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## **UN Non-Paper**

### **Preparation for Meeting with International Community on Framework and Approach to Constitution Drafting Body Rules of Procedure (May 12, 2005)**

#### **1. Right to participation in constitution-making process as embodied in international instruments**

International law in general –and UN bodies in particular- have supported the right of participation in constitution-making processes. Specifically, this support has been legally endorsed in the following ways:

- 1.1. Logical derivation of the right to participate in constitution-making from the general meaning of “democratic participation” in the UN Declaration of Human Rights (article 21 – “Everyone as the right to take part in the government of his country”; “the will of the people shall be the basis of the authority of government”).
- 1.2. Logical derivation from article 25 of the UN International Covenant on Civil and Political Rights (ICCPR) –“every citizen shall have the right and the opportunity (...) to take part in the conduct of public affairs, directly or through freely chosen representatives (...); to vote and to be elected at genuine periodic elections (...).”
- 1.3. On the grounds of political participation as a fundamental principle, relevance of regional and trans-national declarations such as the African Charter on Human and Peoples’ Rights, (article 13.1), the Asian Charter of Rights (article 5.2) and the Inter-American Democratic Charter. The Arab Charter on Human Rights indicates in article 1.a) that “All peoples (...) have the right to freely determine the form of their political structure (...)” and in article 19 that “The people are the source of authority and every citizen of full legal age shall have the right of political participation (...).”
- 1.4. 1991 ruling from the UN Committee on Human Rights (UNCHR) acting in judicial capacity to hear individual complaints under Optional Protocol I to the ICCPR (Marshall v. Canada, December 3, 1991). Authorization of a specific right to participate in constitution-making as an undoubted part of public affair, also pointing out that “it is for the legal and constitutional system of the state party to provide for the modalities of such participation”.
- 1.5. UNCHR General Comment on article 25 of the ICCPR (July 12, 1996): “Citizens also participate directly in the conduct of public affairs when they choose or change their Constitution” – explicit expansion of the scope of democratic participation beyond the act of voting. The High Commissioner for Human Rights has then determined that people “have a

right to freely determine their political status and to enjoy the right to choose the form of their constitution or government” (It needs to be noted, however, that General Comment is authoritative but not binding in law).

- 1.6. Article 7, UN Security Council Resolution 1546: “The Security Council (...) *Decides* that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall: (a) play a leading role to: (...) (iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;”
- 1.7. Article 60, Transitional Administrative Law : The National Assembly will “carry out the responsibility” of drafting a permanent constitution “in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution”.

## **2. TNA Rules of Procedure’s provisions regarding the constitution-making process**

### 2.1. General comments

The rules of procedure of any legislative chamber establish specific mechanisms for the legislature to perform its functions and fulfill its legislative role. In the case of Constituent Assemblies, rules of procedure provide direction on the constitution-drafting process, traditionally establishing specific rules that regulate, among others, sequence of proceedings, committee structure, required quorum and thresholds for approval. Rules of procedure provide a road map for the elaboration of a constitutional draft, vote of the draft at the different parliamentary levels, and ratification of the final text.

### 2.2. TNA Rules of Procedure

The Rules of Procedure of the Iraqi National Assembly contain the following relevant articles regarding the constitution-making process<sup>1</sup>:

#### General reference:

- 2.2.1 Article 1- “The National Assembly is the legislative branch responsible for (...) drafting the permanent constitution of Iraq.”
- 2.2.2 Article 15- “The quorum of the NA is achieved with the presence of two thirds of the total number of Members. It shall make decisions by simple majority of the present members unless TAL states that other percentage is needed, or when there are certain situations that need special majority as stipulated in this Rules of Procedure.” Speaker as tie-breaking vote.

Article 77(2) – “The quorum of the committee’s meetings shall be achieved by the attendance of the majority of its Members, provided that the Chair and the Rapporteur are among them. The decisions of the committee shall be made by the majority.”

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<sup>1</sup> This list contains summaries or direct quotes of articles, and –when considered relevant- comments on their contents (in bullet points).

- *These provisions imply that the constitutional draft can be approved by the committee and/or plenary of the TNA by simple majority, with no special threshold being referred to.*
  - *For the sake of inclusiveness, it is advisable to recommend a special threshold for approval, either at committee or plenary level (2/3 threshold could be considered).*
- 2.2.3 Article 71- The Constitution Drafting Committee shall be responsible for: First, write the draft of the permanent constitution of Iraq no later than August 15; Second, obtain assistance from legal experts and jurisprudents from Iraq and abroad; Third, conduct seminars and workshops to introduce the constitutional process and to consult with the public and with civil society organizations.
- *Legal assistance “from Iraq and abroad” is not only welcome, but in fact the constitutional committee is made responsible for “obtaining” it.*
  - *The Rules of Procedure contemplate the timeline for drafting the constitution as indicated by TAL.*
- 2.2.3. Article 75- “Each committee (...) shall consist of at least seven members and no more than eleven, except the Constitution Drafting Committee.”
- 2.2.4. Article 76- “Each committee shall select (...) a Chair, Deputy Chair, and a Rapporteur by absolute majority of the committee members, within three days after the formation of the committee.”
- 2.2.5. Article 118- “The committees’ sessions are not to be made public. Only members of the committees, other NA’s members and office staff members as well as the experts and advisors a committee may make use of may attend.”
- *Public access to the works of the committee constitutes an important element for a participatory and informed process, but at the same time may hinder genuine and open discussion among members of the committee. The presence of media should therefore be allowed under prescribed circumstances.*
  - *This article allows for the presence of advisors and experts in the works of the committee.*

#### Options for inclusiveness

- 2.2.6. Article 58- “The Presidency Commission and the Committees of the NA shall have the right to question ministers and officials”

Article 59- “Each Member shall have the right to ask the interrogated person for any necessary information to clarify the situation regarding the subject of the interrogation.”

- *These provisions indirectly allows for inclusion of officials which are non-TNA members and belong to non-represented parties/factions to participate in the deliberations of the constitutional committee and/or its theme subcommittees (if created).*

2.2.7. Article 73- List of Standing Committees, which “shall assist the Assembly in exercising its legislative and oversight functions.”

Article 80- “The Standing Committees may ask for any information they need from governmental departments, public and trade organizations and institutions (...). It shall have the right to be assisted by experts (...).”

- *There is no particular provision linking the works of these committees to the constitutional debate, but there is no provision either precluding tasks of facilitation in terms of identification of particular problems and issues, or identification of expertise in the different theme areas.*
- *A number of these Standing Committees may play a key role in assisting the constitutional committee in its deliberations, such as the Legal Committee, the Debate and National Relations Committee, the Human Rights Committee, the Regions and Provinces Affairs Committee, the Tribes Committee and the Civil Society Organizations Committee, among others.*
- *Particular venue for institutional cooperation between the constitutional committee and some of the standing committees on the basis of what is included in the Rules of Procedure:*
  - *Debate and National Relations Committee: “Shall be in charge of (...) maintain links and relationship with various political factions, and inform the National Assembly of about the developments of political work on the local level, develop mechanisms for national participation and activate them, organize conferences for national dialogue.” (article 90).*
  - *Legal Committee: “Shall be in charge of (...) Assist the TNA and its committees in drafting legislative texts (...).” (article 96). (The legal committee could technically act as legal drafting body of the constitutional committee).*
  - *Regions and Provinces Affairs Committee: “ Shall be in charge of (...) follow up the fair distribution of resources and allocation among regions and provinces (...).” (article 97).*

2.2.8. Article 78- “The committees may invite any member of the NA to express his/her opinion (...) but that member shall not have the right to vote. Also, the committee shall have the right to call any government official (...) or may call any expert or specialist who is not a member of the TNA, in order to solicit their input and opinion.”

Article 79- “The Speaker of the National Assembly shall have the right to call members of the Council of Ministers (...), any government official to attend its meeting through the concerned Minister (...), persons of special ranks (...) to attend the committees).

- *Voices that are not represented in the membership of the Assembly can be brought to the debate at the level of the constitutional committee in the form of “members of Council of Ministers”, “government official”, “persons of special rank”, “any expert or specialist”.*
- *Non TNA members that participate in committee meetings are given the right to express their opinions, but not to vote.*

2.2.9. Article 84- “The National Assembly may form Temporary Committees and Investigation Committees, in accordance with the requirement of work, and the subject presented to it.”

Article 85- “Temporary and investigation committees shall be formed by the approval of the majority of present Members in the Assembly, based on a suggestion submitted by the Presidency Commission or by 20% of the NA Members.”

- *The possibility of setting up temporary committees would technically allow for the configuration of an appointed constitutional commission, or a temporary committee composed of the constitutional committee plus added members (enlarged constitutional committee). Unlike in the case of filling a vacancy (article 82), articles 84 and 85 do not refer the composition of temporary committees to the Rules of Procedure of the Assembly (which prescribe membership of TNA). Thus, inclusion of non-members in temporal committees would be technically possible within the framework of these rules of procedure.*
- *This provision would permit the creation of specific institutional settings for the study of constitutional issues, including theme committees within the constitutional committee, and a harmonization committee (which may or may not be the constitutional committee itself). This article could also provide for the configuration of a technical drafting unit within the constitutional committee.*

2.2.10. Article 111- “The Committee on Civil Society Organizations shall be in charge of (...) support legislation and procedures that ensure enhancement and activation of the role of civil society organizations to help make the public opinion mature; work towards creating an institute that conducts studies focusing on developing ideas and mechanisms of civil society institutions in a manner compatible with the specificities of the Iraqi society.”

- *This article provides a venue for the strengthening of public support to civil society organizations, and can provide an institutional framework for the configuration of an outreach unit linked to the NA and its constitutional committee.*

2.2.11. Article 41- “The NA Member shall not be assigned any other positions whether inside or outside the government; the NA Member who becomes member of the Presidency Council or member of the Council of Ministers shall be considered resigned from NA.

Article 45- “The NA Member shall not combine membership in the NA and public office. The Member shall be regarded fully committed as of the date he is sworn in before the Assembly.”

Article 82- “In case there is a vacancy in the membership of a committee, another member will be elected, in accordance with the manner stipulated in the Rules of Procedure.”

- *Consideration can be given to whether these particular provisions affect any of the current TNA members, in which case a proposal could be made to incorporate persons associated to non-represented groups as new members in the Assembly, for the sake of inclusiveness and in the context of the current constitution-making process.*

#### Setting the agenda of the debate

2.2.12. Article 7- “The Presidency Commission shall consist of the Speaker and his two deputies”.

Article 10- The Presidency Commission will have as task “organize the agenda of each session of the plenary (...) along with projects, proposals and reports submitted to be discussed (...), “prepare the NA work plan and follow up its implementation after adoption (...), prepare and amend the organizational structure of the NA (...), task a committee to study a certain subject (...)”

Article 11- “(...) The Commission shall issue its decision by consensus.

Article 29- “No session will be held without preparing the agenda of the assembly, which shall be prepared by the Presidency Commission (...). No subject shall be raised or discussed if not listed in the agenda, unless approved by the majority of present members”.

Article 30- “A Member may ask the Speaker to allow him to make a statement regarding an issue that is not listed in the agenda, if it is a serious issue and of an urgent nature and importance.” The Speaker may allow the Member to present a brief statement. The Assembly will decide if the subject is discussed, by simple majority.

Article 26- Tasks of the Speaker: “(...) Running debates, maintaining orders of discussion, specifying subjects of discussion, drawing attention of the speaking Member to focus on the subject of the discussion, and maintain order (...).

- *The 3-member Presidency Commission sets the agenda by consensus. The Speaker may allow for new topics to be raised (provided the Assembly votes in favor by simple majority). No item included by the Presidency Commission can be erased from the agenda.*

2.2.13. Article 27- Tasks of the Second Deputy Speaker: “(...) Follow up the works of Standing Committees, and submit reports about them (...).

- *This article provides a venue for periodic reporting from the constitutional committee to the plenary.*
- *It needs to be noted, however, that the constitutional committee is technically not listed as one of the Standing Committees of the Assembly.*

2.2.14. Article 9- Speaker of NA, deputies and Members of the Assembly shall swear “that I shall (...) maintain the independence and sovereignty of Iraq, and look after its people and the integrity of its territories, sky, waters and wealth, and its federal democratic system (...)”.

- *This provision technically binds the Speaker and the TNA Members to the principles of maintaining the territorial and financial integrity of the country, and to the principles of democracy and federalism.*

### **3. Options for promotion of inclusive and participatory process**

The following procedural options would be possible within the framework provided by the draft rules of procedure of the Transitional National Assembly:

#### 3. 1. Inclusive drafting body / possible modalities for the elaboration of a text

##### 3.1.1. General comments

The provisions of the rules of procedure of the TNA do not technically preclude the option of assigning the task of creating the initial draft to an enlarged parliamentary body including non-elected representatives, or to an extra-parliamentary appointed body assigned with the task of drafting a text or portions of it. In either case, this body could consult with the public and key stakeholders as widely as possible. It would be important that the composition of this body results from negotiations among key constituencies, thus ensuring it is representative of the political, social and ethnic diversity of the country.

If the constitutional committee is assisted in its legal drafting by the legal committee, consideration needs to be given to what is the committee where provisions for inclusiveness are more relevant.

Positive elements:

- A Constitution drafting body including non-elected members would ensure that all major stakeholders are involved in the process from the very beginning, thus strongly contributing to inclusiveness, participation and consensus-building.
- Including extra-parliamentary actors in the writing of the draft Constitution would allow the option of providing representation and vote capacity of the different elected and non-elected forces on an equal basis (a purely parliamentary committee, on the other hand, may need to respect the ratio of representation of each force at the Assembly as a whole, and/or not provide non-elected members the capacity to vote).
- Inclusion of non-elected actors does not necessarily mean that the process is any less legitimate, among other things because elected actors would also be part of this process. Moreover, the task of the extra-parliamentary committee would be that of preparing the first draft of the constitutional text. A decision would need to be made regarding whether this draft should or not be binding upon the whole of the Assembly.
- Once the draft text reaches the floor of the plenary, it may still be possible to return the discussion to the inclusive constitution drafting body. It is at the level of the committee that the trade-offs have taken place. Therefore, the text as drafted at the committee level should be considered by the plenary as a settled balance of provisions.

##### 3.1.2. Specific procedural options:

- 3.1.2.1. Assembly → delegation to a special drafting panel (or enlarged constitutional committee) → plenary

An initial general discussion at the Assembly (either at plenary or committee level) is followed by the appointment of a drafting panel (or enlarged constitutional committee), which would be responsible for the drafting of the initial version of the constitutional text. The result of the work of this body would return to the Assembly through the general committee, or directly to plenary.

- 3.1.2.2. Assembly → delegation to a special drafting panel (or enlarged constitutional committee) → theme committees → drafting panel / enlarged constitutional committee as harmonization committee → plenary.

The difference with the previous case is that the draft text elaborated by the external panel is distributed by chapters among different theme committees. A harmonization body (the special panel or enlarged constitutional commission itself) would consolidate the work of each of the theme committees before the text reaches the plenary.

These two options would allow for the production of an initial draft by the drafting body, reception of comments and proposals submitted by civil society, and elaboration of a final draft for consideration of the TNA.

### 3.2. Purely intra-parliamentary (“non-inclusive”) drafting body / possible modalities for the elaboration of a text

#### 3.2.1. General comments

A general presentation at plenary (or at the level of the general committee, with presence or not of the highest authorities) would be followed by work at the committee level. Debate and final voting would move (or not) to the plenary. The presence of a purely intra-parliamentary drafting body contains positive and negative elements:

Positive elements:

- The Assembly as elected body has the democratic legitimacy to undertake this task.
- Given the shortage of time allocated to the process, an appropriate discussion at the Assembly can only be assured if the overall process takes place within this body.

Negative elements:

- Keeping the process only in the hands of those elected does not allow for the necessary degree of inclusiveness, in a context where the Assembly is not completely representative of the social and political structure of the country.

#### 3.2.2. Specific procedural options:

- 3.2.2.1. Single parliamentary constitutional commission → plenary

A single constitutional commission, as established, could allow for consultations with national and international experts. This committee could be assisted by a technical, drafting sub-committee (also already established by the rules of procedure), which would be in charge of the actual drafting of the articles. It is not clear from the draft rules of procedure whether and how the committee could take into account the input received by external actors and non-elected internal actors (which could technically have voice –if they have a status of “expert”- but no vote). Vote at the committee would be followed by presentation and vote in plenary.

- 3.2.2.2. Parliamentary theme committees/panels → harmonization committee (constitutional committee) → plenary

The constitutional commission could organize itself in theme committees/panels. These committees/panels would be based on the major constitutional issues (such as federalism, territorial organization, relationship state-religion, fundamental rights), and each would



discuss the related chapters in the draft constitution (allowing or not for consultations with national and /or international experts). The constitutional commission would work as harmonization committee, assigned with the task of making sure that there are no conflicting provisions in the chapters coming from each one of the theme-committees. Voting at constitutional commission level would be followed by discussion in plenary.

These two options would allow for the production of an initial draft by the drafting body, reception of comments and proposals submitted by civil society, and elaboration of a final draft for consideration of the TNA.

#### **4. Summary points for consideration:**

##### 4.1 Inclusive drafting body: Making provision for the participation of non-members of the TNA

The National Assembly has been entrusted with the responsibility of drafting the new constitution of Iraq. In order for the resulting document to embody the aspirations of the country as a whole, it will be necessary to move beyond the realm of elected representation and reach out to constituencies that are not fully represented in parliament. Institutional options to this end could include the configuration of an expanded constitutional committee, or the appointment of an inclusive constitutional commission by the National Assembly or its committee to produce a draft on all or some of its provisions. Participation of non-elected actors can be channeled through hearings and/or provision of membership in the constitution drafting body. In the second case, the committee may or not decide to grant them a full member status. This may raise difficulties in securing the participation of important “outsider” groups, or at least credible representatives of them. Rules could be argued to make such participation meaningful.

##### 4.2. Committee structure: Theme subcommittees

The constitutional committee can organize its work in different ways. A single constitutional committee operating under a strict timeline may find it structurally difficult to thoroughly consider all the provisions that may or may not be included in the future constitution. To overcome this problem, an option could involve the configuration of theme subcommittees, working in parallel and reporting periodically to the constitutional committee (acting as harmonization committee), and/or to the general committee. Under this institutional setting, subcommittees –each debating on each of the major themes- would have the opportunity of a deeper consideration and debate on different options for constitutional formulations on each of those substantive areas. This structure would also allow for a higher capacity of consultation with Iraqi and/or international experts, and for consideration of provisions emanating from civil society. Wherever possible, sub-committees could include as members individual Iraqi experts and/or those not (or inadequately) represented in the National Assembly. Rules may need to specify the workings of these committees, and the status of their reports / draft proposals.

##### 4.3. Civil society participation and access to the committee by the public

Public participation is critical for the achievement of country-wide ownership of the constitution-making process. The National Assembly has the opportunity of involving all Iraqis in the drafting of the national constitution. Such involvement can be critical in widening the potential for consensus, and in grounding the draft text on a broad basis of common understandings across social and geographical cleavages. This can be achieved by launching public information campaigns on the importance of the constitutional process for the future of the country, and on the significance of the issues being debated. The constitutional committee as drafting body can also consider the opportunity of creating mechanisms and timelines so that proposals of civil society can be channeled into the constitutional debate, and taken into consideration by the members of the constitutional committee in their periodic deliberations. This work could be carried out by an

independent outreach unit institutionally linked to the constitutional committee. Rules may need to address the means by which public submissions are received and treated.

#### 4.4. Treatment of the media

The constitutional committee could reach out to society not only through specific information campaigns, but also through periodic reporting from the committee(s) to the media, and indirectly through reports from the media to the citizens. An informed media will contribute to providing citizens with the necessary information that will allow them to participate in the fullest of their capacity in the provision of inputs to the process. The work of liaison with the media can be undertaken by an outreach unit (as outlined in the previous paragraph). As far as rules and procedures are concerned, the committees may wish to specifically provide for media access to decision and reports, while excluding them from sessions where candid exchanges and negotiations would take place.

#### 4.5. Institutional processes: Decision-making and timelines

The constitutional committee can consider what form of overall process would better provide for a thorough and participative debate. The committee may consider organizing its works – and in particular the production and flow of its draft texts- in a way that allows for broad consultation and debate (in theme committees, single constitutional committee, or appointed constitutional commission); in particular, through the presentation of an initial draft, reception of suggestions and proposals from civil society on that draft, consideration of these proposals, debate, vote, and publication of a final parliamentary draft. Such scheme would allow influential actors and the public at large to comment on an actual complete draft and send proposals to enrich it, before the process is finally completed in parliament. This would provide a venue for country-wide comment on a global set of article proposals, before these proposals become part of a settled set of provisions to be accepted or rejected as a whole. Likewise, the drafters may consider the establishment of specific voting thresholds to ensure that the draft that is approved at the Assembly is backed by a high degree of parliamentary support. Device such as “sufficient consensus” has been used elsewhere.

#### 4.6. Inter-parliamentary institutional links: Procedures for interaction with other committees and the TNA

Constitutional debate in the National Assembly will be framed by the interactions between the different parliamentary bodies directly involved. The constitutional committee will need to institutionally interact with the legal committee, the general committee (in accordance with the National Assembly Rules of Procedure), with theme subcommittees (if created), with a constitutional commission (if appointed), and with the plenary. In defining these interactions, the constitutional committee may consider seeking a political agreement whereby the document resulting from debate and vote in the constitutional committee/constitutional commission is not lightly tampered with at the plenary of the Assembly. Such provision would contribute to strengthening the incentive for consensus at the level where the capacity for inclusion of non-represented members is highest.