

**Communication to the Prosecutor of the International Criminal Court Regarding the
Declaration by the National Unity Government of Myanmar
Accepting the Court's Jurisdiction**

Executive Summary

Legal Action Worldwide (“LAW”) represents over 500 Rohingya clients displaced from Myanmar during what the United Nations called the military’s 2017 “*clearance operations*.” LAW, together with its counsel Debevoise & Plimpton LLP, hereby requests that the Prosecutor of the International Criminal Court accept the declaration of the National Unity Government of Myanmar granting the Court jurisdiction over crimes committed in Myanmar since 1 July 2002 and extend the scope of his investigation into the situation in Bangladesh/Myanmar to include crimes committed in Myanmar.

I. Background

- On 8 November 2020, Aung San Suu Kyi’s National League for Democracy overwhelmingly won national elections, lawfully securing 396 of 476 seats in the Pyidaungsu Hluttaw, the lower house of Myanmar’s parliament.
- On 1 February 2021, however, Myanmar’s military (the “Tatmadaw”) attempted an unlawful *coup d’état* against the elected civilian government, declaring a state of emergency and detaining President Win Myint and State Counsellor Aung San Suu Kyi.
- On 4 February 2021, in defiance of the attempted *coup d’état*, 390 parliamentarians signed their oaths of office in accordance with the 2008 Constitution of Myanmar. The following day, 15 elected National League for Democracy parliamentarians formed the “Committee Representing Pyidaungsu Hluttaw” with the objective of carrying out the duties of the Pyidaungsu Hluttaw, including forming a government. The Committee then issued a Federal Democracy Charter, which lays out a roadmap for democratic government.
- On 16 April 2021, in accordance with the Federal Democracy Charter, the Committee Representing Pyidaungsu Hluttaw appointed the National Unity Government led by President Win Myint, Vice-President Duwa Lashi La (serving as acting president while President Win Myint is in military detention), and State Counsellor Aung San Suu Kyi.
- On 17 July 2021, Acting President Duwa Lashi La submitted a declaration on behalf of the National Unity Government recognising the jurisdiction of the International Criminal Court under Article 12(3) of the Rome Statute.

II. Argument

- The question before the Prosecutor is whether Acting President Duwa Lashi La had the requisite authority to submit an Article 12(3) declaration on Myanmar’s behalf. Under established practice, the Prosecutor determines the validity of Article 12(3) declarations through a rigorous factual and legal analysis with due regard to the approach of the UN General Assembly.
- Although “*effective control*” is the traditional starting point in determining whether a government can act on behalf of a State, **lawful governments enjoy a presumption of continuity** so long as they retain control over some territory.

- General Assembly practice shows that in cases of government upheaval, especially *coups d'état*, **effective control is not always determinative**. When required to decide which of two rival authorities to accredit, the UN General Assembly and its Credential Committee have on multiple occasions—including with regard to Haiti, Afghanistan, Sierra Leone, Honduras, and Libya—based their determination on other factors, such as the authority's **democratic legitimacy and prospects that it will comply with international law**.
- Based on these factors, the National Unity Government has the **strongest claim to represent Myanmar**:
 - **First, the General Assembly has clearly rejected the Tatmadaw as Myanmar's legitimate representatives** at the United Nations. On 18 June 2021, the General Assembly nearly unanimously adopted Resolution 75/87, expressing “grave concern” over the actions that Myanmar’s military had taken against the “*elected civilian Government*” and called on the Tatmadaw “*to respect the will of the people as freely expressed by the results of the general election of 8 November 2020.*”
 - **Second, effective control is too indeterminate to displace the presumption of the civilian government's continuity** after 1 February 2021. Although the Tatmadaw have seized government offices and arrested civilian leaders, they have not established clear control over Myanmar territory, including over five states where ethnic armed organisations that have aligned *themselves* with the National Unity Government exert their own military capacity. The Tatmadaw faces widespread civilian opposition, which raises doubts that the military will be able to consolidate power or stabilise an economy in freefall.
 - **Finally, electoral legitimacy and compliance with international law clearly point to the National Unity Government** as Myanmar’s legitimate representatives. The military’s attempted *coup d'état* was blatantly unconstitutional, as several UN bodies and officials have confirmed. By contrast, only the National Unity Government enjoys electoral legitimacy as the fruit of a committee of elected parliamentarians. Where the National Unity Government has pledged to respect international law—including human rights—obligations, the Tatmadaw has rejected a regional peace-making attempt and, according to credible reports, has a long record of committing acts constituting genocide, crimes against humanity, and war crimes.
- In sum, consistent with the resolution of the UN General Assembly, **the Tatmadaw clearly cannot represent Myanmar**. The Tatmadaw does not enjoy effective control, and therefore the presumption of the civilian government’s continuity must prevail. In any event, effective control is not determinative of the question, and only the National Unity Government can claim democratic legitimacy and international law compliance. Unequivocally, **the National Unity Government has the strongest claim to be Myanmar’s representative**.

III. Conclusion

- For the foregoing reasons, LAW requests that the Prosecutor (1) accept the National Unity Government’s declaration made on 17 July 2021 under Article 12(3) of the Rome Statute; and (2) extend his investigation in the situation in Bangladesh/Myanmar to cover crimes falling within the Court’s jurisdiction committed in Myanmar since 1 July 2002.