

Under international law, can the Security Council issue resolutions obligating States to resettle displaced persons?

Why resettlement?

One of UNHCR's core mandates is permanent (durable) solutions. There are three durable solutions: voluntary repatriation, local integration and resettlement (to third countries).

Voluntary repatriation has a basis in international law, nonetheless is not an option for victims of ongoing conflicts. Local integration is not explicitly based in international law, as "it requires (i) agreement by the host country concerned; and (ii) an enabling environment". Currently, the mass influx of people displaced by the ongoing Syrian conflict into neighbouring countries is destabilising the entire region, making local integration not viable and contributing to the protracted situation of over 45% of refugees.

Resettlement, having no basis in international law, being "essentially based on the goodwill of states", becomes the most appropriate durable solution.

Limitations of the Refugee Convention

A third of the world's refugees is hosted by states who are not parties to the Refugee Convention. The Convention and its definition of refugee is limited, even when complemented by relevant provisions of IHRL and IHL.

Few people qualify for resettlement. A person must (1) be determined to be a refugee and (2) resettlement – based on seven categories – must be the "most appropriate solution". In 2014, 950,000 people were identified for resettlement, but only 105,200 refugees were resettled to only the 26 of the 142 party states to the Refugee Convention offering a resettlement program.

(Lack of) political will

There is a lack of political will to "receive large amounts of refugees", even from resettlement programs, based on security, fraud and integration concerns. An over-generous refugee program is believed to create a "pull factor" for asylum seekers, as well as economic and social migrants. Due to the limitations of the Refugee Convention and political will of states to resettle refugees, other avenues of resettlement need exploring.

UN Security Council (UNSC) Powers

One avenue is whether the UNSC resolutions can be used to obligate states to resettle displaced persons. The UN Charter permits the UNSC, within the limits the purposes and principles of the UN, to issue binding resolutions.

The UNSC is not mentioned in the Refugee Convention or the UNHCR Statute. The UN Charter is similarly silent on IHL, IHRL or IRL. However, the UNSC, through Article 39 determinations, has incorporated areas of IRL under its peace and security mandate. The first being UNSC Resolution on Iraq, linking "massive flow of refugees" with a threat to international peace and security.

This link is part of UNSC's increasing role in the protection of civilians in armed conflict and useful for furthering the durable solution of resettlement through Article 41 of the UN Charter.

Since the Iraqi invasion of Kuwait, the expanded use of Article 41 (eg, imposing economic sanctions) has faced some criticism (see eg, ICTY's justification of its legitimate establishment). Of note, Article 41 measures are usually not directed against unoffending member states, and are difficult to enforce in general.

Nonetheless, Article 41 was used to issue, arguably, legislative resolutions of general applicability, establishing a terrorism-related sanctions committee that places and removes individuals to/from a sanctions list and obligates states to enforce travel bans and asset freezes. Article 41 is also used to create "effective implementation mechanisms", which can apply to resettlement, not to create obligations but to provide the means of implementing resettlement obligations once they are created.

"the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.' It is a negative definition. ... nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be." *Tadić*, para 35

MINUSMA mandate: "In support of the Malian authorities, to contribute to the creation of a secure environment for ... the voluntary, safe and dignified return or local integration or resettlement of internally displaced persons and refugees in close coordination with humanitarian actors" UNSC, Resolution 2227 (2015), para 14.(f)(i) UNSC, Resolution 2164 (2014), para 13(c)(vii)

MONUSCO mandate: "Support the Government's efforts, along with international partners and neighbouring countries, to create an environment conducive to the voluntary, safe and dignified return of internally displaced persons and refugees, or voluntary local integration or resettlement" UNSC, Resolution 1925 (2010), para 12(g)

UNAMIR mandate: "To monitor the process of repatriation of Rwandese refugees and resettlement of displaced persons to verify that it is carried out in a safe and orderly manner" UNSC, Resolution 872 (1993), para 3(f)

For example "Calls upon the countries of the region to continue in their efforts to create conducive conditions for voluntary repatriation, safe and durable integration of refugees and former combatants in their respective countries of origin. In this regard, calls for commensurate international support for refugees and reintegration and reinsertion of returnees, internally displaced persons and former combatants" UNSC, Resolution 1653 (2006), para 15

"encouraging ... the Governments of Timor-Leste and Indonesia ... to facilitate the resettlement of East Timorese remaining in West Timor" UNSC, Resolution 1480 (2003), Preamble; UNSC, Resolution 1410 (2002), para 12; UNSC, Resolution 1319 (2000), para 4; UNSC, Resolution 1319 (2000), para 11

"Requests all Ivorian parties to cooperate with MINUCI ... to support efforts to find safe and durable solutions for refugees and displaced persons" UNSC, Resolution 1479 (2003), para 10

UNSC expressed support for Haiti "Government's resettlement strategy for displaced persons" UNSC, Resolution 2070 (2012), para 5 UNSC, Resolution 2012 (2011), para 4 UNSC, Resolution 1944 (2010), Preamble, paras. 3, 7 and 22

Connecting IDPs with their vulnerability to natural disasters "Acknowledging that Haiti continues to face significant humanitarian challenges, with more than 600,000 internally displaced persons still dependent on assistance for their basic survival, an ongoing cholera epidemic, and extreme vulnerability to natural disasters" UNSC, Resolution 2012 (2011), Preamble

Finally, while legally possible, it is unlikely that UNSC resolutions obligating member states to resettle displaced persons would be issued, due to the positive obligations entailed and the lack of political will or unanimity of States. However, the non-exhaustive nature of Article 41 means that it can be used in ways, as yet unconsidered. It is therefore possible that Article 41 can be relied on to obligate (or at minimum exhort) states to resettle displaced persons.

Analysis of UNSC Resolutions

Since 1993, 444 resolutions mentioned "refugee" or "displaced". The 55 that mentioned resettlement and/or durable solutions were analysed.

Binding terms "decides" and "demands"

Two types of resolutions used binding language. The first, "demands" that "all parties to the conflict" create conditions conducive for durable solutions, without demanding the solutions themselves. Nor is resettlement always clearly included as a durable solution, being omitted in some resolutions.

The second "decides" the mandates of peacekeeping missions (eg, Mali [MINUSMA], Democratic Republic of the Congo [MONUSCO], Central African Republic [MINUSCA] and Rwanda [UNAMIR]). However, the language is only binding to "support", "improve coordination" and "monitor" local authorities/government, humanitarian actors/international partners, and the displaced persons themselves – suggesting only indirect participation in durable solutions by other member states.

The term "resettlement"

In UNSC resolutions, resettlement has four meanings. First, "Disarmament, Demobilization, Repatriation, Resettlement, and Reintegration (DDRDR)" of armed groups. Importantly, the processes of repatriation, resettlement and reintegration of ex-combatants and the displaced are different and should not be intermixed. Similarly, while often addressing several issues in one provision, UNSC should not create "unwarranted links" between combatants and the civilian displaced population.

Second, "resettlement" in another part of the country, as per the *Guiding Principles on Internal Displacement* and Secretary-General's Policy Committee Decision on Durable Solutions. Often, no distinction is made between resettlement as "relocation to a third country" or "settlement elsewhere" of IDPs within a country (ie, local resettlement). The meaning must be extracted from context. Local resettlement is deduced when only IDPs (not refugees) are mentioned, or the provision targets the country of origin (or, sometimes, its neighbours), eg Sudan and South Sudan, Côte d'Ivoire, East Timor and Mozambique.

Third, local resettlement of natural disaster IDPs, primarily in post the 2010 Haiti earthquake resolutions.

Finally, resettlement to a third country is contemplated in only three resolutions. Primarily, in preambles to two resolutions on Syria. Using the exhortatory (not binding) "urging", the provisions, unusually, address "all Member States" and the principle of burden-sharing. Two resolutions on Syria mention refugees in an operative part, but not in connection to resettlement.

Secondly, the operative part of the first thematic resolution on children and armed conflict. No linguistic markers identify whether local or third country resettlement is contemplated (except "by UNHCR"). The provision is absent in future resolutions on the theme, which merely reaffirm Resolution 1261(1999).

Presumption of local resettlement

Based on the above analysis, when contents of provisions are unclear, local resettlement of IDPs can be presumed. Through many mentions in UNSC resolutions, including in binding provisions and mandates of two recent peacekeeping missions, local resettlement could be argued to be emerging *opinio juris*.

For example: "Stresses the importance of achieving dignified and durable solutions for refugees and internally displaced persons, and of ensuring their full participation in the planning and management of these solutions, demands that all parties to the conflict in Darfur create the conditions conducive to allowing the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons or their local integration" UNSC Resolution 1935 (2010), para 15; UNSC Resolution 2003 (2011), para 18; UNSC Resolution 2063 (2012), para 18; UNSC Resolution 2113 (2013), para 21; UNSC Resolution 2228 (2015), para 23; UNSC Resolution 2173 (2014), para 23

MINUSCA mandate: "improve coordination with humanitarian actors, to facilitate the creation of a secure environment for ... the voluntary safe, dignified and sustainable return or local integration or resettlement of internally displaced persons or refugees in close coordination with humanitarian actors" UNSC, Resolution 2217 (2015), para 32(c)

"stresses in particular the following: (a) Voluntary return and resettlement in secure and sustainable conditions of a critical mass of internally displaced persons" UNSC, Resolution 1861 (2009), para 25(a)

"the willingness of local actors to facilitate the safe, voluntary and sustainable return, reintegration or resettlement of internally displaced persons and refugees" UNSC, Resolution 2228 (2015), Annex 1, Benchmark 2

"urges all Mozambican parties to continue ... to cooperate with ... (UNHCR) and other humanitarian agencies in pursuing ongoing programmes to assist the remaining displaced persons and refugees to be resettled" UNSC, Resolution 916 (1994), para 18

"Noting with concern that the international response to the Syrian and regional crisis continues to fall short of meeting the needs as assessed by host governments and the United Nations, therefore urging once again all Member States, based on burden-sharing principles, to support the United Nations and the countries of the region, including by adopting medium and long-term responses to alleviate the impact on communities, providing increased, flexible and predictable funding as well as increasing resettlement efforts" UNSC, Resolution 2258 (2015), Preamble

Unfortunately, this cannot yet be claimed of resettlement to a third country. Nonetheless, UNSC resolutions on Syria are evidence that urging (if not yet obligating) states to resettle refugees to a third country is not only viable legally, but also in practice.

Proposed implementation

Two ideas of implementation are proposed as discussion starting points to overcome a lack of political will.

Standing arrangements of international cooperation

UNSC resolutions could be incorporated in an already proposed system of standing arrangements of international cooperation.

According to the Expert Meeting on International Cooperation to Share Burdens and Responsibilities, temporary protection arrangements should be only one of many measures "to address ... larger-scale situations". In 2014 the UNHCR Temporary Protection Guidelines, called "for 'standing arrangements' to be agreed on a multilateral/regional basis and to be activated in response to particular situations or events when they arise."

Such arrangements are within the capability of UNSC, either as a peacekeeping operation or under its Article 41 powers. It can also issue activating (and de-activating) – triggering – resolutions.

Peacekeeping

Local resettlement is increasingly part of peacekeeping operation protection of civilians mandates. However, peacekeeping operations are based on state and institutional practice of contract-like relationship of "consent and cooperation" between host states, UN and contributing member states.

The adaptability of peacekeeping operations was recently seen in the first-ever UN emergency health UNMEER mission to fight the spread of Ebola. UNMEER was created by the Secretary-General, following a determination that "the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security" and unanimously adopted UNGA resolution, requesting "the Secretary-General to take such measures as may be necessary" to establish UNMEER, headed by the WHO.

This sets an ideal template for international protection for mass influx situations, eg, Syrian refugees. The humanitarian situation (including refugee flows) has already been declared a threat to peace and security in the region. An emergency response mission could be triggered by combined UNSC (and UNGA) resolutions at the request of and in cooperation with the neighbour states most affected by the mass displacement, particularly, Lebanon, Turkey and Jordan.

The emergency response mission would be led by UNHCR, working in collaboration with peacekeeping operations in the area, with one of the mission's objectives being the "scaling up the response on the resettlement to third countries" to ease the burden borne by the countries in the region.

Budgetary incentives

Resettlement as part of peacekeeping operations can be incentivised through the collection of moneys. At the end of 2014, USD 653 million was owed, with only 31 member states having paid their allocated peacekeeping contribution. Payments could be decreased or worked out according to a more favourable formula should a Member State choose to contribute to the mission by resettling displaced persons.

Conclusion

UNSC can and has issued exhortatory resolutions on resettlement (to a third country). Only local resettlement resolutions have been obligatory, establishing *opinio juris*. Practically, UNSC resolutions could be triggers in long-standing burden-sharing resettlement arrangements. Alternatively, third country resettlement can be added to peacekeeping resolutions or an UNMEER-style resettlement mission could be established. These measures would be incentivised through mitigating accrued or future peacekeeping mission debt.

"[w]ithin the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law" Kosovo Advisory Opinion, para 85

A resolution is binding when it includes "a determination of the existence of a threat to international peace, ... in accordance with article 39; the chapeau 'acting under Chapter VII,' and the verb 'decides' in the resolution's relevant operative paras." UNSC Action under Chapter VII, 4

Notion of positive peace introduced in 1992: "the absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security" Note by the President of the Security Council, S/23500 (1992), 31 January 1992, 3

"effective implementation mechanisms" manage sanctions through "capacity-building, broader market regulation, the development of best practices, and the establishment of subsidiary bodies to identify sanctions violators and tackle structural problems." Kirsch, 1324 For example, establishing a "monitoring and reporting mechanism on children in armed conflict" Alborn 2014, 37 referring to UNSC, Resolution 1612 (2005)