners...”⁶²

37. A press statement issued by the President of the International Committee of the Red Cross (ICRC) in June 2007 cites persistent abuses against both detainees and civilians.⁶³ Under its prison system, the SPDC forces thousands of detainees to serve as porters for the armed forces, exposing them to malnutrition, degradation and injury from service during armed conflict. According to the ICRC, civilians in conflict areas, particularly along the Thai border, are subject to abuse by the armed forces. The armed forces have destroyed food supplies on a large scale and have placed restrictions on villagers’ movements, preventing many from working their fields. The ICRC President described the statement as an “exceptional step of making its concerns public”,⁶⁴ prompted by the junta’s unwillingness to talk to the ICRC and to take any account of ICRC recommendations.

⁵⁹ 5753rd Meeting of the Security Council, 5 October 2007, UN Doc S/PV.5753.

⁶⁰ 5757th Meeting of the Security Council, 11 October 2007, UN Doc S/PV.5757.

⁶¹ HRC, *Mandate of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc A/HRC/7/L.37, 25 March 2008.

⁶² HRC, *Situation of human rights in Myanmar*, UN Doc A/HRC/7/L.36, 25 March 2008.

⁶³ International Committee of the Red Cross Press Release, 29 June 2007, “Myanmar: ICRC denounces major and repeated violations of international humanitarian law”, available at <http://www.cicr.org/web/eng/siteeng0.nsf/html/Myanmar-news-290607!OpenDocument> (last accessed 2 May 2008).

⁶⁴ *Ibid.*

38. The UN Special Rapporteur on the situation of human rights in Myanmar has received continual reports of “widespread and systematic forced labour practices ... implemented by State actors”.⁶⁵ In repeated resolutions, the UN General Assembly has expressed grave concern at:

“[t]he ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar . . . including discrimination and violations suffered by persons belonging to ethnic nationalities of Myanmar, including extrajudicial killings, rape and other forms of violence persistently carried out by members of the armed forces; the continuing use of torture, deaths in custody, political arrests and continuing imprisonment and other detention; the continuing recruitment and use of child soldiers and the use of landmines; forced labour, including child labour; trafficking in persons; the denial of freedom of assembly, association, expression, and movement; wide disrespect for the rule of law; confiscation of arable land, crops and other possessions; and the prevailing culture of impunity.”⁶⁶

39. The International Labour Organisation (ILO) has documented the SPDC’s serious and persistent violations of the Forced Labour Convention.⁶⁷ At its 268th Session in March 1997, the Governing Body established a Commission of Inquiry pursuant to Article 26 of the ILO Constitution to investigate a complaint against the SPDC for serious and persistent violations of that Convention. On 2 July 1998, the Commission issued its report, which found that the SPDC was in flagrant and persistent violation of the Convention and the peremptory norm against forced labour.⁶⁸ At its 88th Session in 2000, the Conference adopted the Commission’s findings and recommendations and called upon the SPDC to comply with such recommendations.⁶⁹

40. In 2006, the UN Special Rapporteur noted a “lack of sustainable political or human rights development” by the SPDC⁷⁰ and little evidence of a “serious commitment by the government to addressing the culture of impunity for State actors [for the commission of human rights violations].”⁷¹ Indeed, the SPDC has largely denied that the violations occur, repeatedly referring to the human rights violations noted in UN resolutions as “unfounded” or “unsubstantiated allegations” by those “waging a war of disinformation on Myanmar”.⁷²

⁶⁵ Report of the Special Rapporteur of 7 February 2006, para 74.

⁶⁶ GA Res 61/232, 13 March 2007, para 2.

⁶⁷ ILO Convention No 29 concerning Forced or Compulsory Labour, Geneva, 28 June 1930 (as modified), 39 UNTS 56. See also ILO Convention No 105 concerning the Abolition of Forced Labour, Geneva, 25 June 1957, 320 UNTS 292.

⁶⁸ Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 2 July 1998, available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> (last accessed 2 May 2008).

⁶⁹ ILO, Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, June 2000, available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#II> (last accessed 2 May 2008)

⁷⁰ Report of the Special Rapporteur of 7 February 2006, para 21.

⁷¹ *ibid.*, Summary, 2.

⁷² Annex to the letter dated 2 November 2005 from the Permanent Representative of Myanmar to the United Nations addressed to the Secretary General, UN Doc A/C.3/60/6, 3 November 2005, para 2. See also the Report of the Special Rapporteur of 12 February 2007, para 38 (expressing regret that “in discussions in the Commission on Human Rights and in the General Assembly they have preferred to deny the allegations and to denounce the accuracy of the Special Rapporteur’s findings”).

41. Numerous international bodies have condemned the SPDC's practice of arbitrary arrest and imprisonment in violation of the International Covenant on Civil and Political Rights and have called upon the SPDC leadership to take immediate remedial action. On 8 January 2007, the UN Secretary-General urged the SPDC to release all political prisoners in the country.⁷³ On 10 May 2007, 14 United Nations human rights mandate holders called on the SPDC authorities to release NLD leader Aung San Suu Kyi "unconditionally and to free all the remaining political prisoners."⁷⁴ On 22 May 2007, ASEAN Member States appealed to the SPDC authorities not to renew the detention of the NLD leader.⁷⁵ On 31 May 2007, the UN Working Group on Arbitrary Detention found that the deprivation of liberty of Aung San Suu Kyi is arbitrary and in contravention of several provisions of the Universal Declaration on Human Rights.

42. Following the renewal of Aung San Suu Kyi's detention for a further year on 27 May 2008, the UN High Commissioner for Human Rights expressed her profound disappointment, and again called for her unconditional release:

"These continued severe restrictions on the freedom of expression and movement against Aung San Suu Kyi contravene basic human rights. They come at a time when the people of Myanmar are suffering hard and their suffering should not be compounded by more restrictive measures."

UN Secretary-General Ban Ki-moon expressed his regret at Daw Suu Kyi's continuing detention:

"I regret the decision of the Government of Myanmar to extend for a sixth consecutive year the detention under house arrest of Daw Aung San Suu Kyi, the General Secretary of the National League for Democracy (NLD). The sooner restrictions on Daw Aung San Suu Kyi and other political figures are lifted, the sooner Myanmar will be able to move towards inclusive national reconciliation, the restoration of democracy and full respect for human rights."⁷⁶

43. In response to the September 2007 events, the UN Security Council issued a Presidential Statement on 11 October 2007. This statement reads in pertinent part:

"The Security Council strongly deplores the use of violence against peaceful demonstrations in Myanmar and welcomes Human Rights Council resolution S-5/1 of 2 October 2007. The Security Council emphasizes the importance of the early release of all political prisoners and remaining detainees...

The Security Council stresses the need for the Government of Myanmar to create the necessary conditions for a genuine dialogue with Daw Aung San Suu Kyi and all concerned parties and ethnic groups ..."⁷⁷

⁷³ Statement attributable to the Spokesperson for the Secretary-General on Myanmar, 8 January 2007, available at: <http://www.un.org/apps/sg/sgstats.asp?nid=2398> (last accessed 2 May 2008).

⁷⁴ United Nations Press Release, "UN rights experts call for the release of Daw Aung San Suu Kyi and all remaining political prisoners", 10 May 2007, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/6340B45597C97429C12572D7002ECFA5?opendocument> (last accessed 2 May 2008).

⁷⁵ "ASEAN seeks Aung San Suu Kyi's release", International Herald Tribune, 22 May 2007, available at: <http://www.iht.com/articles/2007/05/22/africa/myanmar.php> (last accessed 2 May 2008).

⁷⁶ UN Doc SG/SM/11598.

⁷⁷ UN Doc S/PRST/2007/37, 11 October 2007.

44. The response of the military government to cyclone Nargis has attracted widespread criticism. There were significant delays by the SPDC in accepting offers of international aid, and in granting visas to allow international humanitarian workers into the country. As noted above, four weeks after the disaster fewer than half the 2.4 million people affected by the cyclone have received any form of aid from either the government or international or local aid groups. On 14 May 2008, nearly a fortnight after the cyclone, the Under-Secretary-General for Humanitarian Affairs spoke of his “huge frustration” that when international aid workers were permitted to enter, they were not allowed to move into the affected areas.⁷⁸ The military junta only agreed to allow international aid workers into the affected areas, regardless of nationality, after the UN Secretary-General met with SPDC leader Senior General Than Shwe on 23 May 2008.⁷⁹

45. The United Nations has condemned the military government’s forcing cyclone victims to leave relief centers and return to their homes in the devastated Irawaddy delta:

“We do not endorse premature return to areas to where there are no services... People need to be assisted in the settlements and satisfactory conditions need to be created before they can return to their place of origin. Any forced or coerced movement of people is completely unacceptable.”⁸⁰

46. The SPDC has been criticized for persisting in holding the referendum on 10 May 2008, and only postponing the referendum in affected areas until 24 May 2008. A joint article issued by the French Minister of Foreign and European Affairs and the British Secretary of Foreign and Commonwealth Affairs stated:

“The regime in Naypyidaw has announced it will go ahead with the referendum on its constitution tomorrow, a process that excludes Aung San Suu Kyi and representatives of ethnic groups. It is clear, however, that the conditions on the ground make the free and fair process demanded by the UN Security Council all the more difficult. We believe the priority should be the humanitarian crisis. Now is not the time to be making decisions about the country’s political future.”⁸¹

Similarly, the UN Under-Secretary-General for Humanitarian Affairs described the Government’s proposal to hold a referendum in the affected areas on 24 May 2008 as “completely unrealistic and unhelpful.”⁸²

(c) Conclusions

47. The 1990 parliamentary elections were a response to political unrest and popular dissatisfaction with the SPDC. In those elections, members of the NLD won a large majority of seats. The UN General Assembly has acknowledged in multiple resolutions that these election

⁷⁸ UN Press conference on Myanmar by Emergency Relief Coordinator, 14 May 2008, available at: http://www.un.org/News/briefings/docs/2008/080514_Holmes.doc.htm (last accessed 30 May 2008).

⁷⁹ Secretary-General’s press conference at Hotel Sedona in Yangon, 23 May 2008, available at <http://www.un.org/apps/sg/offthecuff.asp?nid=1164> (last accessed 30 May 2008).

⁸⁰ Statement by T Skavdal, Asia director of the U.N. Office for the Coordination of Humanitarian Affairs, 30 May 2008. See <http://www.voanews.com/english/2008-05-30-voa14.cfm> (last accessed 23 May 2008).

⁸¹ Article in “The Times”, London, 9 May 2008.

⁸² UN Press conference on Myanmar by Emergency Relief Coordinator, 14 May 2008.

results were a legitimate expression of the will of the people in support of a transition to democracy.⁸³ Nevertheless, the SPDC refused to allow the parliament to convene and imprisoned many of the elected representatives.⁸⁴

48. The subsequently-formed CRPP is chaired by the chair of the NLD, U Aung Shwe, and includes among its 18 members NLD General Secretary Aung San Suu Kyi. The CRPP is founded on the consent of 433 elected representatives from 485 constituencies equalling over 89% of the vote in the 1990 elections. The CRPP has received support from such international bodies as the European Union and the Inter-Parliamentary Union.⁸⁵

49. Prior to the 1990 elections, the SPDC signed an agreement with the United Nations to hand over power to an elected government.⁸⁶ For a short time after the elections, the SPDC acknowledged that free and fair elections had taken place, and assured the United Nations that it would transfer power. But it did not comply. The representative of Canada described the actions of the SPDC following the election as “defiance of a clear expression of the public will.”⁸⁷ After more than 17 years, there has been no progress in the restoration of democracy.

D. Conclusion

50. While the process for determining credentials challenges is not governed by settled rules, in cases of sufficient gravity, the United Nations Credentials Committee has taken account of other criteria than effective military control. In these cases effective control of territory has not been the determinative factor. Rather, the Committee has given weight to other factors, such as the willingness of the relevant entity to meet its international obligations, particularly in the area of human rights, and the extent to which it represents the will of the people of the Member State concerned, especially in the wake of free and open elections.

51. The SPDC’s deplorable human rights record, the decades during which it has resisted UN calls for reform and a return to democracy, and the consistent violent repression of democratic movements are matters of record. Since 1988, the SPDC has consistently violated the fundamental principles and peremptory norms of international human rights law and has shown blatant disregard for the Purposes and Principles of the UN Charter.

52. In these exceptional circumstances, it is open to the Credentials Committee to recommend to the UN General Assembly that the credentials issued by the SPDC should be rejected. In the event of a credentials challenge, substantial control over territory should not override the SPDC’s persistent disregard of its international obligations and its evident lack of support from the people.

⁸³ See, e.g., GA Res 61/232, 13 March 2007, in which the General Assembly affirmed that the elections “clearly expressed” the will of the people of Myanmar.

⁸⁴ ALTSEAN Burma, “Ten Years On: A Parliament Denied” 2000, 6.

⁸⁵ *Ibid.*, 3, 17-20.

⁸⁶ Communication dated 5 June 1991 from the Ministry of Foreign Affairs of the Government for the Union of Myanmar to the Embassy of France in Yangon, annex to UN Doc. A/46/226 (7 June 1991).

⁸⁷ See Summary Record of the 53rd Meeting of the Third Committee, UN Doc A/C.3/45/SR.53, 27 November 1990, para 30.

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