

Syria: Monday Vote on Draft Resolution on Cross-Border and Cross-Line Humanitarian Access

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What's In Blue

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On Friday (11 July), the penholders on the humanitarian track on Syria—Australia, Jordan and Luxembourg—put a draft resolution on cross-border and cross-line humanitarian access in Syria in blue for a vote at 12 noon on Monday (14 July). The draft was finalised following five weeks of intense negotiations between the penholders with the P5, followed by a further two rounds on 7 and 10 July with the full Council, and a final meeting on 11 July to work out remaining issues. Several amendments made to the text last Friday may have improved chances of Russian support for the draft resolution. It seems China has been more supportive and constructive during these negotiations than it was in the lead-up to the four draft resolutions on Syria vetoed by both China and Russia. While Council members are unwilling to speculate how China and Russia might vote, a number appear cautiously optimistic.

The draft resolution notes the Secretary-General's view that arbitrarily withholding consent for the opening of all relevant border crossings for humanitarian aid is a violation of international humanitarian law and an act of non-compliance with resolution 2139 that demanded unhindered humanitarian access. The draft authorises the UN and its implementing partners to deliver humanitarian assistance across borders and conflict lines in the absence of state consent and in accordance with UN needs assessments rather than taking directives from Damascus. It also establishes a monitoring mechanism to ensure the humanitarian nature of such aid convoys. Cross-border and cross-line access and the monitoring mechanism have been authorised for 180 days, after which the authorisation and mechanism will be reviewed. It also reiterates the need for a political solution and implementation of the 30 June 2012 Geneva Communiqué and welcomes the appointment of Staffan de Mistura as the new Special Envoy for Syria. Finally, it affirms the Council will take further measures in the case of non-compliance.

The Humanitarian Situation

The humanitarian situation in Syria is devastating, with a death toll estimated at 162,000. There are 2.9 million refugees and 6.4 million internally displaced persons. When Under-Secretary-General for Humanitarian Affairs Valerie Amos last briefed the Council members on 26 June, she presented a report that clearly demonstrated that the regime had used the distribution of humanitarian aid as a tactic of war. She reported that there continues to be no progress in implementing any of the key demands in resolution 2139, such as authorising cross-border aid operations, allowing access to besieged or hard-to-reach areas, observing medical neutrality, ceasing aerial bombardments or easing administrative hurdles. In fact, since the adoption of resolution 2139 on 22 February 2014, those in need have increased from 9.3 million to 10.8 million and those in hard-to-

reach areas have increased from 3.5 million to 4.7 million. Most alarmingly, while needs have increased, access continues to drop significantly due to even more arduous clearance and transport procedures put in place by the Syrian government since April.

Negotiations on the Draft Resolution

On 27 May, following discussions with the P3, the humanitarian leads shared with China and Russia a draft resolution that, under Chapter VII, permitted the UN to carry out cross-border and cross-line aid operations in the absence of state consent and included the threat to impose measures under Article 41, i.e. sanctions, in the case of non-compliance. China and Russia, clearly uncomfortable with the prospect of casting a fifth veto on Syria, genuinely engaged in negotiations while firmly flagging their objection to a Chapter VII resolution challenging state sovereignty. Early on, the explicit reference to Chapter VII was dropped from the draft, reviving the "Chapter VI versus Chapter VII" debate that was prominent in the 27 September 2013 adoption of resolution 2118 on the destruction of Syria's chemical weapons arsenal.

While a Chapter VI resolution can be binding, pursuant to Article 25 of the UN Charter and how the intent of the Council is expressed in the operative wording of the decision, only Chapter VII resolutions are enforceable. (Chapter VI of the UN Charter is on the peaceful settlement of disputes while Chapter VII addresses threats or breaches to the peace and acts of aggression. Only a Chapter VII resolution can specifically authorise force.) The draft resolution that is currently in blue underscores that member states are obligated under Article 25 to accept and carry out Council decisions but does not specify what UN Charter chapter it is under.

Also due to objections from Russia, supported by China, the reference to measures under Article 41 were dropped and replaced with a decision to take measures under the Charter in the case of non-compliance. But even this more general language was unacceptable, with Russia insisting that they would only support the agreed language in resolution 2139 on humanitarian access, i.e. expressing the Council's intent to take further steps in the case of non-compliance. A compromise appears to have been reached on 11 July: "decides" was replaced with "affirms" and reference to the UN Charter was removed while retaining "take measures" instead of "further steps". The penultimate paragraph therefore affirms the Council will take further measures in the event of non-compliance with this resolution or resolution 2139 by any Syrian party.

Early in the negotiations, Russia also insisted the text include references to localised ceasefires, like that reached in Homs on 2 May, as a way towards less violence and an eventual political settlement. Most Council members argued that they could not agree to describing ceasefires that had been reached after two years of government bombardment and siege tactics to starve the area into submission as a positive example of engagement between the government and opposition. However, a compromise was struck and the draft in blue notes that agreed ceasefires, truces, days of tranquility and humanitarian pauses consistent with humanitarian principles and international humanitarian law could facilitate aid delivery. It also recalls that starvation of civilians as a method of combat is prohibited by international humanitarian law.

Taking up the suggestion in the 22 May report on humanitarian access (S/2014/365) that the UN stood ready to put in place a mechanism which ensured aid operations at border posts outside government control are conducted in a transparent way, Russia requested it be included in the draft text. This led to intense discussions between the P5 and the humanitarian leads in June, in consultation with the Office for the Coordination of Humanitarian Affairs (OCHA), on the modalities of such a monitoring mechanism while, in tandem, Russia sought buy-in from Syria. Syria agreed in principle to the mechanism at four UN-identified priority border crossings outside government control. However, Syria also insisted that such aid would need to be redistributed under the government's authority. This became a serious obstacle in the negotiations as it undermined the fundamental intent of enabling aid to reach those in need via the most direct route. In addition, the humanitarian leads and the P3 were aware from several reports on humanitarian access that the regime used the distribution of humanitarian aid as a tactic of war. This made it difficult for them to agree to a text that could potentially bolster this tool in Syria's war strategy. By 27 June, the humanitarian leads and the P3 informed Russia that their flexibility on the issue of state consent was exhausted as it violated their guiding principle of devising a formula in New York that would have a positive impact on the ground in Syria.

Then, on 2 July, a possible solution was put forward by Australia, Jordan and Luxembourg at a meeting with the P5. The suggestion was that the UN would notify the Syrian authorities of the contents of the humanitarian convoys, creating a notification system that would offer transparency with no corresponding requirement for the regime's approval. The draft text was circulated to all 15 members of the Council on 3 July. Council members in the core negotiating group have noticed a shift in Russia's position on cross-border humanitarian access during the drawn out negotiations. At the outset Russia insisted all of Syria's conditions be met although this was incompatible with the spirit and intent of resolution 2139 and the current draft resolution. By 2 July, it finally signaled its comfort with the UN notification system. While Council members characterised the negotiations among the entire membership as constructive, a few sticking points remained.

Russia firmly opposed determining the situation in Syria as a threat to international peace and security. Such opposition is related to its red-line on any Chapter VII resolution on Syria. China supported this position. Article 39 under Chapter VII gives the Council the authority to determine if there is a threat to the peace and make recommendations to maintain or restore international peace and security. The inclusion of Article 39 language on the threat to international peace and security appears to have been seen as an indirect reference to Chapter VII by China and Russia. Therefore—although a significant majority of Council members agreed with the penholders and the P3 that massive refugee flows, a violent civil war, the growing strength of the Islamic State of Iraq and al-Sham in Syria and across the border into Iraq and other numerous cross-border incidents constituted a clear threat to international peace and security—the final text in blue only determines the situation as a threat to “peace and security in the region.” However, this amendment does not undermine the core aim of the draft to improve humanitarian access.

Russia also questioned whether the UN notification mechanism would be able to adequately ensure the humanitarian nature of aid deliveries—insinuating neighbouring countries might use the convoys to ship arms across the border. Jordan, as both a Council member and a neighbouring country, argued for greater trust among Council members that the UN, its implementing partners and member states would not misuse authorisation for cross-border humanitarian aid. However, to address Russia's concerns the final text includes as part of the notification system that the UN should inform Syrian authorities if customs authorities of the relevant neighbouring countries opened aid consignments.

OCHA has been closely consulted throughout the negotiations. While supportive of the initiative, it warned that expectations need to be tempered as the adoption of the draft resolution will not enable the step-change in access that Amos has long advocated as it will not alter the challenging security and operational environment. However, OCHA has estimated that authorisation for cross-border access could allow the UN to potentially reach between approximately 1.3 and 2.5 million more people in need.

In terms of the security of humanitarian workers, Syria's letter to the Council on 18 June stating that the delivery of aid without consent constitutes an attack on Syria (S/2014/426) is worrying. As a result the drafters included language on the need for all Syrian parties to the conflict to ensure the safety and security of personnel engaged in humanitarian relief activities. However, in the final negotiations on 11 July, language was removed stressing that primary responsibility in this regard lies with the Syrian authorities. But reference that attacks on humanitarian workers may amount to war crimes was retained.

The draft also stresses the need to end impunity and reaffirms that those who have committed or are responsible for violations of international humanitarian law and violations and abuses of human rights must be brought to justice. Yet in practice, action on the accountability track in the Council remains blocked following the 22 May veto by China and Russia of the referral of Syria to the International Criminal Court. To keep such issues at the forefront of Council thinking, there will be an Arria-formula meeting this month with the Human Rights Council's Commission of Inquiry on Syria briefing Council members on testimonies it has collected on war crimes and crimes against humanity that have taken place in Syria.

If adopted, the reporting cycle on implementation of this resolution will fall within the existing monthly reporting on resolution 2139 and Amos will next brief on 30 July. Finally, on the political track, with the 30 June 2012 Geneva Communiqué largely superseded by events on the ground—including the 3 June re-election of President Bashar al-Assad—there has been little activity. Council members, however, will be interested in hearing De Mistura's plans on how to revive the political process as Special Envoy for Syria.

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