

GUIDANCE NOTE OF THE SECRETARY-GENERAL

United Nations Assistance to Constitution-making Processes


UNITED NATIONS NATIONS UNIES
GUIDANCE NOTE OF THE SECRETARY-GENERAL
United Nations Assistance to Constitution-making Processes

SUMMARY

This note provides the guiding principles and framework for UN engagement in constitution-making processes. For the United Nations, constitution-making is a broad concept that covers the process of drafting and substance of a new constitution, or reforms of an existing constitution. Both process and substance are critical for the success of constitution-making.

The note sets out a policy framework for UN assistance to constitution-making processes derived from lessons learned from constitution-making experiences and from UN engagement in these processes. It is informed by the Guidance Note of the Secretary-General on United Nations Approach to Rule of Law Assistance. It outlines the components of a constitution-making process and identifies the expertise the UN will require to provide effective assistance. The note emphasizes that UN assistance, when requested by national authorities, should be designed to contribute toward inclusive, participatory and transparent processes, and should be based on applicable international norms and standards, as well as best practices. UN assistance will need to include options and advice tailored to the specific country context and should recognize constitution-making as a sovereign national process, which, to be legitimate and successful, must be nationally owned and led. Attached to the note is an *example* of a timeline of events that illustrates the complexity and sequencing of participatory processes.

A. Guiding Principles

1. Seize the opportunity for peacebuilding
2. Encourage compliance with international norms and standards
3. Ensure national ownership
4. Support inclusivity, participation and transparency
5. Mobilize and coordinate a wide range of expertise
6. Promote adequate follow-up

B. Components of a Constitution-making Process

Constitution-making processes usually have many elements, ranging from a high-level negotiation between key constituencies leading to an agreement on how constitution-making is to proceed, to final adoption procedures. Any United Nations assistance will need to stem from national and transitional authorities' requests, and be tailored to the specific country context. Forms of assistance may include: political and strategic, legal and human rights, capacity building and institution development, and financial, logistic and administrative support.

C. Advance Planning

Certain elements of a constitution-making process require careful early advance planning to be carried out successfully in an inclusive, participatory and transparent fashion.

D. UN System Arrangements

The convening mechanism for constitutional assistance is the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit.

INTRODUCTION

Constitution-making processes are a central aspect of democratic transitions, peacebuilding and state-building. For the United Nations, constitution-making is a broad concept that covers the process of drafting and substance of a new constitution, or reforms of an existing constitution. Both process and substance are critical for the success of constitution-making. The design of a constitution and its process of development can play an important role in peaceful political transitions and post-conflict peace consolidation. It can also play a critical prevention role. Constitution-making presents moments of great opportunity to create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability.

The United Nations has been involved in a number of constitution-making processes. In recent years, these have included Cambodia, Timor-Leste, Afghanistan, and Iraq. The Organization is likely to be called upon in the future to assist other countries in their constitution-making processes. The UN is also requested to facilitate peace processes with possible constitutional implications and to assist national actors in addressing constitutional limitations so as to implement peace agreements. UN engagement in and assistance to constitution-making increasingly is a core component of the Organization's peacebuilding and state-building strategy, and requires a coherent policy framework and effective arrangements for drawing on UN institutional capacities to provide constitutional assistance.

UN experience has demonstrated the strategic importance of constitution-making in governance transitions. However, UN engagement in this field has usually been conceived anew. Often, the UN system has employed *ad hoc* approaches, leading to mixed results. A pressing need exists for the UN to develop strategic guidance on how to support national actors during the design and implementation of a constitution-making exercise.

A. GUIDING PRINCIPLES

The policy framework set out below is a living document, to be updated periodically.¹ It derives from lessons learned from previous UN constitutional assistance experiences. It provides that UN engagement in constitution-making should be guided by the following principles:

1. Seize the opportunity for peacebuilding

Constitution-making can provide a key opportunity for peacebuilding in conflict and post-conflict countries. Hence, UN assistance to constitution-making should be a core component of the peacebuilding and state-building strategy. UN support should be understood as assisting a comprehensive political transition, and requiring a coherent, multifaceted approach. Nonetheless, the appropriateness of UN engagement in constitution-making processes should be assessed on a case-by-case basis. In considering engagement with such efforts, the UN should fully take into account the national situation and political complexities, as well as the practical and symbolic ramifications of its involvement. Priority attention should be given to situations in which UN assistance will likely strengthen the rule of law and democratic institutions and practices. The assistance that may be required can range from technical legal expertise, to facilitation of negotiations among stakeholders on the structure of the process and on key constitutional principles. It can also involve assistance in setting up public education and consultation campaigns, the provision of administrative, financial and legal support to the constitution-drafting body, and support for procedures of final adoption.

¹ The present version of the guidance note is the product of such a review, undertaken in 2009 to revise the original note published in 2006.

2. Encourage compliance with international norms and standards

The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop. Accordingly, the UN should engage national actors in a dialogue over substantive issues, and explain the country's obligations under international law and the ways in which they could be met in the constitution. The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons. For example, the principle of equality between men and women should be embedded in constitutions, and states should be encouraged to consider special provisions on children recognizing their status as subjects of human rights.

3. Ensure national ownership

The UN should recognize that constitution-making is a sovereign national process, and that to be successful the process must be nationally owned and led. The UN should be particularly sensitive to the need to provide advice and options without causing national actors to fear that UN or other international assistance could lead to a foreign imposed constitution. Any assistance will need to stem from national and transitional authorities' requests. The options and advice provided must be carefully tailored to the local context, recognizing there is no "one size fits all" constitutional model or process, and that national ownership should include official actors, political parties, civil society and the general public.

4. Support inclusivity, participation and transparency

The UN should make every effort to support and promote inclusive, participatory and transparent constitution-making processes given the comparative experiences and the impact of inclusivity and meaningful participation on the legitimacy of new constitutions. A genuinely inclusive and participatory constitution-making process can be a transformational exercise. It can provide a means for the population to experience the basics of democratic governance and learn about relevant international principles and standards, thus raising expectations for future popular engagement and transparency in governance. Inclusive and participatory processes are more likely to engender consensus around a constitutional framework agreeable to all. The UN must encourage outreach to all groups in society, and support public education and consultation campaigns. Human rights defenders, associations of legal professionals, media and other civil society organizations, including those representing women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons, and labour and business should be given a voice in these processes. Consultations with children themselves should also be envisaged.

5. Mobilize and coordinate a wide range of expertise

Constitutional assistance requires mobilizing and coordinating a wide range of expertise, both within and outside the UN system to ensure access to international and comparative best practice. Best practice can contribute to expanding national actors' knowledge of options and help them explore solutions that are technically sound and likely conducive to long-term stability. While national authorities should play the main coordination role, the UN should encourage partnerships with national and international actors, regional organizations and other expert networks both to coordinate the offers of assistance by other actors and to allow national and transitional authorities to draw more effectively on the best expertise available.

6. Promote adequate follow-up

The UN should promote adequate follow-up once a constitution has been adopted. As the constitution is the framework for a state based on the rule of law, giving effect to it requires meaningful implementation and the protection of human rights. Follow-up can include outreach and education on the adopted constitution, development of subsidiary legislation, and the full range of capacity building and institutional development. Such activities often demand substantial financial and human resources. Where adequate implementation of new constitutional provisions and guarantees is lacking, it can undermine the achievements of the constitution-making process.

B. COMPONENTS OF A CONSTITUTION-MAKING PROCESS

The constitution-making process usually includes the following elements:

- Assessment of the need for a constitution-making process. In conflict and post-conflict situations, a constitution-making process may be provided for in a peace agreement or similar instrument.
- High-level negotiation between key constituencies leading to an agreement on how constitution-making is to proceed (establishing a structure and blueprint for the process, including who will be involved in preparing a draft, how they will be selected, how consensus will be built, how the constitution will be adopted, what the timeline will be, and how disputes will be resolved).
- Establishment of a representative body (e.g. constitutional commission) to lead public education and consultation campaigns, and to prepare a draft of the constitution.
- Establishment of a secretariat or other body to support the mandate of the constitutional bodies, in particular with the logistics involved in carrying out public education and consultation campaigns.
- A public information and civic education campaign on the constitution-making process, and the role and implications of the draft constitution.
- A public consultation process led by the drafting body to gather views and ensure input of the public on the draft constitution.
- Submission of the draft constitution to a representative forum (e.g. constituent assembly, constitutional convention, parliament) to debate it and make any amendments.
- Final adoption procedures (e.g., qualified majority in the representative forum, referendum).
- Post constitution-making education on the newly adopted constitution and development of a strategy for its implementation.

At various stages throughout this process national and transitional authorities may choose to engage international assistance, both in terms of the process and on substantive constitutional law. Each of these elements requires careful planning and expertise that the UN should be able to offer to the national actors as required.

The kind of assistance provided will usually not be limited to high-level political facilitation or technical legal expertise. Moreover, any assistance will need to stem from national and

transitional authorities' requests for assistance, and it must be tailored to the specific country context. Such assistance can only be effective if the UN is able to draw on a wide range of expertise in the political, governance, legal, human rights, public information and other relevant fields within and outside the UN system.

Assistance may include, but is not limited to, the following (depending on the country context):

Political and Strategic

- Support to and assistance in the negotiation of an initial agreement on the structure of the constitution-making process.
- Strategic assistance on the selection process for the drafting body and the representative forum (elections of various kinds or a representative nomination process).
- Political facilitation on key contentious issues (both substantive and procedural).

Legal and Human Rights

- Assistance in the drafting of rules of procedure for the drafting body and the representative forum.
- Provision of comparative legal analysis on constitutional designs, and options for addressing key constitutional areas.
- Provision of advice on the requirements of international human rights treaties and their respective treaty bodies, and other international obligations of the state (e.g., bills of rights, provisions on judicial independence, domestic effect of international treaties, rules on acquisition and loss of nationality, constitutionalization of national human rights institutions), including those applicable to new states.

Capacity Building and Institution Development

- Assistance in the establishment of the institutional structure of a secretariat and its institutional development.
- Assistance in equipping the drafters with technical and negotiation skills.
- Assistance in the creation and implementation of a public information and civic education campaign.
- Assistance in the creation and implementation of a public consultation process (including the use of focus groups, questionnaires, village meetings, and the synthesis of the information gathered) to be led by national actors.
- Assistance in the implementation of arrangements for ratification, including referendum on the draft constitution.

Other forms of assistance

- Financial, including development of budgets, and donor coordination.
- Logistic and administrative support.

C. ADVANCE PLANNING

Certain elements of a constitution-making process require careful early advance planning to be carried out successfully in an inclusive, participatory and transparent fashion. The UN should advise national actors of these requirements and assist them to begin the process in a timely

fashion, taking into account the country-specific circumstances of the constitution-making process. In particular, the creation and implementation of public education and consultation campaigns, and the securing of funds, human and material resources require advance planning (e.g., documentation needs to be prepared for a public information campaign, translated into local languages and distributed). The process should then be followed by a structured (and time intensive) national dialogue or consultation process that feeds back the views of the people to the decision makers involved in the drafting and debating of the constitution. Attached to this guidance note is an *example* of a constitution-making process timeline and sequencing. This is merely illustrative, and serves to underscore the complexity of the process and the need for adequate advance planning.

D. UN SYSTEM ARRANGEMENTS

Constitution-making requires an address within the UN system. Constitutional assistance, however, does not require the creation of a new organizational structure or a new full-fledged capacity within one or more departments or agencies. Rather, constitutional assistance requires a combination of expertise that resides across various departments and agencies, as well as outside the UN system. In addition, the frequency of requests for constitutional assistance is relatively limited. Constitutional assistance demands a convening mechanism to draw from the various parts of the UN system whenever needed, as well as from external actors. This requires a collaborative effort, and the mobilization and coordination of the requisite expertise, including for the following fields: political facilitation (Department of Political Affairs/Department of Peacekeeping Operations); procedural and substantive advice in peace processes, and electoral systems and processes (DPA); governance (United Nations Development Programme); legal (Office of Legal Affairs); human rights (Office of the High Commissioner for Human Rights); women, children, and vulnerable and marginalized groups (United Nations Children's Fund/United Nations Development Fund for Women/OHCHR); refugees, displaced and stateless persons as well as the prevention and reduction of statelessness (United Nations High Commissioner for Refugees); and public information (Department of Public Information). The convening mechanism should lead a consultative process to further develop UN policy on constitutional assistance.

This convening mechanism is the Rule of Law Coordination and Resource Group, chaired by the Deputy Secretary-General and supported by the Rule of Law Unit. The Group, supported by the Unit serves as the focal point for system-wide attention on constitutional assistance to ensure policy coherence and development, document UN experiences to build institutional capacity and record lessons learned, and mobilize and coordinate the efforts among the various departments and agencies providing constitutional assistance when requested by national authorities and/or mandated by the Security Council and/or requested by UN departments, agencies, funds or programmes. It will also draw on external actors (e.g., outside specialists, academics, non-governmental organizations, expert networks), as well as develop and strengthen these partnerships (including by maintaining rosters of such external actors and experts).

United Nations departments, agencies, funds and programmes as well as Special Representatives of the Secretary-General, Executive Representatives of the Secretary-General and Resident Coordinators are advised to inform the Chair of the Rule of Law Coordination and Resource Group of new requests for constitutional assistance in order to make use of this convening mechanism to respond effectively to requests from national and transitional authorities.

An Example Constitution-Making Process Sequencing & Timeline

