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## Reports

### **Syria New Constitutional Committee:** Enlightened UN Diplomacy or Repositioning the Assad Regime?

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**UN Building in Geneva [Reuters]**

## Abstract

UN Secretary General Antonio Guterres announced recently the successful formation of a 150-member constitutional committee for Syria, which includes representatives of the Syrian regime in Damascus, opposition groups, and civil society organizations to "review the constitution" in order to reach a political solution in Syria. He expressed optimism the new committee could be "the beginning of a political road to a solution." His special envoy for Syria, Geir O. Pedersen, has launched the talks in Geneva, with the participation of "smaller drafting body of 45-15 from the government, 15 from the opposition, 15 from the middle third, that they will then start their work here in Geneva." Pederson also explained the decisions would be taken by consensus, where possible; and otherwise by majority of 75 percent. The new talks will begin with a plenary session involving 50 delegates each from three blocs: Assad's government, the Turkish-backed political opposition movement, and civil society delegates.

This new shift in the UN Syria mediation raises several new questions about the trajectory of the eight-year lingering conflict: How did this committee come into being? How its contextualization can be constructed within the overall highs and lows of the United Nations intervention of peacemaking? What are the major challenges in forging a new agreement? What are the expectations and possible outcomes of the work of this Committee? Pedersen has acknowledged "No one believes that the Constitutional Committee in itself will solve the conflict. But if it is understood as part of a broader political process, it could be a door-opener and a very important, of course, symbolic beginning of a

political process." This is the focus of the following paper, proposed by Dr. M Hosam Hafez, Syrian lawyer and former head of the Legal Office of the Syrian High Negotiations Committee

## **The Syrian Uprising and Shadowy Constitutional Path**

The Syrian revolution began with the protestors' demands for reform and change. Modifying the constitution was not one of their original demands. The Syrian experience with the regime in Damascus made ordinary Syrians believe that any constitutional change would be nothing more than a sham document that would not stop the regime's bloodshed, its security grip and control over their fate. For the vast majority of Syrians, the Assad regime has shown barely any respect to legal or constitutional provisions. Moreover, many of them believe that the regime would surely use such a move in a deliberate media campaign to demonstrate its flexibility and eagerness to 'fulfil' the Syrians demands as expected by the world public opinion.

However, the call for a new constitution was not really unheard of, or far from the opposition elite's demands prior to the Syrian uprising which erupted in Spring 2011. There were explicit calls for an amendment to the 1973 constitution, which replaced a series of interim Baathist constitutions. These calls focused on the abolition of Article 8 of the Constitution, which provides for the imposition of the Baath Party as a "leader of the state and society". In addition, there was a constant demand to abolish Article 84, which outlines the mechanism for nomination for the post of President of the Republic by trusting the candidacy of the sole nominee to the national leadership of the Baath Party.

In an attempt to contain the movement of the Syrian people, the Assad regime took a series of steps, which were considered inadequate and not serious under the banner of the political reform. The Damascus regime was not keen on rewriting a new constitution as a path of political reform. Bashar Assad mentioned the issue of rewriting or amending the 1973 constitution in his third speech he delivered May 21, 2011. Instead of calling for a general election, which could result in an authentic constituent assembly, the Regime appointed a number of Syrians in a committee to write a new constitution that would take into account the deficiencies of the existing constitution of 1973.

The Regime decided to appoint Mazhar al-Anbari, a lawyer who had presided over the drafting committee of 1973 Constitution, as the head of the new committee, with a mandate of rewriting the constitution within four months. The list of the 29 members included a large number of Baathists, non-Baathists and specialists, some of them were members of the so-called National Progressive Front, in addition to a few independent members. The Regime's pursuit to include prominent opposition figures in the Constitution Drafting Committee was not successful. The Committee convened in several sessions and came up with a draft constitution, handed over to President Assad

on February 15, 2012. It was also presented to popular referendum, by a decree calling on the electorates to cast their ballots, on the 26th of the same month.

Large number of Syrians boycotted the referendum, as did the Syrian opposition after declining the invitation to serve on the new the Constitutional Committee. From a technical perspective, the opposition groups argued the mere idea of having a constitution drafted, by a certain group of unelected individuals appointed by the regime, was a recipe for reproducing the same preferences of the regime. They also criticized the method of selection of the Committee members and the lack of inclusiveness of other stakeholders, whether on the base of geographical or political representation, was a reflection of the Regime's totalitarianism approach to all public affairs in Syria.

Most importantly, the Opposition argued there was no way that any constitution, drafted and adopted under the Regime's continued use of excessive military force against civilians and sustained incursions, could hardly represent any democratic values. However, the referendum underwent in the ballots, and its outcome of the new constitution approval was adopted by a presidential decree in Damascus.



U.N. envoy for Syria h a new constitution should be "a sign of hope" for Syria [UN]

## Syria's Constitutional Committee: Context and Trajectory

### 1. Political Track

The six-point plan proposed by UN Envoy late Kofi Annan, former Secretary General of the United Nations, was the first international internationally-backed peace plan for the Syrian conflict. The Plan

was largely operational, whereas its political component was limited to a commitment to work with the UN envoy Annan for a comprehensive Syrian-led political process. Hence, amending the constitution, or drafting a new one, was not a priority according to his plan. Therefore, there was no reference to the Constitution or the constitutional amendment process. Ultimately, Annan's plan was quickly buried due to the intransigence of the Syrian regime. International meetings continued to gather until the Geneva Communiqué, which was issued by the Working Group for Syria June 30, 2012 in the presence of the then-Secretary General of the United Nations, then-Secretary General of the League of Arab States, and Joint Special Envoy of the United Nations and the League of Arab States for Syria.

The Geneva Communiqué included a clear plan for political transition, which aimed at ridding Syria of violence and the status of a volatile political state. The constitution question was placed within the last steps, which should consolidate the political transition and pave the way into the long-term settlement and stability in Syria. According to the Geneva Communiqué, the transition was supposed to begin with the establishment of the Transitional Governing Body (TGB).

The Geneva agreement was clear in defining the chronology of the implementation of the steps of the solution, the political transition, and the significance of the constitution. It referred to the “review of the constitutional order and the legal system” and the “constitutional drafting that is subject to popular approval”. However, this review of the legal system and the constitution drafting ought to take place at a later stage in time and only after a number of key steps. This chronology was legally and politically justified, as the “Transitional Governing Body” should establish a neutral environment, in which the transition could take place, with the Transitional Governing Body exercising full executive powers.

Accordingly, it is clear the Geneva Communiqué emphasized the priority of the actual political transition over the constitution drafting. Only after the stage in which the TGB had already paved the road for institutional change, the creation of the new constitutional order should follow. The final step after having a reliable constitutional and legal system shall be conducting free, fair and pluralistic elections. (1)



Kofi Annan as UN envoy to Syria [Reuters]

The negotiations outcome between the Opposition and Revolutionary forces on the one hand, and the Regime on the other, did not produce any tangible results in the 2014 negotiations. These negotiations were based entirely on UN Security Council Resolution 2118 [2013], which fully adopted the Geneva Communiqué of June 30, 2012. Moreover, Article 16 of the Resolution reaffirmed the primacy of the establishment of the “Transitional Governing Body”. Other than what is included originally in the Geneva Communiqué, UNSC Resolution 2118 made no mention of the Constitution or the constitutional process.

After a period of political stalemate and failed attempts at the US-Russian consensus, a new shift emerged as the Vienna Declaration issued by the International Support Group for Syria (October and November, 2015). It changed the rules of the international community interactions about the Syrian crisis. As ISIS gained more territories in Syria, the Vienna Declaration brought in the idea of a parallel between the fight against terrorism and the political process, thus bringing the regime in Damascus back to the ‘recognized’ counterterrorism players regardless of its crimes.

However, the Vienna Declaration underscored the formation of a comprehensive and non-sectarian (transitional) governance, which would will represent the Regime and the Opposition, in organizing the drafting of a new constitution before addressing the elections project. These elements were reaffirmed by the Second Vienna Declaration issued November 14, 2015. UNSC Resolution 2254 revisited the provisions of the Geneva communiqué and called for repositioning the new constitution

question to be handled after the establishment of the TGB. It added a timetable to help schedule the transition process and called on the international mediator to act.

# Turkey, Russia, Iran agree on constitutional committee in Syria

The leaders of Turkey, Russia and Iran reiterated their strong commitment to Syria's sovereignty, independence, unity and territorial integrity during the Syria summit in Ankara



## FROM THE JOINT STATEMENT:

Joint statement after trilateral summit **stressed Syria's sovereignty, independence, unity and territorial integrity** with strong commitment to the **UN principles**.

Stability in northeastern Syria could be achieved on the basis of sovereignty and respect for territorial integrity, leaders stressed.

Joint statement after trilateral summit stressed Syria's sovereignty, independence, unity and territorial integrity with strong commitment to the UN principles.

The leaders rejected any attempt to "create new realities" on the ground in Syria under the pretext of "fighting terrorism".



TURKISH PRESIDENT  
RECEP TAYYIP  
ERDOGAN

"We are in full agreement on the political unity and territorial integrity of Syria as well as the protection of peace in the field and finding a permanent political solution to the conflict"

"We are in a period where we need to shoulder more responsibility for peace in Syria. I believe that the Ankara summit will bring a breath of fresh air to the Astana process"

"The PKK, and its extension the YPG/PYD, is the biggest threat to Syria's future. As long as the PKK/PYD presence in the country continues, neither Syria nor our region can find peace"



RUSSIAN PRESIDENT  
VLADIMIR  
PUTIN

"Stability has been reached, level of violence reduced in Syrian lands through our joint efforts. Our diplomats made constitutional committee list, did procedural work, The list is approved."

"Trilateral summit on Syria in Astana format is the most effective mechanism to contribute to the resolution process in Syria,"

"Situation in Idlib, Syria de-escalation zone is troubling, Security problems in northeastern Syria should be solved on basis of protecting Syria's territorial integrity, We are all in favor of the territorial integrity of Syria"



IRANIAN PRESIDENT  
HASAN  
ROUHANI

"Iran believes that the Syrian crisis can only be solved by political means, and that this will happen with the participation of the Syrian people"

"We need to make it easier for Syrian refugees in neighboring countries to return to their homeland as soon as possible and to build a future in line with the wishes of the Syrian people".

"The regulation of the Syrian constitution in line with the demands of the Syrian people will be an important step towards ending the current crisis".

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Anadolu Agency

Turkey Russia and Iran positions on Syria new Constitutional Committee [Anadolu Agency]

## 2. Legal Track

One can argue none of the international resolutions gave the United Nations or any international party the power to form a constitutional committee for Syria. Apart from lack of transparency and the legal inconsistencies, to draft a constitution for Syria, away from the negotiations political track, was a clear violation of the UN Security Council Resolutions. Uncertainty and lack of clarity of the subsequent steps only added insult to the injury. If all these international references did not, and could not be, interpreted as a will of the establishment of a constitutional committee in the presence of the current government in Damascus, then what was the reference of that committee? It is simply a conference sponsored by the Russian Federation in the Black Sea resort of Sochi, which the Russian Government insisted on calling the 'Syrian National Dialogue Conference' hosted January 30, 2018.

Moscow had invited to the conference hundreds of members of the Regime supporters and much less of the Opposition. However, the conference was boycotted by the Syrian Negotiations Committee which was established the second Riyadh conference. (2) The final declaration of the Sochi Conference highlighted the points on which the parties had agreed upon in the preparations stage for the conference, including the accommodation of "the Twelve Basic and Living Principles of the Syrian parties", reached by former UN Envoy Staffan de Mistura. The most important part of the declaration was the announcement of a constitutional committee to undertake "a constitutional reform process." The Syrian Negotiating Committee accepted the output of Sochi shortly after its announcement; and quickly engaged in the preparation of the opposition candidates' list. Subsequently, Turkey formally submitted the list

to the UN. It is noteworthy to mention the Syrian Negotiating Committee had informally submitted the same list to Mr. de Mistura.

During the preparations for the Sochi Conference, the pre-agreement notes shared between the guarantors of the Astana Process, the Russian Federation, Turkey and Iran, in coordination with the UN Envoy, provided a form of a Constitutional Committee. The list of the parties who agreed on the notes included 150 Syrians: one-third of the delegates nominated by the Syrian regime, one-third by the Opposition, and one-third by the UN Envoy from other parties. The final list was supposed to include "neutral" Syrians from experts and representatives of civil society. For nearly two years, the Opposition and the Regime have exchanged blame for blocking the international efforts by the UN Envoys, Staffan de Mistura and later Geir Otto Pedersen, to reach a consensus on the Commission's members and procedural system. Mr. Pederson has succeeded in crystalizing the composition and internal mechanisms of the Constitutional Committee.



## SYRIA CRISIS: NEW UN ENVOY ASSUMES POST

Three former UN envoys for Syria resigned as Syrian regime leader Bashar al-Assad stalemated peace talks on the civil-war country. The world watches whether the newly appointed Geir O. Pedersen, the UN special envoy for Syria, will find a solution to the eight-year-long crisis in the civil war-torn country

NEW UN ENVOY FOR SYRIA

**GEIR O. PEDERSEN**



UNITED  
NATIONS



**LAKHDAR  
BRAHIMI**

Algerian envoy Brahimi took the position after Annan for 21 months



**KOFI ANNAN**

Annan negotiated a six-point plan with the regime in Syria



**STAFFAN DE  
MISTURA**

Mistura has been running intra-Syrian talks since late 2017 seeking to draft a new constitution for Syria

2019, Anadolu Agency

[www.twitter.com/anadoluagency](https://www.twitter.com/anadoluagency)



New UN envoy for Syria [UN News]

### 3. Rules of Procedure

In a letter sent to the Security Council members September 26, 2019, UN Secretary-General enclosed a document on the 'Rules of Procedure of the Constitutional Commission.' Guterres explained at his press conference, the said document confirmed what the three guarantors had concluded in Sochi. The Rules of Procedure affirmed that the Constitutional Committee comprises three equal parts: Opposition, Regime and Civil Society. As expected in similar cases, the document entitled "The Terms of Reference and Basic Elements of the Rules of Procedure of a Constitutional Committee with a Balanced and Inclusive Credibility", setting the procedural mechanism of the Constitutional Commission, was a stark example of the fact that the Committee had not been subjected to the basic references of the political process. Yet again, this document clearly indicates Resolutions 2118 and 2254, beyond the direct reference to Resolution 2118, have been ignored, if not totally exceeded, in

terms of the hierarchy of the topics under discussion, the terms of reference, timetable, and subsequent implementation.

One can point to another irony: there is clear avoidance of decisiveness and determinism in the Rules of Procedure; so, that each party can rely on some part of the text to support its arguments. The Document used the terms “constitutional reform” borrowed from the Sochi Declaration and “drafting a new constitution” side-by-side or interchangeably.

The introduction of the Document also provided for a heterogeneous combination of references and authority; none of which amounted to an international legal reference, not even an adequate political reference. Article 1 of the Committee’s mandate reiterated the heterogeneous mixture referred to in the introduction, and mentioned the contribution of constitutional reform to public approval in the political settlement in Syria and the implementation of resolution 2254 [2015], as well as linking the desired constitutional reform to the Twelve Principles. Moreover, it left the Committee's rules of procedure open for some confusing debate about determining whether ‘to amend’ the Constitution or ‘draft’ a new Constitution. Clearly in practice, this uncertainty meant members would not have any common goals in the drafting process.

The Document explained that the Committee has two bodies, an expanded body of 150 members and a smaller body of 45 members: the first as an ‘approval body’ and the second as a ‘drafting body’. This duality of composition means the process would be subject to two separate procedural stages both depending on the possibility of consensus or/and vote on each item or even each word in and text draft. The multiplication of procedures and the complex process would add more haggling among the members of two unelected bodies.

## AS SYRIAN CONFLICT RAGES ON, DIPLOMACY CONTINUES

Diplomatic efforts for a political solution continue in the 7th year of civil war in Syria. Parties are expected to meet in Geneva in October for the 8th round



### Syrian Conflict and open-ended diplomacy [Anadol Agency]

One of the most peculiar rules of the Document is the decision-making mechanism. Any proposal suggested by any side, that is not agreed upon – which is very likely to be the norm -, will require 34 votes in the smaller body and 113 votes in the expanded body. A quick look at the composition of the lists of candidates for membership of the Constitutional Committee would strongly suggest that any proposal submitted by the Opposition will be doomed to failure, however, the opposite is not necessarily true.

According to the Document, the Commission has two co-chairs; an odd arrangement in the turbulent political and legal framework. The reasons for such a formula could be read within the context of bringing the political parties to a 'state of satisfaction' while preparing and brokering the work of the Commission. Nevertheless in the actual drafting stage, this recipe is absolutely impractical. In addition, it is inconceivable for any chair, who emerges from the Opposition and complies with its internal authorities, to play an active role in light of the presence of a co-chair with similar powers, particularly that the regime-co-chair appointee is subject to immense and tight control by the Syrian authorities.

Another challenging article is the one replacing the demand for immediate implementation of the 'Humanitarian Law' provisions and traditional 'Confidence Building Measures' with the assurance of the security and safety of the Constitutional Committee members. This text seems to be a flagrant setback, as a priority in all international references. It addresses the procedures of implementing international and domestic laws in terms of releasing detainees, stopping the killing and shelling, which were at the core of the preparatory phase.

While it was of paramount importance to identify the mechanisms of applying the outcomes of the Committee's mandate to the Syrian legal system, the Document's vague wording left out the issue of including the Commission's outputs in the Syrian law system for compatibility among the Commission's members. According to its legal authority, the Regime's legal incorporation mechanisms seem to contradict what the opposition might propose. This fact leads us to believe that the chances of reaching an understanding with regards to mechanisms of integrating the output of the Constitutional Commission is very slim. Each team has very different mechanisms due to its legal authority and political affiliation. Members of the Committee representing the Syrian Regime are organically linked to the 2012 Constitution, which established a specific mechanism for amending the constitution by presenting the amendments before the People's Assembly; whereas the Opposition members are keen of producing a 'revolutionary constitution', which could be put directly to referendum.

Due to the fragility of its terms of reference and legal and political structure, and all noticeable loose poles and gaps, the Committee will face enormous challenges, not least the illegality of representation and selection of its members. It does not include representatives of the Kurdish autonomous administration in northern and northeastern Syria, which, in a statement, deemed its exclusion an unfair measure because it is present on large areas in the north and northeast of the country.

Another challenge is the lack of representation of large areas of Syria and its political and ethnic components, not to mention the exclusion of professional highly-qualified Syrians. Members of the Syrian Negotiating Committee and the Syrian National Coalition dominate the membership list. The

second list, List of the Regime, which includes specialists, consists of several names associated with the Regime's security establishment. Moreover, the third list, List of Civil Society, involves individuals who have close links to the security apparatus of the regime.

Some observers have echoed similar concern about the limited scope of representation in the negotiating process. For instance, Robert Ford, former U.S. ambassador to Syria, highlighted what he considers as detectors of the desired outcome of the Constitutional committee. He wrote, "The third fact that prevents the constitution committee from achieving a political solution to Syria's crisis is the absence of representatives from the eastern part of Syria under the control of the Syrian Kurdish PYD party and its Syrian Democratic Forces."<sup>(3)</sup>

The Committee will face other dilemmas, such as how to agree to amending the 2012 Constitution or drafting a new one, not to ignore the calls for restorative justice and accountability, and the fate of Assad and members of his regime who have their hands stained with blood. Flagrant international interference with the Opposition and Regime's key decisions remains a usual business in the recent years of the unrest in Syria. The subordination of most Committee members to the alignments of a particular state, or another, is expected to be strongly articulated in the process.

It is noteworthy the selection of the Committee members, including the Opposition and presumed Civil Society, is largely subject to the dictates of certain guarantor powerful states. The process of influencing, and even manipulating, some of these members will be direct and easy, especially since the rules of procedure have been completely silent on the subject of members replacement, either on procedural or behavioral grounds or due to resignation or lack of commitment. The Rules of Procedure did not spell out any of these fundamentals, which meant they were left to the Commission's own jurisprudence, or to the intervention of the international mediator.

## Conclusion

The process of constitutionalizing the Syrian regime in 2012 was a miserable failed attempt of its rehabilitation internally. Just like military dictatorship, which snatched the power under the bayonets and then resorted to the decorations of the referendum, the Syrian regime tried the old trick and failed to claim popular acceptance. In contrast, The Syrian opposition, which refused to be part of the First Constitutional Committee, has surprisingly scrambled for a part of the current Constitutional Committee, which was the outcome of the Sochi Conference. This shift has emerged despite having different figures at the forefront of the scene or perhaps precisely for this reason. We are now facing a similar process, which seeks to establish constitutional legitimacy for the Regime, yet with some international blessing this time.

The 2012 Constitution was drafted with the support of two countries only: the Russian Federation and China. Now , the current constitutional process comes with the blessing of the United Nations and other bodies of the international community. While the former has not given any legitimacy to the Assad regime and has been criticized by many countries, the current constitutional process - the process itself - will politically and legally reposition the Syrian Assad and shall grant it legal and constitutional legitimacy, which would help repositioning it as a partner in the forthcoming poor and unreliable formal peace.

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### About the Author



**Dr. M Hosam Hafez is Syrian lawyer, academic, and former head of the Legal Office of the Syrian High Negotiations Committee**

### References:

1. Paragraph 9 of Geneva Communiqué states: “Clear steps in the transition: The conflict in the Syrian Arab Republic will end only when all sides are assured that there is a peaceful way towards a common future for all in the country. It is therefore essential that any settlement provide for clear and irreversible steps in the transition according to a fixed time frame. The key steps in any transition include: (a) The establishment of a transitional governing body that can establish a neutral environment in which the transition can take place, with the transitional governing body exercising full executive powers. It could include members of the present Government and the opposition and other groups and shall be formed on the basis of mutual consent; (b) It is for the Syrian people to determine the future of the country. All groups and segments of society in the Syrian Arab Republic must be enabled to participate in a national dialogue process. That process must be not only inclusive but also meaningful. In other words, its key outcomes must be implemented; (c) On that basis, there can be a review of the constitutional order and the legal system. The result of constitutional drafting would be subject to popular approval; (d) Upon establishment of the new constitutional order, it will be necessary to prepare for and conduct free and fair multiparty elections for the new institutions and offices that have been established; (e) Women must be fully represented in all aspects of the transition.”
2. Sochi Conference On Syria Opens Despite Opposition Boycott, <https://www.rferl.org/a/syria-russia-sochi-conference-opens-without-opposition/29005414.html>
3. Robert. Ford, “3 Basic Facts on Illusion of Syria Constitutional Reform,” Asharq Al-Awsat, October 1, 2019 <https://aawsat.com/english/home/article/1926821/robert-ford/3-basic-facts-illusion-syria-constitutional-reform>