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EDITORIAL

Welcome to the JULY 2020 issue of ANZSIL Perspective.

We are enjoying the continuing development of ANZSIL *Perspective* now it is openly available online. It enables us to interact with the wider international community. We are very pleased to have contributors this month from the ANZSIL seminar series in July and look forward to more contributions as we move towards our revised conference arrangements.

This month I am delighted to present 3 perspectives:

1. Legal Options for Cross-Border Humanitarian Assistance in Syria, with or without the Security Council by Rebecca Barber.
2. Suspending the Australia-Hong Kong Extradition Treaty After the National Security Law by Holly Cullen.
3. Slow Burn to Success: WTO Reaffirms Australia's Tobacco Plain Packaging Measure by Andrea Gronke.

These three articles have a common thread which is that international law, like most other bodies of law, is of continuous application and there for the long haul, as well as covering matters of a short term, or even frenetic nature. In this respect, plain packaging has been a decade long process, the humanitarian crisis in Syria is seemingly intractable and we have watched the issues in Hong Kong simmer and erupt.

A reminder that, in addition to regular contributions and rapid turnaround pieces, as an editorial team we encourage contributions from early career researchers and collaboration. Our new venture on book reviews includes the possibility to encourage a dialogue around a book as a theme, reviewing the issues rather than just the content. As ANZSIL Perspective continues to grow, we hope that it can become a platform for intellectual debate and discussion on important contemporary international law issues. This can involve text books or those books which may frame international legal issues. Enquiries about reviews, or expressions of interest in reviewing books, specifying areas of expertise, should be addressed to our book reviews editor, Holly Cullen, at holly.cullen@uwa.edu.au.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 11 August 2020. The current call for *Perspectives* and submission details, and newly revised guidelines, are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

Legal Options for Cross-Border Humanitarian Assistance in Syria, with or without the Security Council

Rebecca Barber

Over a period of five days earlier this month, the UN Security Council conducted nine rounds of voting on five draft resolutions, before finally reaching a compromise on the issue of whether to authorise cross-border humanitarian assistance to millions of desperately vulnerable people in northwest Syria. The compromise – Security Council Resolution 2533 – was to allow aid to pass through just one of the two Turkish border crossings that previously had been authorised by the Council. It effectively cuts off humanitarian assistance to 1.3 million people in the Aleppo governorate – an outcome that humanitarian agencies had spent weeks of intensive lobbying trying to avoid. The Council was, quite literally, haggling over people's lives.

The Security Council's authorisation for cross-border humanitarian assistance in Syria has been in place since 2014, when the Council passed Resolution 2165, authorising UN agencies and their partners to provide assistance via four designated border crossings: two from Turkey, one from Iraq and one from Jordan. The Council's authorisation is seen as necessary, because the Syrian Government so heavily restricts access to non-government areas from the Syrian capital of Damascus. For five years the authorisation was renewed annually, benefiting more than four million Syrians. Then in January this year, the Council was forced by Russia – which regards cross-border assistance as a violation of Syria's sovereignty – to drop the Iraqi and Jordanian crossings. The result was Resolution 2504, which re-authorised only the two border crossings allowing access from Turkey into northwest Syria, for just six months. The closure of the Iraqi crossing effectively cut off UN-supported humanitarian assistance for more than a million Syrians in the northeast.

Now, with the additional closure of one of the Turkish border crossings, the cross-border assistance that previously supplied four million people across the whole of non-government controlled northern Syria must be channelled through just one border crossing.

UN humanitarian agencies have formed the view that without Security Council authorisation, it would be illegal for UN agencies to cross borders to provide humanitarian assistance in Syria without Syrian Government consent. NGOs may operate without Security Council authorisation, but practically, this is difficult without the UN. The UN provides funding to NGOs, including $300 million annually through the Syria cross-border fund. The UN provides logistics support, vaccinations, COVID-19 testing kits, and personal protective equipment. In northwest Syria alone the UN World Food Program delivers food to 1.3 million people. NGOs say they would 'struggle to even begin to fill the enormous void left by the UN'.

This all begs a critical question: are UN humanitarian agencies correct to conclude that humanitarian assistance provided without the consent of the Syrian Government, even in areas outside government control, is illegal? If not, it's a misinterpretation with enormous humanitarian consequences. Such was the view expressed by 35 prominent international lawyers in an open letter in 2014, which argued that Syria's humanitarian suffering was being 'compounded by … an overly cautious interpretation of international humanitarian law'. That letter was written prior to the Council's initial authorisation of

cross-border assistance, but is equally valid today, with two of the previously authorised border crossings now gone.

Various rules of international law play into the question of whether humanitarian assistance provided without the consent of the host state is illegal, and it is beyond the scope of this article to examine all of them. Just two issues will be highlighted here.

The first is the question of exactly what rule of international law UN agencies would breach if they were to provide humanitarian assistance in northern Syria without Syrian Government consent. Customary international humanitarian law (IHL), as interpreted by the ICRC, says that parties to conflicts must allow humanitarian relief for civilians in need, 'subject to their right of control'. It is generally agreed that consent from the host state is required, but cannot be arbitrarily withheld. IHL does not explicitly say that if consent is arbitrarily withheld, assistance that is exclusively humanitarian in nature, provided without that consent, is illegal.

The general view holds that humanitarian assistance provided without the consent of the host state violates the international law principle of non-intervention in the domestic affairs of a state (see here, for example). But this is founded on the assumption that responsibility for ensuring a population's lifesaving needs are met – or, to use the language of international human rights law, ensuring 'the satisfaction of … minimum essential levels' of a population's basic rights – falls within a state's *domaine réservé*. International law is not at all clear that this is the case; indeed, it suggests the opposite. In 1970, the International Court of Justice (ICJ) said that the 'rules concerning the basic rights of the human person' are 'by their very nature … the concern of all states'. Similarly in 1989, the International Law Institute affirmed that a state which breaches its human rights obligations 'cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction'. Many scholars agree that a state's *domaine réservé* does not encompass an absolute freedom to violate human rights (see here and here, for example).

Accepting all this, why is there persistent adherence to the view that providing humanitarian assistance for the sole purpose of allowing people to enjoy their basic rights breaches the principle of non-intervention? Such a view contrasts with the statement of the ICJ in *Nicaragua* in 1986, that 'the provision of strictly humanitarian aid to persons … in another country … cannot be regarded as unlawful intervention'. Admittedly, the ICJ was talking about the provision of assistance to the Nicaraguan *contras* at the border, and some scholars have interpreted the ICJ's statement to be limited to this scenario. This, however, seems an unnecessarily restrictive interpretation, when so much could be gained from a more expansive one.

The second issue is that international law recognises a defence of necessity – affirmed by the ICJ as 'a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.' The International Law Commission (ILC), in its Draft Articles on State Responsibility as well as Draft Articles on the Responsibility of International Organisations, has said that necessity may preclude the wrongfulness of an otherwise unlawful act, if that act is the only way of safeguarding an essential interest threatened by a grave and imminent peril. The ILC's commentaries list 'ensuring the safety of a civilian population' as one of the essential interests in relation to which the plea of necessity has been invoked. In 2014, the Dutch Advisory Committee on Public International Law said that 'necessity could perhaps be successfully invoked if the civilian population faced a serious and imminent threat, for example starvation or a devastating epidemic'.

There are few unsettled questions of international law that have such immediate bearing on millions of people's lives. If UN humanitarian agencies were to interpret the law as allowing cross-border humanitarian assistance without Security Council authorisation, they would still need to consider a host of practical difficulties related to operating without government consent. However, in light of the fact that the assistance in question is provided from neighboring countries with the cooperation of local authorities, such difficulties are less insurmountable than they might be in other contexts. The purposes of the UN include 'achiev[ing] international co-operation in solving international problems of an…humanitarian character'. This purpose would not appear to be served by restrictively interpreting the law in a manner that preferences state sovereignty above the alleviation of humanitarian suffering.

About the Author: Rebecca Barber is a PhD scholar with the TC Beirne School of Law and the Asia Pacific Centre for the Responsibility to Protect, University of Queensland. Prior to undertaking her PhD, she had a career with international humanitarian NGOs, managing human rights and legal assistance programs, as well as multi-sector humanitarian response programs, in a series of humanitarian crisis in South Asia, Southeast Asia and Africa. She has also worked as a humanitarian advocacy advisor with Oxfam and Save the Children, and as a lecturer with Deakin University's Centre for Humanitarian Leadership.

Suspending the Australia-Hong Kong Extradition Treaty After the National Security Law

Holly Cullen

States have begun to respond to China's adoption of a new national security law for Hong Kong, bypassing the Hong Kong legislature. Key features of the new law include life sentences for crimes of secession and subversion of state power, and more active state oversight of political activity linked with foreign organisations. Immediately after the law's adoption, the Hong Kong government announced the formation of special police and prosecution units to enforce the law. By early July, hundreds of protesters had been arrested, some under the law with its much harsher penalties.

Some worry that those charged under the law could be extradited to mainland China, a policy which had been strongly opposed by many in Hong Kong and led to protests last year. The national security law therefore raises the question of what might happen to persons extradited to Hong Kong from other countries. Australia and New Zealand, for example, have extradition treaties with Hong Kong but not with China. Australia concluded a treaty with China in 2007 but withdrew it from the ratification process in 2017 following growing opposition in the Senate, in part because of human rights and fair trial concerns noted by the Joint Standing Committee on Treaties. Arguably the national security law would enable an accused extradited to Hong Kong to be subsequently extradited to China.

On 9 July 2020, the Australian government announced a package of measures to support those impacted by the national security law, mostly immigration measures making it easier for some Hong Kong people to settle in Australia. The government also announced that it was suspending the Australia-Hong Kong extradition treaty. Canada announced a similar suspension on 3 July 2020. However, the extradition treaty between Hong Kong and Canada includes specific provision for either party to suspend the treaty, with the suspension to take effect immediately upon receipt of notice. New Zealand's treaty with Hong Kong uses similar language, so New Zealand would have a similarly straightforward path to suspension.

Australia's extradition treaty with Hong Kong, however, only provides for termination and not suspension. Australia was therefore required to fall back on general treaty law. Both China (in its own right and on behalf of Hong Kong) and Australia are parties to the Vienna Convention on the Law of Treaties (VCLT) which sets out grounds for suspension or termination of treaties. The Australian government has chosen to rely on the ground of 'fundamental change of circumstances' (contained in Article 62 VCLT):

> 'The Australian Government remains deeply concerned about China's imposition of a broad national security law on Hong Kong.
> The National Security Law erodes the democratic principles that have underpinned Hong Kong's society and the One Country, Two Systems framework.
> It constitutes a fundamental change of circumstances in respect to our Extradition Agreement with Hong Kong.'

Article 62 sets two conditions for invoking fundamental change of circumstances. First, the circumstances must have constituted an essential basis of the consent of the parties to be bound by the

treaty. This branch of the test is relatively easy to justify. The fact that Australia was willing to have an extradition treaty with Hong Kong but not China suggests that the 'one country, two systems' principle of Hong Kong's legal system was an essential basis for consent to the treaty. The national security law undermines that rule, which was part of the Sino British Joint Declaration of 1984 - and China's adoption of the law has therefore been criticised by many governments as a breach of the agreement. The second condition is that 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.' Presumably the argument under that head is that the prospect of extradition from Hong Kong to China 'radically transforms' any extradition from Australia to Hong Kong.

A credible argument, therefore, can be constructed to justify suspension on the ground of fundamental change of circumstances. However, were that argument to be judicially tested, it might be insufficient. The International Court of Justice had the opportunity to rule on whether political changes can constitute a fundamental change of circumstances under Article 62 VCLT in the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia concerning a bilateral treaty for building a dam in the Danube River. Hungary argued that there had been a fundamental change in circumstances since the treaty's conclusion in 1977, including the fact that both Hungary and Slovakia had changed their economic systems from 'socialist integration' to market economies, which justified terminating the treaty. The Court rejected this argument. Although it accepted that the political environment had changed since 1977, it concluded that:

> 'In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed.'

The Court also emphasised that this ground for suspending or terminating a treaty will only be available in exceptional circumstances, because the stability of treaty relations weighs in favour of maintaining a treaty freely entered into. However, the connection between the political change and the object and purpose of the Treaty would seem to be closer in the case of the Australia-Hong Kong extradition treaty than in the Gabčíkovo-Nagymaros project.

The viability of Australia's argument probably won't be judicially tested, since China has entered a reservation to Article 66 VCLT, thereby excluding the possibility of it referring most disputes under the VCLT to the International Court of Justice. It is possible that China could decide to frame the dispute as one of customary international law (as was done by Nicaragua in the *Military and Paramilitary Activities in and against Nicaragua* case), given that most rules in the VCLT are also rules of customary international law. To date, however, China has not initiated any contentious cases before the International Court of Justice, nor has it accepted the jurisdiction of the Court under Article 36(2) of the ICJ Statute, so judicial settlement of any dispute over suspension of the extradition treaty seems unlikely.

While suspension of the treaty on the ground of fundamental change of circumstances may be a difficult argument to sustain if Australia had to defend it in a judicial process, for now at least the Chinese government is not challenging the grounds of suspension. Its response via the Chinese embassy in Canberra accused the Australian government of 'a serious violation of international law and basic norms governing international relations, and a gross interference in China's internal affairs'. It did not, however, attack the suspension of the extradition treaty specifically.

The suspension may largely be symbolic, as there do not appear to have been recent extraditions from Australia to Hong Kong. However, transferring an accused for trial in another country is implicitly an endorsement of the robustness of that country's rule of law, so it is an important symbol. Professor Donald Rothwell has also suggested that the argument concerning fundamental change of circumstances could equally apply to other treaties concerning transnational crime or mutual legal assistance.

Also symbolic is the fact that Australia, like Canada, has chosen to suspend rather than to terminate the extradition treaty. It implies confidence in the potential for the fundamental change of circumstances to be reversed, allowing the treaty's operation to be recommenced. The choice of suspension also allowed an immediate change to treaty relations as Article 65(2) VCLT allows for suspension three months after notification, or immediately 'in cases of special urgency'. The Australia-Hong Kong extradition treaty only allows for termination after six months' notice. Australia's suspension of its extradition treaty therefore will make few practical changes but is a powerful communication of its concerns about the threat to 'one country, two systems.'

About the Author: Holly Cullen is Adjunct Professor of Law at the UWA Law School, where she is a member of the Modern Slavery Research Cluster. She has worked at universities in England and Australia and began her career as an Advocate of the Bar of Québec. Her recent publications include *Experts, Networks and International Law*, co-edited with Joanna Harrington and Catherine Renshaw (Cambridge University Press, 2017) and *The Politics of International Criminal Law*, co-edited with Philipp Kastner and Sean Richmond (Brill, in press, 2020)

Slow Burn to Success: WTO Reaffirms Australia's Tobacco Plain Packaging Measure

Andrea Gronke

On 9 June 2020, the World Trade Organization's (WTO) Appellate Body issued its long anticipated reports in the tobacco plain packaging disputes, drawing to an end nearly nine years of litigation in various domestic and international fora resulting from Australia's tobacco plain packaging measure. The Appellate Body rejected the appeals brought by the Dominican Republic and Honduras and confirmed the earlier findings of the WTO Panel in 2018 that Australia's tobacco plain packaging measure is fully consistent with WTO rules.

Significance of the reports

In 2012, Australia became the first country in the world to introduce tobacco plain packaging as part of a multifaceted approach to reducing tobacco use and exposure. Based on three decades of expert evidence and an explicit recommendation by the 180 parties to the World Health Organization Framework Convention on Tobacco Control, Australia implemented tobacco plain packaging to combat the tobacco industry's well-documented exploitation of product and packaging design features to influence consumer behaviour.

The Appellate Body's report is significant for a multitude of reasons, most importantly because it confirmed the right of States to implement legitimate public health measures such as tobacco plain packaging consistently with their WTO obligations. The decision has implications beyond public health measures and underlined the importance of the rules-based trading system and the essential role of WTO dispute settlement for settling international trade disputes in an effective and impartial manner.

Findings on the scope of Appellate Review under Article 11 of the DSU

Equally significantly, the decision brought some clarity to the longstanding controversy around the standard of review applied to claims under Article 11 of the Dispute Settlement Understanding (DSU) and explicitly rejected the appellants' attempts to use Article 11 to re-litigate factual issues.

The appellants in these disputes advanced an unprecedented challenge to the factual findings of a panel, alleging that the Panel did not discharge its responsibilities under Article 11 of the DSU to make an objective assessment of the facts. In doing so, the appellants invited the Appellate Body to exceed the limits placed on the function of appellate review, a function that has been carefully defined by the Appellate Body over many years.

The Appellate Body ultimately rejected the appellants' attempt to re-litigate their factual claims under the guise of challenging the Panel's objectivity and affirmed the Panel's discretion as the trier of fact to decide which evidence it uses in making its findings and the probative value of that evidence. Although the Appellate Body rejected the appellants' claims against the Panel's objectivity in determining the degree of contribution of the tobacco plain packaging measure to Australia's objective, the separate dissenting opinion took an even narrower view of the scope of appellate review and asserted that the majority should have dismissed these claims without detailed examination.

These findings will have important implications for any future decisions by the WTO Appellate Body.

A note on the future of appellate review in the WTO

On 10 December 2019, the terms of two of the three remaining Appellate Body members expired and the WTO Appellate Body lost quorum and ceased to function after 25 years of operation. The Appellate Body's report on the tobacco plain packaging disputes therefore represents the Appellate Body's final report until the impasse of Appellate Body membership can be resolved.
In the interim, a new Multi-party Interim Appeal Arbitration Arrangement (MPIA) has been established pursuant to Article 25 of the DSU as a temporary measure to enable Members to resolve disputes while the Appellate Body is unable to function. Twenty-two WTO Members, including Australia and New Zealand, have formally joined the MPIA, and it remains open to all WTO Members.

The MPIA seeks to avoid some of the criticisms aimed at the Appellate Body, including highlighting the need for greater efficiency in order to meet the 90 day timeframe set out in the MPIA. One way the MPIA facilitates this is by allowing arbitrators to take appropriate organisational measures to streamline proceedings and, with the agreement of the parties, to exclude claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.

Australia is continuing to keep the issue of Appellate Body reform on the international agenda and is looking to work with all WTO Members to enable the Appellate Body to resume performing its key role in WTO dispute

About the Author: Andrea Gronke is a Senior Legal Officer in the Office of International Law in the Australian Attorney-General's Department, where she worked on Australia's defence to its tobacco plain packaging measure in the WTO Appellate Body proceedings.