

DECIPHERING THE SYRIAN PEACE PROCESS

WHAT IS IN UN SECURITY COUNCIL RESOLUTION 2254?

1. INTRODUCTION

After almost five years of war, there has been renewed diplomatic activity to find an end to the conflict in Syria. While any quick resolution seems unlikely given the extent of fragmentation of parties to the conflict at the Syrian, regional and international levels, broad parameters for a peace process have been agreed at the international negotiations in Vienna. The fact that the agreement is broadly endorsed by a wide range of countries in the International Syria Support Group (ISSG) is unprecedented and gives it a certain foundation. The UN Security Council confirmed the agreements in its resolution 2254 of 18 December 2015. While there is a lot of doubt if this peace process will succeed, at least it currently helps shape the diplomatic process.

The resolution centres on these key elements:

- A nation-wide ceasefire between the parties to the conflict, except with terrorist groups as designated by the UN Security Council¹
- A UN-facilitated political negotiation process between the government and the opposition in Geneva that would lead to
 - "inclusive governance"
 - a new constitution
 - elections within 18 months, meaning by June 2017 (though some understand the deadlines differently and assume elections in January 2018)

The UN Security Council Resolution includes vague terminology - a price that was paid to get to an agreed text in a context of diverging opinions among the UN Security Council members on some key points such as the future of Syrian President Bashar Al-Assad.

- In parallel to the Syrian negotiations in Geneva, which started on 25 January 2016 and will be resumed on 25 February 2016, the ISSG will continue its talks in Vienna. The process is principally framed by the following five documents:
UN Security Council Resolution 2254 of 18 December 2015, which endorses all the following documents and thus confirms that they remain binding.²
- The two **Vienna Statements**³ (October and November 2015) issued by the International Syria Support Group
- The **Geneva communiqué of the Action Group for Syria** of 30 June 2012⁴.

From the standpoint of international law, among all five documents, the UN Security Council Resolution enjoys the highest legal authority, representing binding international law. As will be shown, the Security Council Resolution changes the parameters of the earlier statements and communiqués in some

² <http://www.un.org/press/en/2015/sc12171.doc.htm>

³ The joint statements on the outcome of the talks on Syria in Vienna of 30 October 2015 (<http://www.auswaertiges-amt.de/DE/InfoService/Presse/Meldungen/2015/151030%20BM%20Wien.html>) and the statement of the ISSG of 14 November 2015 (<http://www.state.gov/r/pa/prs/ps/2015/11/249511.htm>)

⁴ <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>

¹ See point 8 of the UN SC resolution.

aspects, but in most cases it is ambiguous enough not to directly contradict any of the other documents.

The main difference is that the Geneva communiqué included more details and overall made stricter demands for changes to the Syrian government, while the Vienna communiqués are less detailed. As all these documents have been endorsed by the UNSC resolution, this Briefing Paper cites them only where they include specific relevant text.

This paper offers a few reflections on the constitution-making and election aspects of the UN SC resolution and the communiqués. While these may seem of low priority at a time when agreeing ceasefires is the first major task, the constitutional and electoral aspects provide important context to the expectations of the various players. The way a new constitution or an election system may look will influence their calculations of what could be in it for them in the long-term to lay down arms and come to the negotiation table. For some stakeholders, certain constitutional guarantees, for example for the protection of minorities, could be a *conditio sine qua non* in the negotiations. In the words of the UN SC resolution, there is “a close linkage between a ceasefire and a parallel political process” (point 6). Furthermore, with the ambitious timelines of the UN SC resolution (point 9), constitutional issues are likely to be discussed immediately in the Geneva talks.

2. FLUID POLITICAL PROCESS

To understand what is likely to unfold in the months to come in Geneva, it is important to point out that the envisaged peace process is highly fluid. What is more, a key challenge is to get and then maintain agreement on who is meant by “opposition” and which opposition delegates can actually participate in the Geneva talks and wider peace process.

The UN SC resolution requests the UN Special Envoy for Syria, Staffan de Mistura, to convene representatives of the Syrian government and of the opposition to formal negotiations on a political transition process. However, the various documents mentioned above do not provide guidance of who represents the opposition except that ‘terrorist groups as designated by the UN SC’ should not be included. No opposition group enjoys electoral legitimacy, nor does the government as Syria has not held credible democratic elections.

The ‘National Coalition for Syrian Revolutionary and Opposition Forces founded in 2012 represents the biggest opposition group. Its relations to other opposition groups however highlight the fragmentation among the opposition. It is supported by the Local Coordination Committees and the Free Syrian Army, but not by the Kurdish Democratic Union Party (PYD). The Kurdish National Council is a member of the National Coalition though, the KNC is an organisation that was founded in Erbil/Kurdistan-Iraq and is

backed by the KRG (Kurdistan Regional Government) in Iraq. The Syrian National Council, formed in 2011 was represented in the National Coalition but formally withdrew over disagreement around the Coalition’s participation in the Geneva II talks, which took place in January 2014 but failed to reach agreement.

A challenging task is outlined in Article 9 of the UNSC Resolution: “develop[ing] a common understanding within the ISSG of individuals and groups for possible determination as terrorists”, which will determine their eligibility to contribute to the opposition’s representation.⁵ This question has two dimensions: At one level many opposition groups are troubled by labelling some groups as terrorist because in their view the Syrian government started the war and is the main culprit for the large majority of the war’s casualties. At another level, the inclusion of some of the armed groups in the political talks is essential for moving towards peace.

The Riyadh meeting that took place 09-11 December 2015 managed to bring together key opposition groups including representatives of some armed groups. It allowed identifying a negotiating committee of 34 members out of which a core negotiating team of 15 members has been formed. Kurdish groups were largely missing in Riyadh as Turkey is allegedly trying to exclude Kurdish representatives from the negotiations. Only the Kurd Abdelhakim Bashar was elected in the negotiating committee through his membership in the National Coalition.⁶ The Kurdish side held a separate conference⁷ in Derik, Turkey, almost parallel to the Riyadh meeting.⁸ The eventual inclusion of the Kurdish side will be one of the challenges to tackle for the Geneva talks. The need to deploy a negotiating team to Geneva has resulted in some formal consolidation through

⁵ “8. Reiterates its call in resolution 2249 (2015) for Member States to prevent and suppress terrorist acts committed specifically by Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Nusra Front (ANF), and all other individuals, groups, undertakings, and entities associated with Al Qaeda or ISIL, and other terrorist groups, as designated by the Security Council, and as may further be agreed by the ISSG and determined by the Security Council, pursuant to the Statement of the ISSG of 14 November 2015, and to eradicate the safe haven they have established over significant parts of Syria, and notes that the aforementioned ceasefire will not apply to offensive or defensive actions against these individuals, groups, undertakings and entities, as set forth in the 14 November 2015 ISSG Statement;

⁶ 9. Welcomes the effort that was conducted by the government of Jordan to help develop a common understanding within the ISSG of individuals and groups for possible determination as terrorists and will consider expeditiously the recommendation of the ISSG for the purpose of determining terrorist groups;

⁷ According to Carnegie, see

<http://carnegieendowment.org/syriaincrisis/?fa=62263>

⁸ <http://ekurd.net/kurds-opposition-congress-syria-2015-12-09>

⁸ For more on this, see Carnegie

<http://carnegieendowment.org/syriaincrisis/?fa=62263>

the Riyadh process. It is however to be expected that this set-up remains somewhat fluid, meaning that opposition representatives who are not included in the core group may be able to be present in the margins of the negotiations and make their voices heard in talks around the talks, or may be included in the negotiation team. The Riyadh process was already elastic, adding more and more representatives to avoid boycotts. An elastic process has the advantage of being able to include new actors over time, and to avoid the emergence of spoilers who are left outside the process. It is noteworthy that Tunisia's transitional body set up after then President Ben-Ali's departure in 2011, the 'High Authority for the Achievement of the Revolution's Objectives, Political Reform, and Democratic Transition', started out with 71 members⁹ but additional members joined during the 7 months of its existence from mid March until mid October 2011. At the end the body included 155 members. This elasticity served the inclusiveness of Tunisia's process well. However, too much elasticity can also destroy a process by making it unmanageable or by inviting negotiators to the table who may want to spoil the talks.

3. CREDIBLE, INCLUSIVE GOVERNANCE

The UN Security Council Resolution expresses its support to establish "credible, inclusive and non-sectarian governance". This formula was first used by the first Vienna declaration. It marks a shift from the Geneva communiqué which was more detailed and more explicit, indicating that a transition should include "the establishment of a transitional governing body which can establish a neutral environment in which the transition can take place. That means that the transitional governing body would exercise 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."

As pointed out in The Carter Center's insightful study "Syria: Options for a Political Transition"¹⁰, the Geneva formula establishes a collective executive, essentially something like a unity government with executive power as opposed to the current presidential system of Syria. The notion of 'inclusive governance' is more fuzzy and unspecific, even

though it is difficult to see how maintaining the current executive Presidency could be considered to be 'inclusive governance' even if reformed a bit. This question will be one of the first difficult points of the Geneva negotiations.

Importantly, the formula of the Geneva communiqué is not obsolete, given that the Vienna communiqués and the UN SC resolution endorse the Geneva communiqué. Furthermore the resolution's preamble reiterates the formula of an "inclusive transitional governing body with full executive powers". It would not be fruitful for negotiators to engage in long debates about the exact meaning of these texts but to explore instead what could be mutually agreeable governance arrangements, within the parameters set by these texts. Inclusive transitional governing bodies have often been put in place to overcome conflict, in particular in sub-Saharan Africa and prominently in Kenya (2008) and Zimbabwe (2009); the latter being considered a less successful case. The particular challenge in Syria will be a governing body, which has effective power on the security sector of the state and armed groups too.

An additional challenge will be the physical location of a unity government as long as its safety and integrity in Damascus cannot be assured. The Libyan unity government for example is currently located in Tunis with negative impact on its effectiveness.

4. A NON-SECTARIAN STATE

All the relevant documents stress the non-sectarian nature of a future Syrian state. 'Sectarian' or 'non-Sectarian state' are not hard and clear notions of international law. However, a sectarian state is generally understood as one that is formally organised along confessional lines. In the Middle East, Lebanon is clearly seen as coming closest to a sectarian state, but is widely seen as a special case of a small country.

For some parties of the conflict and many international analysts the conflict in Syria is mainly a confessional one, while others reject that narrative, considering it a façade behind which economic or geo-strategic interests are hidden. Furthermore many Syrians reject being labelled in this manner. Be that as it may, some parties to the conflict have a strong confessional identification and in the case of the Kurds an ethnic identification. These will not disappear because of the non-sectarian formula. Instead for many actors the negotiations on control of the central state, arrangements of decentralisation, control of security forces and electoral arrangements will have a confessional or ethnic sub-text.

⁹ <http://www.tunisienumerique.com/membres-du-conseil-de-linstance-superieure-pour-la-realisation-des-objectifs-de-la-revolution-de-la-reforme-politique-et-de-la-transition-democratique/12754>

¹⁰ https://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/Options-for-Political-Transition-in-Syria-Jul-2015-en.pdf

5. SYRIAN-LED, SYRIAN-OWNED TRANSITION

All above-mentioned documents stress that they prepare the ground for a Syria-led and Syria-owned political transition. The reality until now has been different of course, with regional and international actors playing a massive role in the Syrian war as well as in diplomatic efforts to end it. Once talks begin between government and opposition in Geneva, Syrians have a chance to regain some of the diplomatic and political space, although in light of current divisions in Syria, it is likely that international actors will have to lean on the parties to search for common ground in negotiations.

The UN SC resolution indicates that the UN will facilitate the Syrian-led political process and that elections shall be “administered under the supervision of the UN”. A balance will have to be found between the notion of international supervision and a Syrian-led transition process. In view of the massive lack of confidence between the Syrian parties, the balance is likely to tilt towards the former. It can require direct involvement in establishing the mechanisms of the election, including the date, monitoring polling stations, counting the ballots, and assisting in the resolution of disputes. Where the UN is not satisfied with the electoral procedures or their implementation in a particular phase, the electoral management body conducting the process is required to act upon UN recommendations and make any necessary adjustments. The progress of the election is contingent upon the UN's endorsement of each phase.¹¹ Supervision thus indicates an intrusive UN role. Namibia (1989) and East-Timor (1999) are examples of such an operation.

6. CONTINUITY OF GOVERNMENTAL INSTITUTIONS

All the documents stress the need for the “continuity of governmental institutions”, although the formula did not make it into the operational text of the UN SC resolution, but only into its preamble. The Geneva communiqué mentioned more specifically the continuity of governmental institutions and qualified staff. The continuity formula is seen to provide a contrast to the dissolution of state institutions in Iraq in the aftermath of the US' invasion.

It can be expected that the Syrian government will invoke the formula as much as possible to resist change to existing state institutions, while the opposition may lean on other parts of the relevant texts. For example, the question could

come up on the sensitive point of who organises elections. Would it be the Ministry of Interior as has been the practice or a new, to-be-established election management body? The text gives no clues, but the UN SC recognises this sensitive point by mandating UN supervision of the process.

The Geneva communiqué in particular qualifies the continuity formula, indicating that all public services must be “preserved and *restored*” (emphasis added) and that they must perform according to human rights and professional standards under a “leadership that inspires public confidence under the control of the transitional governing body.” It is clear therefore that continuity is contingent on reforms and a conducive political context.

As above it will not be fruitful for negotiators to engage in long discussions on how to interpret these texts, but rather to explore how institutions could be reformed in a way that is mutually agreeable.

7. A NEW CONSTITUTION

While the Geneva communiqué spoke about a “review of the constitutional order”, meaning the existing constitution of Syria, the UN SC resolution mentions more straightforwardly the need to draft a new constitution. It mandates that the political process should “set a schedule and a process for drafting a new constitution”. This should be done “within a target of six months”. The political talks therefore have the dual task of establishing a transitional governing body and determining a constitution-making process, both within the tight framework of six months. The sequence and relationship of these two processes may then be one of the first discussion points of the negotiations.

The discussion on constitution-making is likely to move on to the question of who should draft a constitution (size of the constitution-drafting body, composition, structure, mandate, rules of procedure, etc.) and how a constitution should be adopted (majority requirements in the constitution-making body, public referendum) as well as timing questions. Often constitution-making bodies are formed through popular elections. The UN SC implies that this will not be the case as the only electoral events mentioned are those to take place after the 18-month period “pursuant to the new constitution”, in other words, the first elections would take place after a new constitution has been adopted. In view of the situation in Syria it makes sense to exclude the idea of electing a constitution-making body, as the lack of a conducive electoral environment could delay the process significantly.

¹¹ UN Policy Directive: UN Electoral Assistance, Supervision, Observation, Panels and Certification, 17 January 2013.

It is also possible that the negotiating parties will consider the question of super-constitutional provisions that should shape the transitional process until a constitution is adopted. Some of the principles of the UN SC resolution and the other documents could already be considered to be super-national principles (such as the non-sectarian character of the state or the need for inclusive governance).

The UN SC only provides little guidance on the content of the new constitution. The Geneva communiqué includes a few more elements. It mentions the need for the state to comply with international standards for human rights standards, and independent judiciary and the rule of law. It stresses that these should not only be enunciated but translated into workable mechanisms. Constitution-drafting will therefore have to go beyond broad principles, seeking to create - possibly detailed - constitutional guarantees for effective institutions, such as the judiciary, an independent human rights institution, a court of auditor, an effective parliament including opposition rights, etc.

The resolution provides no timeframe for the adoption of the constitution, except that the elections, to be held 18 months into the transition (by June 2017), should take place on the basis of the new constitution. This would leave precious little time for drafting and adopting the constitution well before elections.

The Geneva communiqué indicated that the result of the constitution-drafting would be subject to popular approval. Usually this would imply holding a referendum on a new constitution. However, the second Vienna communiqué indicated that elections would be held on the basis of a new constitution, implying that there would not be a specific electoral event on a new constitution. The UN SC resolution is not specific on this point. If no constitutional referendum was held, the first elections would be seen as an implicit public endorsement of the new constitution; in that case the question of voter turn-out would be particularly sensitive.

It is a concern that in this process, the Syrian people do not play a sufficient role as they may be excluded at the three stages of the constitutional process: They will not vote for a constitution-making body, there may not be a referendum on a new constitution and the texts are also silent on any form of public consultations during the process. There is a tangible risk then that whatever may be agreed will not be accepted by a population that had no involvement in the process. As protests around the world show, purely elite-driven processes are likely to be rejected. In Syria in particular some involvement of the population will be

critical, not the least to spread the idea that any peace deal is likely to include a lot of unpleasant compromises.

The Geneva communiqué mentioned a process of national dialogue before constitution-making but the timetable of the UN SC (and the realities in Syria) appear to override that idea.

The need for some form of public consultation should however be taken very seriously when designing the process of constitution-making. A referendum at the end of it should not be excluded even if the UN SC is not explicit about holding one. It is important to note that a referendum is technically the easiest electoral process as it raises no questions about candidature requirements and no electoral districts need to be drawn as the country is one district (except if electoral protections are included for specific groups or regions).

8. ELECTIONS

The UN SC “expresses its support for free and fair elections pursuant to a new constitution to be held within 18 months and administered under supervision of the United Nations, to the satisfaction of the governance and to the highest international standards of transparency and accountability, with all Syrians, including members of the diaspora, eligible to participate”.

The documents are not specific about the type of electoral events. At a minimum a parliament would be elected. Depending on the system of governance, a president may also be directly elected. The experience in the region suggests that the semi-presidential model may be popular with many negotiators, as it avoids the bad reputation of the dictatorial presidential systems of the past while avoiding parliamentary systems which are perceived as being unstable. It is thus more likely that national elections would be about parliament plus a president or a collective presidency.

The UN SC does not specifically mention national-level elections, but these are implicitly its focus, as the elected government is designed to succeed the transitional “inclusive governance” arrangements that concern all of Syria. That said, local elections will be an issue at some stage, as any new constitution is likely to include elected local councils. Regional elections could play a role, depending on the constitutional arrangements and the type of decentralisation they include. As mentioned above, a constitutional referendum may also become part of the electoral events.

The number of electoral events and their sequencing will be an issue for negotiations. From a technical standpoint referendums and presidential elections are often the easiest, as they are held with the whole territory as one electoral district. On the other hand it could pose a risk of quick concentration of power in a new President, or a collective presidency, if this was the first elected institution. Furthermore, it is conceivable that constitutional arrangements would require specific regional majorities for the president/presidency to ensure a degree of inclusiveness and increase chances for candidates who represent the nation across ethnic or religious boundaries. For example Indonesia and Nigeria have such requirements.¹² Such an approach would necessitate the drawing of electoral districts.

Serious challenges in the negotiation of electoral arrangements will be:

- The electoral systems to be used. The choice of system is politically highly sensitive as it will impact the power calculations of all sides. It is noteworthy that the Geneva communiqué indicates that the state should give space to established and newly-emerged actors to compete in elections. This provision would suggest that a highly majoritarian election or high thresholds for representation would not be appropriate.
- The drawing of electoral districts (which will need agreement on an electoral system first).
- The electoral rules: Who will adopt election laws to implement constitutional arrangements on elections, before a new parliament is in place? These rules will need to answer thorny questions, for example on candidacy requirements (will categories of candidates be barred?).
- Electoral management: i.e. will an independent electoral management body be created; what will be legal and practical guarantees for security, transparency and integrity?

Even if all these questions were resolved, the practical aspects of registering voters, allowing time for campaigns, recruiting and training election management staff, organisation of polling, counting, and election appeals will

be tremendous and are not likely to be implemented quickly. The 18-month timeframe thus looks highly ambitious.

The UN's SC resolution calls for elections according to the "highest international standards of transparency and accountability". International obligations for democratic elections are well-developed, at the UN level in particular in the International Covenant for Civil and Political Rights and authoritative interpretations by the UN's Human Rights Committee.¹³ Beyond these legal obligations it is clear that the UN SC resolution demands an approach to elections that favours in every step of their administration an approach conducive for transparency and clear allocation of tasks and responsibilities.

9. OVERVIEW OF TIMELINES AND ISSUES

See overview on the next page.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<http://www.democracy-reporting.org>

¹² In Indonesia, a Presidential/Vice-Presidential ticket needs to win an absolute majority country-wide and 20% of the vote in more than half of the provinces. In Nigeria a candidate need to win an absolute majority nation-wide but also on third of the vote in at least two-thirds of the provinces.

¹³ For an overview, see DRI/Carter Center's report on international law obligations on democratic governance and elections: <http://democracy-reporting.org/publications/thematic-papers/report-june-2012.html>

Syrian political process

This timeline represents the UN Security Council mandated transition in Syria (in blue) with comments by DRI (in brown) on selected issues that are likely to become contentious in the talks and may result in delays.

Discussions about governance and constitution

Controversy about 'governance' (2015) vs. transitional body exercising full executive power, which suggests change of current Presidential system; Controversy about the role of the current Syrian constitution

Establishment of a constitution-drafting body

Composition likely to be contested; question of overall constitutional principles will arise

Adoption of a new constitution

Unclear by whom and how

Drafting of election

Contentious issues: Electoral system, likely to depend on constitution; voter and candidate eligibility; electoral districting; composition of election management body; political party registration; adoption of the framework (by whom and how)

Voter registration

To include diaspora (14 NOV 2015 ISSG Statement)

Preparations for polling

To include out-of-country voting in Turkey, Jordan, Lebanon, Germany and others?

18 DEC 2015

JAN 2016

17 JUN 2016

17 JUN 2017

UN Resolution 2254 (2015)

Road Map for Peace Process in Syria, Timetable for Talks

Start of Geneva talks

UN-facilitated talks between Government and Opposition

Establishment of "credible, inclusive and non-sectarian governance"

Constitutional reform

Schedule and process set for drafting new constitution

Elections

Pursuant to the new constitution; administered under UN supervision; diaspora to participate (14 NOV 2015 ISSG Statement)